

Remedies and Reparation

Dinah Shelton*

1. INTRODUCTION

The international law of State responsibility determines the consequences that ensue when a State commits an internationally wrongful act. This law is largely codified in the International Law Commission (ILC) Articles on State Responsibility, drafted over decades by the ILC and accepted by the United Nations (UN) General Assembly in 2001.¹ The ILC Articles must be taken as the starting point on issues of State responsibility in relation to breach of any primary obligation, including duties imposed in the field of economic, social and cultural (ESC) rights.

The ILC Articles make it clear that State responsibility results when there is an act or omission attributable to a State and that act or omission is not in conformity with what is required by international law.² To this extent, all international obligations are transnational, because they give rise to consequences at the international level when a breach occurs. However, determining whether a State has failed to conform its conduct to its obligations requires identifying those obligations. For the purposes of the current discussion, this requires an examination of the content and scope of ESC rights obligations, whether derived from treaty law, custom or general principles of law. Obligations to respect, protect or fulfil the human rights of those inhabiting other States cannot be presumed from the fact that human rights is a matter of

* Dinah Shelton is the Manatt/Ahn Professor of Law, George Washington University Law School, where she has taught since 2004 and Member of the Inter-American Commission on Human Rights.

¹ International Law Commission (ILC), 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', *Report of the International Law Commission on the Work of its Fifty-third Session* (Fifty-third Session, 2001), UN GAOR, Supp. No. 10, UN Doc. A/56/10, at 50(1)(b) (2001) ('ILC Articles').

² Article 2 defines an internationally wrongful act as conduct (an action or omission) "attributable to the State under international law", which conduct "constitutes a breach of an international obligation of the State". Article 1 insists that, "Every internationally wrongful act of a State entails the international responsibility of that State."

international concern,³ but must be demonstrated from the existence and in the content of specific norms. After the standard of care and specific duties are identified and a breach is shown, the question of causality emerges, in identifying injured States or non-State actors and determining the scope of injury for which reparations may be demanded. These elements are further discussed in this chapter, which draws on international environmental law for lessons on the issue of causality that may help in identifying and securing compliance with transboundary ESC rights obligations.

2. STATE RESPONSIBILITY: IDENTIFYING THE BREACH

As has been discussed in detail in previous chapters and just mentioned in this chapter, State responsibility arises only when there is an act or omission attributable to a State and that act or omission constitutes a breach of an international obligation of the State. It is the primary obligation that must be interpreted and applied, determining the substance of the conduct required, the standard to be observed and the result to be achieved, if any. Thus, whether or not there has been a breach of an obligation depends on the precise terms of the obligation, its interpretation and application, taking into account its object and purpose and the facts of the case.⁴

International agreements concerned with civil and political rights commonly limit State obligations in favour of those individuals 'within the territory and subject to the jurisdiction' of the acting State. Even when the text refers only to 'jurisdiction' and not to territory, tribunals like the European Court of Human Rights (ECtHR) have viewed jurisdiction as 'primarily territorial'. The European Court applies an 'effective control' test to determine the applicable *espace juridique* in which the Convention applies.⁵ The Inter-American Commission on Human Rights (IACHR)

³ The emergence of human rights as a legitimate concern for the international community provides a basis for the creation of international norms and obligations; it has no normative content in and of itself. As a legitimate international concern, human rights cannot be considered exclusively within the domestic jurisdiction of States. See Article 2(7) of the Charter of the UN (adopted 26 June 1945, entered into force 24 October 1945), 1 UNTS XVI ('UN Charter'). The recognition of human rights as a matter of international concern directly inspired adoption of the more than 100 multilateral treaties on the topic and permitted UN member States to raise concerns about violations of human rights in other States. Human rights matters appeared on the agenda of the UN General Assembly from its first session in 1946. See Yearbook of the UN (1946), 207; Resolution on Religious and Racial Persecution, GA Res. 103(1), 48th plenary mtg. (29 November 1946), UN Doc. A/Res/103(1); Discrimination against Indians in South Africa, GA Res. 44(I), I (pt. 2) UN GAOR, Resolutions, UN Doc. A/Res/44(1) (1946).

⁴ Commentaries, ILC Articles on State Responsibility (n. 1 above), commentary to Article 12, para. (1).

⁵ When a Contracting Party is found to be exercising 'effective control' outside its national territory, it may be held responsible for violations of the Convention. See European Court of Human Rights (ECtHR), *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004; ECtHR, *Loizidou v. Turkey* (merits), 18 December 1996, Reports of Judgments and Decisions (Reports) 1996-VI; ECtHR, *Ilascu and Others v. Moldova and Russia* [GC], no. 48787/99, Reports 2004-VII. The Court will not exercise jurisdiction, however, if the complaint concerns extraterritorial acts of the State conducted as part

goes further, evaluating whether or not a State has exercised extraterritorial power and authority over the *persons* whose rights were violated.⁶ Thus, although regional bodies have concurred that responsibility for ensuring human rights is 'primarily territorial', transnational obligations have been recognised even in the field of civil and political rights.

The limiting language of 'jurisdiction and control' contained in instruments concerned with civil and political rights is undoubtedly deliberate, reflecting the fact that in most instances States do not and cannot legally assert power over the exercise of civil and political rights in another State's territory. Economic interdependence and global wealth disparity create an entirely different set of circumstances for the exercise of economic and social rights; the corresponding treaty language is therefore different. The UN Charter specifically includes a pledge by member States to "take joint and separate action in cooperation with the Organization" for the achievement of, *inter alia*, higher standards of living, economic and social progress and development, as well as respect for and observance of human rights and fundamental freedoms.⁷ This pledge is important for those few, powerful States not party to the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸

The ICESCR's statement of obligation explicitly encompasses transnational action: "Each State Party . . . undertakes to take steps, *individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, . . .*" to realise the rights contained in the Covenant.⁹ Article 11(2) reiterates the obligation to take measures individually and through international cooperation, in this instance to combat hunger, adding specific reference to the need for States, "[t]aking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need". A third relevant statement is found in Article 15(4): "The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields."

of a UN Security Council peacekeeping operation. See ECtHR joint cases, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway* [GC], nos. 71412/01 and 78166/01, Decision as to the admissibility of 31 May 2007.

⁶ Inter-American Commission on Human Rights (IACHR), Report No. 109/99, Case 10,951, *Coard and Others (United States)*, 29 September 1999, para. 37; IACHR, Report No. 31/93, Case 10,573, *Salas (United States)*, 14 October 1992, para. 6; IACHR, Report No. 112/10, *Interstate Petition Pl-02, Frankind Gujillermo Aisalla Molina (Ecuador-Colombia)*, 21 October 2010, paras. 90-1; IACHR, Report No. 86/99, Case 11,589, *Armando Alejandro Jr., Carlos Costa, Mario de La Pena and Pablo Morales (Cuba)*, 29 September 1999.

⁷ UN Charter (n. 3 above), Articles 55 and 56.

⁸ International Covenant on Economic, Social and Cultural Rights (ICESCR; adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3.

⁹ *Ibid.* Article 2(1). Emphasis added.

At a minimum, the stated obligations in the ICESCR encompass the duty "to take steps" in two ways: to cooperate and to provide international assistance. Cooperation can be viewed as an obligation of conduct, whereas the provision of international assistance, to the maximum of a State's available resources, constitutes an obligation of result. The obligation of conduct means that it is not necessary to show that specific harm results from the breach of a duty to cooperate; it is enough that a State refuses or fails to fulfil its obligation to cooperate imposed by treaty or otherwise.¹⁰ From the perspective of international responsibility, it does not matter whether the obligation is one of conduct or one of result, because a breach of either duty can be considered a wrongful act.¹¹

The critical question is the following: Are the duties to cooperate and to provide international assistance specific enough that breaches can be identified and give rise to State responsibility? The duty to cooperate, at least, has been held to give rise to enforceable rights. In the *Mox Plant Case (Ireland v. United Kingdom)*, Ireland invoked a duty to cooperate in the field of protecting the marine environment. The International Tribunal on the Law of the Sea (ITLOS), in its order on provisional measures issued on 3 December 2001,¹² opined that the duty to cooperate is a fundamental principle in general international law, as well as one contained in the relevant treaty provisions, and that rights may arise therefrom which the Tribunal may protect. The ITLOS provisional order mandated that the parties cooperate to exchange further information about the environmental consequences of the proposed project and devise measures to prevent harm that could result from proceeding with the project.

It is thus foreseeable that acts or omissions by a State could violate the duty to cooperate or provide assistance and give rise to State responsibility. The first issue would be to determine the standard of care imposed by international law. A State might act deliberately and with the intent to harm, for example, by imposing an economic embargo or blockade on another State in an effort to coerce the latter into changing its government or foreign policy, thereby denying the State the ability to obtain the goods and services it needs for its inhabitants to exercise their economic rights. Such deliberate interference with a State's economic resources could be

¹⁰ Commentaries, ILC Articles on State Responsibility (n. 1 above), commentary to Article 2, para. 9. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase*, Advisory Opinion, International Court of Justice (ICJ) Reports 1950, p. 228.

¹¹ In the *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, ICJ Reports 1997, p. 7, at 77, para. 135, the ICJ referred to the parties having accepted "obligations of conduct, obligations of performance, and obligations of result". See C. Tomuschat, 'What is a "Breach" of the European Convention on Human Rights?', in R. Lawson and M. de Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* (Dordrecht: Nijhoff, 1994), pp. 315–35, at 328.

¹² *Mox Plant Case (Ireland v. United Kingdom)*, Provisional measures, Order of 3 December 2001, 41 International Legal Materials 405 (2002).

viewed as the opposite of cooperating or providing the required assistance and thereby constitute a breach of international duty.

A State might act with reckless disregard for the economic and social rights of inhabitants of other States, exhibiting a knowing indifference to their well-being. In the area of climate change, for example, the continued greenhouse gas emissions of certain States in the face of scientific knowledge of the consequences of climate change to the very existence of small, developing island States could be considered reckless. If the standard of care prohibits reckless conduct, then State responsibility may ensue. Negligence is yet a lower standard for liability, found in most legal systems. It is debatable whether the international standard of 'due diligence', often cited in human rights and environmental law, imposes responsibility for negligent or reckless conduct, especially when it is a matter of controlling the activities of non-State actors within the State.¹³

The exact content of the ESC rights obligations (like the obligation to provide a fair trial) will have to be developed through elaboration of texts, such as the General Comments of the Committee on Economic Social and Cultural Rights (CESCR), and through jurisprudence. Challenged conduct could range from placing unreasonable conditions on the receipt of loans or grants, providing subsidies to domestic enterprises to give them an unfair advantage over foreign producers, arbitrary refusal to provide economic assistance, or discrimination in favour of one State or group of States against others. More problematic issues arise when, for example, intellectual property rights (protected by both international economic and human rights law) are claimed to restrict access to necessary medications or other critical products.¹⁴ Even more difficult are questions about a State's responsibility for the health of its own economy, when the functioning of that economy has a significant impact on the well-being of other persons throughout the world. In general, individuals and companies retain autonomy to conduct their own economic activities to secure profits and enhance their own well-being, although every legal system imposes limits on predatory economic practices. The extent to which a State is or should be liable for failing to control predatory practices when they take place abroad, as opposed to leaving the individual or company solely responsible, is a highly contentious matter.

For a wrongful act or omission to engage the responsibility of the State, the conduct must be attributable to the State and not simply be the autonomous act of an individual or private business entity.¹⁵ Thus, the act must be one engaged

¹³ Compare with Ryngaert in this volume.

¹⁴ On this overlap and tension within the ICESCR, see Committee on Economic Social and Cultural Rights (CESCR), *General Comment 17, The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She Is the Author* (Thirty-fifth Session, 2006), UN Doc. E/C.12/GC/17 (2006).

¹⁵ ILC Articles on State Responsibility (n. 1 above), Article 2. See *Dickson Car Wheel Company Case*, UNRIIAA, Vol. IV, pp. 669–91 (1931), at p. 678; *United States Diplomatic and Consular Staff in Tehran (US v. Iran)*, Judgment of 24 May 1980, ICJ Reports 1980, p. 3.

in by an agent or organ of government, or by one acting under the direction, instigation or control of an agent or organ. Conduct of private persons or entities is not, as a general principle, attributable to the State, unless there is a specific factual relationship between the State and the person or entity. The conduct in question must have been specifically directed or controlled by the State.¹⁶ This clearly raises questions about attributing to a State the conduct of private companies or enterprises acting transnationally. In general, international law respects the separate corporate existence of businesses,¹⁷ and the conduct of such entities is not attributed to the State of incorporation solely by reason of the corporate nationality.

Although the ILC Articles on State Responsibility do not specifically discuss responsibility for complicity in the commission of wrongful acts, such as aiding and abetting violations, or conspiracy, Chapter IV of the Articles does discuss the attribution to a State of the wrongful act of another State. Chapter IV is relevant because in the context of human rights, wrongful conduct may result from the combined acts of several States rather than the conduct of one State acting alone.¹⁸ In the *Soering* case, for example, it was only the combination of proposed extradition by the United Kingdom and imposition of a sentence of capital punishment by the State of Virginia in the United States that gave rise to a finding that the United Kingdom would violate the European Convention on Human Rights (ECHR) by extraditing *Soering*.¹⁹ Article 16 of the ILC Articles on State Responsibility addresses such circumstances, when one State provides aid or assistance to another State with a view to assisting in the commission of a wrongful act by the latter. Such joint responsibility may arise in two other circumstances: (1) when one State directs and controls the commission of a wrongful act by another (Art. 17), and (2) when one State deliberately coerces another to commit a wrongful act.

The standard for imposing State responsibility on an 'assisting' State is high; mere provision of aid is insufficient. The ILC commentary on the articles states as a rationale for this rule that "a State providing financial or other aid to another State should not be required to assume the risk that the latter will divert the aid for purposes which may be internationally unlawful".²⁰ Thus, the ILC Articles require that the

¹⁶ This high threshold for attribution was discussed by the ICJ in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* (Merits), Judgment of 27 June 1986, ICJ Reports 1986, p. 14, at 51.

¹⁷ See *Barcelona Traction, Light & Power Company Ltd. (Belgium v. Spain)* (New Application: 1962), Judgment of 5 February 1970, ICJ Reports 1970, p. 3.

¹⁸ See J. Quigley, 'Complicity in International Law; A New Direction in the Law of State Responsibility', *British Year Book of International Law*, Vol. 57 (1986), pp. 77-131; J. E. Noyes and B. D. Smith, 'State Responsibility and the Principle of Joint and Several Liability', *Yale Journal of International Law*, Vol. 13 (1988), pp. 225-67.

¹⁹ ECHR, *Soering v. United Kingdom*, 7 July 1989, Series A no. 161. European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953), 213 UNTS 221 ('European Convention on Human Rights').

²⁰ Commentaries, ILC Articles on State Responsibility (n. 1 above), commentary to Chapter IV, para. 8.

State be aware of the circumstances of the internationally wrongful act in question and that there be a specific causal link between that act and the conduct of the State assisting, directing or coercing the recipient State. Nonetheless, primary rules may prohibit a State from providing assistance in the commission of certain wrongful acts. In this context, the ICESCR's duty to provide assistance to realise economic and social rights may imply that the converse is prohibited and impose responsibility for assistance given in order to violate such rights. Thus, development assistance that aims to forcibly relocate residents in order to construct a large dam could trigger State responsibility on the part of both States for the resulting human rights violations.²¹ According to James Crawford, "Where the allegation is that the assistance of a State has facilitated human rights abuses by another State, the particular circumstances of each case must be carefully examined to determine whether the aiding State by its aid was aware of and intended to facilitate the commission of the internationally wrongful act."²²

3. STATE RESPONSIBILITY: THE CONSEQUENCES OF THE BREACH

3.1 *Reparation in International Law*

In the absence of treaty provisions setting forth the specific consequences ensuing upon breach of an obligation, the law of State responsibility establishes the content of the new obligations that automatically arise when a State commits an internationally wrongful act. These obligations exist whether or not an international human rights body that monitors compliance has the mandate or power to indicate that specific remedial measures be taken.²³ In addition, the obligations of cessation and reparation do not depend upon a complaint being brought by an injured State. In all instances, the duty to perform the obligation breached remains; the mere fact of a violation does not terminate a treaty nor discontinue any obligation imposed by general international law. Instead, the first duty is to cease the wrongful conduct. Second, the responsible State is under an obligation to make full reparation for "the injury caused" by the internationally wrongful act. Injury can be material or moral. Thus, the consequences of the breach may result in claims by an injured State or engage

²¹ See Report of the Economic and Social Council, Report of the Third Committee of the General Assembly, draft res. XVII, 14 December 1982, UN Doc. A/37/745, p. 50.

²² Commentaries, ILC Articles on State Responsibility (n. 1 above), commentary to Article 16, para. 9. See further discussion on this point in Section 4 below. Note that there may be difficulties in litigating joint and several liability under the *Monetary Gold* principle, at least at the ICJ. *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom, and United States of America)*, Judgment 15 June 1954, ICJ Reports 1954, p. 32; *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections), Judgment of 19 May 1989, ICJ Reports 1992, p. 240, 261, para. 55.

²³ The ECtHR, for example, has interpreted its remedial powers narrowly to include only declaratory judgments, compensation and fees and costs. It will not issue specific orders to governments on the measures necessary to remedy a violation, but leaves the determination of such measures to the Council of Europe's Committee of Ministers.

the responsibility of the State concerned towards all States parties to the treaty or towards the international community as a whole.²⁴

Although an injured State could bring a claim, inter-State cases for human rights violations are rarely instituted, as other contributors to this volume note. In large part, this is probably because other States do not see themselves as directly harmed by such violations (or it causes diplomatic discomfort). Instead, individuals within the wrongdoing State are typically the victims of the violations. To the extent that victim individuals or groups have access to international petition procedures, other treaty parties may not deem it necessary or even useful to raise the matter through the law of State responsibility – whether by using treaty-based inter-State procedures or by invoking other international processes. Notably, a significant number of the inter-State cases presented to human rights tribunals involve violations of the rights of nationals of the petitioning State, which would support a complaint based on customary international law of diplomatic protection independently of the human rights treaty framework.²⁵ It is interesting to consider whether States parties to a human rights treaty should be deemed to have an obligation to take action against a breaching party, including by filing a complaint, in order to uphold the rule of law and the relevant human rights norms.

In any event, reparation is the “indispensable complement” of a failure to apply a convention; it is a duty of the wrong-doing State and not a right of the injured party, and it is a duty that arises automatically upon the commission of a wrongful act.²⁶ Reparation should, insofar as possible, wipe out the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.²⁷ Reparation may consist of restitution, compensation, satisfaction and guarantees of non-repetition.

The greatest relevance and impact of the ILC Articles on State Responsibility, as they concern reparations, may be precisely in the area of human rights. Breach of these duties is unlikely to injure another State directly or give rise to an inter-State

²⁴ *Barcelona Traction* (n. 17 above), p. 32: Every State, by virtue of its membership in the international community, has a legal interest in the protection of certain basic rights and the fulfilment of certain essential obligations, including “the principles and rules concerning the basic rights of the human person”

²⁵ In the first inter-State case filed in the inter-American system, Nicaragua alleged that Costa Rica was violating the rights of Nicaraguan nationals in Costa Rica. *Interstate Case 01/6, Nicaragua v. Costa Rica*, 8 March 2007, Reports no. 11/97. The first African inter-State case, *D.R. Congo v. Burundi, Rwanda, Uganda*, also involved alleged human rights and humanitarian law violations committed by the defendant States against Congolese nationals, in this instance on the territory of the Congo. Comm. 227/1999, Twentieth Activity Report of the African Commission on Human and Peoples’ Rights, Annex IV, p. 96. The pending European inter-State case of *Georgia v. Russia* (no. 38263/08) is similarly concerned with alleged violations by Russia of the rights of Georgian nationals.

²⁶ *Factory at Chorzow (Germany v. Poland)* (Jurisdiction), Judgment No. 8, 1927 Permanent Court of International Justice (PCIJ) Series A, No. 9, p. 21.

²⁷ *Factory at Chorzow, Claim for Indemnity (Germany v. Poland)* (Merits), Judgment of 13 September 1928, 1928 PCIJ Series A, No. 17, p. 47.

claim for reparations. Partly for this reason, the ILC Articles emphasise cessation of violations and compliance with obligations. Furthermore, the paucity of inter-State cases in subject areas such as international human rights and environmental law suggests that the rules on reparations are more likely to be invoked in proceedings involving non-State actors, where reparations may be essential to the lives or the livelihoods of those injured.²⁸

The ILC Articles addressing reparations rest on two premises: (1) the importance of upholding the rule of law in the interest of the international community as a whole, and (2) remedial justice as the goal of reparations for those injured by the breach of an obligation. Three sets of provisions reflect the two concerns. First, the ILC Articles on State Responsibility consider reparations in a multilateral context rather than as an exclusively bilateral issue, emphasising the restoration and maintenance of the rule of law and elaborating the consequences of a serious breach of a peremptory norm. Article 33 clearly indicates that the responsible State may owe obligations not only to the injured State or States, but also to the international community as a whole. In addition, the concluding Articles of Chapter III impose on the entire international community a duty to respond to a serious breach of a peremptory norm.

Second, the ILC Articles on State Responsibility indicate that the purpose and scope of reparations are limited to remedial measures, excluding sanctions or penalties such as punitive damages. Rules concerning compensation restrict damages to provable, proximate losses. Even the traditional remedy of satisfaction is discouraged because it has been used in the past for punitive purposes. Finally, the ILC Articles insist on the obligation of full reparation but provide for some flexibility, incorporating an element of proportionality or taking into account equitable considerations in affording reparations. These themes cover both the community interest and the concerns of injured parties, but they leave many issues for further consideration and elaboration, especially the following: how to reconcile and meet the goals of restoring the rule of law, deterring future violations, settling disputes and providing full redress to those harmed.

Compensation is intended only to indemnify quantifiable losses suffered by the injured State.²⁹ The commentary makes clear that the obligation of full reparation

²⁸ The ICJ has indicated that the basic principle of reparation articulated in the *Chorzów Factory* case applies to reparation for injury to individuals, even when a specific jurisdictional provision on reparation is contained in the statute of the tribunal. *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, pp. 166–300, pp. 197–8 (citing *Factory at Chorzow, Claim for Indemnity (Germany v. Poland)* (Merits), Judgment of 13 September 1928, 1928 PCIJ Series A, No. 17).

²⁹ Both the Inter-American Court of Human Rights (IACtHR) and the ECtHR have rejected claims for punitive damages under their respective authority to award compensation and ‘just satisfaction’. See ECtHR, *Selçuk and Asker v. Turkey*, 24 April 1998, Reports 1998-II, para. 119; IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of July 21, 1989, IACtHR (Ser. C) No. 7 (1989), para. 38. Claims for a form of monetary sanction in inter-State cases generally appear under the heading of satisfaction.

excludes exemplary or punitive damages or other awards that would extend beyond remedying the actual harm suffered as a result of the wrongful act. Quoting the umpire in the *Lusitania* case, the commentary says that a remedy should be "commensurate with the loss, so that the injured party may be made whole".³⁰ The stated goal of full reparations raises numerous problems of determining the financially assessable damage, including loss of profits, which are discussed in connection with Article 36, on compensation. Overall, however, it can be said that terms like 'full reparation' and 'make the injured party whole' do not facilitate decision making by tribunals or the formulation of claims by injured parties because they are too general to provide practical guidance.

Notably, there is no general requirement, apart from any requirements laid down by the relevant primary obligation, that a State should have suffered material harm or damage before it can seek reparation for a breach. Unlawful action that impacts non-material interests of a State can also entitle a State to receive adequate reparation. Where States are in a treaty relationship and have agreed to engage in particular conduct, the failure by one State to perform the obligation necessarily concerns the other party or parties. It would undermine legal obligations to prescribe no responsibility if there is no identifiable harm or damage.

The UN has also elaborated declarations or guidelines that indicate required or appropriate remedies for specific kinds of human rights violations. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power contains broad guarantees for those who suffer pecuniary losses, physical or mental harm and "substantial impairment of their fundamental rights" through acts or omissions, including abuse of power.³¹ Victims are entitled to redress and to be informed of their right to seek redress. The Declaration specifically provides that victims of public officials or other agents who, acting in an official or quasi-official capacity, violate national criminal laws, should receive restitution from the State whose officials or agents are responsible for the harm inflicted. Abuse of power that is not criminal under national law but that violates internationally recognised norms relating to human rights should be sanctioned and remedies provided, including restitution and/or compensation and all necessary material, medical, psychological and social assistance and support.³² These norms could apply to cases of corruption that result in the loss of resources necessary to respect and ensure economic and social rights.

³⁰ *'Lusitania' Cases (United States/Germany)*, 7 UNRIIA 33, 39 (1923), quoted in Commentaries, Article 36, para. 3. 'Commensurate' is consistent with the principle of full reparations. The ordinary meaning of the term is "of the same size, extent, or duration as another", indicating that reparations should be equal to the harm caused, according to the *American Heritage Dictionary of the English Language*, 3rd edition (Boston: Houghton Mifflin, 1992), p. 380.

³¹ UN GA Res. 40/34 (adopted 29 November 1985), Annex, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', para. 1.

³² Ibid. paras. 5, 11, 14 and 19.

More generally, the UN General Assembly in Resolution 60/147 adopted and proclaimed Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.³³ The assembly recommended that States "take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general".³⁴ In the preamble, the assembly emphasised:

[T]he Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms...

Summarising the principles, victims of gross violations of international human rights law and serious violations of international humanitarian law are entitled to:

- (a) Equal and effective access to an effective judicial remedy as provided for under international law; access to administrative and other bodies, as well as mechanisms, modalities, and proceedings conducted in accordance with domestic law;
- (b) Adequate, effective, and prompt reparation for harm suffered proportional to the gravity of the violations and the harm suffered, and including: restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition; States should provide effective mechanisms for enforcing reparation judgments under their domestic laws; and
- (c) Access to relevant information concerning violations and reparation mechanisms.

The various forms of reparation are explained in Principles 19 through 23. Restitution should restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution can include "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property".³⁵ The principle of *restitutio in integrum* has

³³ GA Res. 60/147 (adopted 16 December 2005).

³⁴ Ibid. para. 2.

³⁵ Ibid. Principle 19.

been repeatedly cited in the jurisprudence of the Inter-American Court of Human Rights (IACtHR)³⁶ and ECtHR.³⁷

Principle 20 provides: "Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case," including for:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage; and
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Rehabilitation includes "medical and psychological care as well as legal and social services",³⁸ and satisfaction may require:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts, and full and public disclosure of the truth . . . ;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims; and
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.³⁹

³⁶ Judge García Ramírez of the IACtHR explained his view of the relationship of restitution and compensation: "Full restitution – which implies full return – is conceptually and materially impossible. . . . The compensation component of the reparations system is a result of this inevitable difference between what was and what may be." Concurring Opinion of Judge Sergio García Ramírez, Judgment on Reparations, *Bámaca Velásquez Case* (22 February 2002), paras. 2–4.

³⁷ See, for example, IACtHR, *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 124 (15 June 2005), para. 170; ECtHR, *Barberà, Messegue and Jabardo v. Spain* (Article 50), 13 June 1994, Series A no. 285-C, para. 16.

³⁸ GA Res. 60/147 (n. 33 above), Principle 21.

³⁹ Ibid. Principle 22.

Finally, guarantees of non-repetition are measures that will contribute to preventing future violations:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical, and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; and
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.⁴⁰

3.2 Remedies and ESC Rights

As for remedies in the field of economic and social rights, General Comment No. 3⁴¹ issued by the CESCR, concerning the nature of State obligations pursuant to Covenant Article 2(1), proclaimed that appropriate measures to implement the Covenant might include judicial remedies with respect to rights that may be considered justiciable. It specifically pointed to the non-discrimination requirement of the treaty and cross-referenced to the right to a remedy in the International Covenant on Civil and Political Rights (ICCPR). A number of other rights also were cited as "capable of immediate application by judicial and other organs".⁴² The Committee has subsequently expanded on this saying, "While the general approach of each legal

⁴⁰ Ibid. Principle 23.

⁴¹ CESCR, *General Comment 3, The Nature of States Parties' Obligations* (Art. 2, para. 1, of the Covenant) (Fifth Session, 1990), UN Doc. E/1991/23 Annex III, para. 14 (1991). For an elaboration by the CESCR on lines of remedial recommendations it anticipates making in response to violations identified, for example, during review of communications submitted through the Optional Protocols of the ICESCR (specifically, remedial actions such as compensation to victims and general recommendations that States remedy root causes of violations), see the 2007 CESCR statement, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant', 10 May 2007, E/C.12/2007/1, para. 13.

⁴² Ibid. para. 5.

system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.”⁴³

One of the perceived barriers to the very justiciability of ESC rights has been the presumption that it would be difficult to design appropriate remedies. Although the remedies for cases involving socio-economic rights will often be classical remedies, such as compensation and declarations of wrongdoing, more often general and structural remedies will be necessary. This does not necessarily represent a novel legal dilemma, however. Kent Roach notes that:⁴⁴

An oversimplified understanding of the remedies for civil and political rights as simple corrective remedies that have no distributive effects is a barrier to effective remedies for socio-economic rights. Many traditional political and civil rights require complex and dialogic relief with distributional implications to be effective. Once this is recognised then the remedial process that is required to enforce socio-economic rights will appear much less anomalous, albeit no less complex.

Socio-economic rights both in domestic and international law will frequently be enforced by recommendations, declarations and calls by adjudicators on legislators to revise laws. A common assumption behind such dialogic remedies is that governments are able and willing to act promptly to comply with the court's rulings. Dialogic remedies create space for continued governmental and legislative policy-making without purporting to mandate either the details of the policy or the processes that will be used to formulate those policies.

The CESCR has precisely sought to set out the types of remedies it would provide under its quasi-judicial optional protocol:

In the context of an optional protocol, the Committee could make recommendations, inter alia, along four principal lines:

(a) recommending remedial action, such as compensation, to the victim, as appropriate;

(b) calling upon the State party to remedy the circumstances leading to a violation. In doing so, the Committee might suggest goals and parameters to assist the State party in identifying appropriate measures. These parameters could include suggesting overall priorities to ensure that resource allocation conformed with the State party's obligations under the Covenant; provision for the disadvantaged and

⁴³ CESCR, *General Comment 9, The Domestic Application of the Covenant* (Nineteenth Session, 1998), UN Doc. E/C.12/1998/24 (1998), para. 10.

⁴⁴ Kent Roach, 'The Challenges of Crafting Remedies for Violations of Social, Economic and Cultural Rights', in M. Langford (ed.), *Social Economic Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008), pp. 46–58, p. 58.

marginalized individuals and groups; protection against grave threats to the enjoyment of economic, social and cultural rights; and respect for non-discrimination in the adoption and implementation of measures;

(c) suggesting, on a case-by-case basis, a range of measures to assist the State party in implementing the recommendations, with particular emphasis on low-cost measures. The State party would nonetheless still have the option of adopting its own alternative measures;

(d) recommending a follow-up mechanism to ensure ongoing accountability of the State party; for example, by including a requirement that in its next periodic report the State party explain the steps taken to redress the violation.⁴⁵

3.3 Case Studies: Environmental and Indigenous Rights

Some economic and social rights, in particular the right to property, broadly defined, and the right to a specified environmental quality, have been enforced and remedies provided by international tribunals. The right to environment, for example, has been given content by regional human rights tribunals through the incorporation of environmental law, principles and standards. To give two examples, in its *Öneryıldız v. Turkey*⁴⁶ judgment, the ECtHR referred to the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment⁴⁷ and the Convention on the Protection of the Environment through Criminal Law⁴⁸ despite the fact that the majority of member States, including the respondent State, had neither signed nor ratified the two Conventions. In the *Taşkın and Others v. Turkey*⁴⁹ case, the Court built on its case law concerning Article 8 of the Convention in matters of environmental protection, indicating the applicability of remedial procedures enshrined in the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.⁵⁰

In the inter-American system, positive obligations for the State to act derive not only from the general obligations of the American Convention on Human Rights (ACHR) in Article 1,⁵¹ but also from specific rights, including Article 4 of the

⁴⁵ CESCR statement, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant', 10 May 2007, E/C.12/2007/1, para 13.

⁴⁶ ECtHR, *Oneryildiz v. Turkey* [GC], no. 48939/99, Reports 2004-XII.

⁴⁷ European Treaty Series no. 150 – Lugano, 21 June 1993.

⁴⁸ European Treaty Series no. 172 – Strasbourg, 4 November 1998.

⁴⁹ ECtHR, *Taşkın and Others v. Turkey*, no. 46117/99, Reports 2004-X, paras. 99 and 119. Turkey had not signed the Aarhus Convention, however.

⁵⁰ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001), 2161 UNTS 447.

⁵¹ American Convention on Human Rights (ACHR; adopted 21 November 1969, entered into force July 18, 1978), Organisation of American States (OAS) Treaty Series No. 36 and 1144 UNTS 123 (ACHR). Article 1 provides: "The States Parties to this Convention undertake to respect the rights and freedoms

Convention, which guarantees an individual's right to have his or her life respected and protected by law.⁵² In the case of *Yanomami v. Brazil*⁵³ the IACHR found that the government had violated the Yanomami rights to life, liberty and personal security guaranteed by Article I of the American Declaration on Human Rights, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI)⁵⁴ because the government failed to implement measures of "prior and adequate protection for the safety and health of the Yanomami Indians".⁵⁵ The government was recommended to take the necessary measures to protect the life, health, lands and other rights of the indigenous communities.

Other cases and country studies have helped to clarify that governments must enact appropriate laws and regulations, and then fully enforce them. In a country report on Ecuador, the Commission referred generally to the obligation of the State to respect and ensure the rights of those within its territory, and the responsibility of the government to implement the measures necessary to remedy existing pollution and to prevent future contamination which would threaten the lives and health of its people, including through addressing risks associated with hazardous development activities, such as mining.⁵⁶ Accordingly, governments must regulate industrial and other activities that potentially could result in environmental conditions so detrimental that they create risks to health or life.⁵⁷ Furthermore, the government must enforce the laws that it enacts as well as any constitutional guarantee of a particular quality of environment.⁵⁸ The Commission was clear: "Where the right

recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . ."

⁵² ACHR, Article 4(1) reads: "Every person has the right to have his life respected. This right shall be protected by law. . . . No one shall be arbitrarily deprived of his life."

⁵³ IACHR, *Yanomami Case*, Res. No. 12/85, Case 7615 (Brazil), in *Annual Report of the IACHR 1984-1985*, OAS Doc. OEA/Ser.L/V/II.66, Doc. 10, rev. 1 (1985), para. 24.

⁵⁴ Ibid. para. 33.

⁵⁵ Ibid. para. 32. American Declaration of the Rights and Duties of Man (adopted 2 May 1948), OAS Res. XXX, Ninth International Conference of American States.

⁵⁶ IACtHR, *Report on the Situation of Human Rights in Ecuador*, OAS Doc. OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997, at 94.

⁵⁷ Ibid.

⁵⁸ In the Ecuador report, the Commission heard allegations that the Government had failed to ensure that oil exploitation activities were conducted in compliance with existing legal and policy requirements. The Commission's on-site delegation also heard that the Government of Ecuador had failed to enforce the inhabitants' constitutionally protected rights to life and to live in an environment free from contamination. The domestic law of Ecuador recognises the relationship between the rights to life, physical security and integrity and the physical environment in which the individual lives. The first protection accorded under Article 19 of the Constitution of Ecuador, the section which establishes the rights of persons, is of the right to life and personal integrity. The second protection establishes "the right to live in an environment free from contamination". Accordingly, the Constitution invests the State with responsibility for ensuring the enjoyment of this right, and for establishing by law such restrictions on other rights and freedoms as are necessary to protect the environment. Thus, the

to life, to health and to live in a healthy environment is already protected by law, the Convention requires that the law be effectively applied and enforced."⁵⁹

The State must also comply with and enforce the international agreements to which it is a signatory, whether these are human rights instruments or ones related to environmental protection. In the Ecuador report, the Commission noted that the State is party to or has supported a number of instruments "which recognize the critical connection between the sustenance of human life and the environment", including: the Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights,⁶⁰ the ICCPR⁶¹ and the ICESCR, the Stockholm Declaration,⁶² the Treaty for Amazonian Cooperation,⁶³ the Amazon Declaration,⁶⁴ the World Charter for Nature,⁶⁵ the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,⁶⁶ the Rio Declaration on Environment and Development⁶⁷ and the Convention on Biological Diversity.⁶⁸ Through standard-setting and enforcement process, the State must "take the measures necessary to ensure that the acts of its agents . . . conform to its domestic and inter-American legal obligations".⁶⁹

In the case of the *Saramaka People v. Suriname*,⁷⁰ the IACtHR set forth three preventive and remedial safeguards it deemed essential to ensure that development is consistent with human rights and environmental protection:

First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan . . . within Saramaka territory. Second, the State must guarantee that the Saramaka will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until

Constitution establishes a hierarchy according to which protections which safeguard the right to a safe environment may have priority over other entitlements. Ibid. pp. 78-86.

⁵⁹ Ibid.

⁶⁰ The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights ('Protocol of San Salvador', adopted 17 November 1988, entered into force 16 November 1999), OAS Treaty Series No. 69.

⁶¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171.

⁶² Declaration of the UN Conference on the Human Environment ('Stockholm Declaration', adopted 16 June 1972).

⁶³ Treaty for Amazonian Cooperation, 17 ILM 1045 (1978).

⁶⁴ Amazon Declaration, 28 ILM 1303 (1989).

⁶⁵ World Charter for Nature, GA Res. 37/7, UN Doc. A/37/51 (1982).

⁶⁶ Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 161 UNTS 229 (1940).

⁶⁷ Rio Declaration on Environment and Development (adopted 14 June 1992).

⁶⁸ Convention on Biological Diversity, 31 ILM 818 (1992).

⁶⁹ Report on Ecuador (n. 56 above), 92.

⁷⁰ IACtHR, *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 November 2007, Ser. C No. 172.

independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.⁷¹

It is notable that these requirements parallel the Bonn Guidelines on Access and Equitable Benefit-Sharing, adopted pursuant to the Convention on Biological Diversity, although the Court does not cite them, referring instead to views of the UN Human Rights Committee,⁷² ILO Convention No. 169, World Bank policies⁷³ and the 2007 UN Declaration on the Rights of Indigenous Peoples.⁷⁴ The Court viewed benefit-sharing as inherent to the right of compensation recognised under Article 21(2) of the ACHR.⁷⁵

The African Commission also has identified remedies and government obligations in this field by reference to environmental norms. In *SERAC v. Nigeria*, the African Commission held that Article 24 "imposes clear obligations upon a government . . . to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources".⁷⁶ The recommendations to the government to remedy the violations thus included ordering or permitting independent scientific monitoring of threatened environments, requiring environmental and social impact studies, monitoring hazardous materials and activities as well as providing information and an opportunity for the public to participate in decision making.⁷⁷ Although the Commission did not refer to specific environmental agreements, the obligations it mentioned are part of international environmental law. The Commission also ordered a range of remedies for other rights such as food and housing, that included compensation, the adoption of legislation and a judicial commission of inquiry. These various orders could be applied to give content to remedies for violating other economic and social rights.

⁷¹ Ibid. para. 129.

⁷² See Human Rights Committee, *General Comment 23, The Rights of Minorities* (Art. 27), UN Doc. CCPR/C/21/Rev. 1/Add.5 (1994); and Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, UN Doc. CCPR/C/70/D/47/1993 (2000).

⁷³ See World Bank, Revised Operational Policy and Bank Procedure on Indigenous Peoples, OP/BP 4.10.

⁷⁴ UN Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007), GA Res 61/295, UN Doc. A/RES/61/295 (2007).

⁷⁵ Article 21(2) provides that, "No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

⁷⁶ *Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001), Case No. ACHPR/COMM/A044/1 (27 May 2002), para. 54. For more recent jurisprudence, tying environmental, cultural and property rights (and requiring environmental and ESCR impact assessments of development projects), see ACHPR, *Endorois Welfare Council v. Kenya* (Feb 2010), paras. 227–8 and 238 (finding a collective violation of Art. 14 right to property of Endorois people).

⁷⁷ Ibid. para. 55.

4. RESPONSIBILITY AND REPARATIONS: THE PROBLEM OF CAUSATION

Causation is a critical element in determining the type and scope of reparation, because the responsible State's obligation is to make full reparation for the "injury caused by the internationally wrongful act".⁷⁸ Identifying a particular cause for inadequate health care, substandard schools or a famine can be problematic at best. There may be both natural and human causes; several States may contribute to the harm, as discussed herein. Pollution may result from many point sources, and it may be impossible to link particular illnesses to a given source of pollution.

As noted earlier in this chapter, it is not necessary that any material or compensable injury actually result from the violation of an international obligation for the law of State responsibility to apply;⁷⁹ it is enough that a State has breached a primary duty for it to be obliged to cease the wrongful conduct and perhaps be required to provide guarantees of non-repetition. Causation may also be a factor in attribution, for example, in determining whether the acts or omissions of the State are sufficiently linked to the conduct of a private party causing injury, for the State to be deemed responsible. Even if the private act is the direct cause of the injury, the State may be responsible if the surrounding circumstances indicate that the State should have taken appropriate steps to regulate or halt the conduct.⁸⁰ Each case will be decided on its facts in the light of the primary obligation.

Causation 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. The ILC Articles do not deal with these complexities, leaving it for courts and practitioners to develop appropriate tests for different types of obligations. It will be particularly difficult in the area of economic and social rights, where multiple factors may contribute to the failure to respect and protect the guaranteed rights. This section first reviews the relevant ILC Articles and then draws from international environmental cases of transboundary harm to point out some of the critical issues relating to causation, as well as some potential solutions.

The ILC Commentary notes that causation in fact does not suffice to entail reparations, because the injury may be too remote, inconsequential or indirect for legal causation to be attributed.⁸¹ A considerable jurisprudence deals with the

⁷⁸ ILC Articles on State Responsibility (n. 1 above), Article 31(2).

⁷⁹ Commentaries, ILC Articles on State Responsibility (n. 1 above), p. 73.

⁸⁰ Ibid. p. 70.

⁸¹ See ECtHR, *Selçuk and Asker v. Turkey*, 24 April 1998, Reports 1998-II; United Nations Compensation Commission [UNCC], *Well Blowout Control Claim*, UN Doc. S/AC.26/1996/5, reprinted in 109 ILR 480; ECtHR, *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61; *Trail Smelter Case (United States v. Canada)*, 3 UNRIAA 1905, 1931 (1938, 1941); UNCC, *Recommendations Concerning Individual Claims (Category 'B' Claims)*, UN Doc. S/AC.26/1994/1, reprinted in 34 ILM 265 (1995).

remoteness of damage or proximate causation. The concern is to allow full compensation for actual material and moral damage while excluding purely speculative claims for injury too indirect or remote to furnish a basis for imposing liability. The line that is drawn inevitably demands policy determinations about the reasonableness of expecting an actor to have foreseen the specific consequences of the action taken and about which party should most appropriately bear the loss. It may not be surprising, then, that the ILC Commentary mentions the degree of fault ("whether State organs deliberately caused the harm in question") as an element that can affect the scope or remoteness of harm that will be encompassed by the duty of reparation, citing a decision of the Iran-United States Claims Tribunal.⁸² This linking of motivation and scope of reparations, however, diverges from the overall approach of the ILC Articles, which avoid any suggestion that reparations vary according to the degree of fault.

When there are several concurrently existing causes, a responsible State may be held responsible for all the consequences, unless an identifiable element of injury can be severed. There is even precedent that the burden of proof shifts to the responsible State, after a breach has been proven, to demonstrate that part of the injury for which it is not responsible.⁸³ Such a precedent could be extremely useful in economic injury cases where linking particular conduct to particular harm is especially problematic.

5. CONCLUSION: LESSONS FROM ENVIRONMENTAL LAW

Future litigation will undoubtedly wrestle with the scope of damages, particularly the definition of 'material' damage to property or other interests of the State and its nationals that are 'assessable in financial terms'. The concept of financially assessable damage is an evolving one, because the determination of whether something is "capable of being evaluated in financial terms" shifts as markets develop and economic analysis designs new methods of valuation.⁸⁴ Although there is considerable international jurisprudence on some headings of damages, litigants and judges are also likely to turn to comparative law, and economic theory and practice, to determine what other claims are capable of being financially assessed, because new

⁸² Commentaries, ILC Articles on State Responsibility (n. 1 above), Article 31, para. 10 (citing *Islamic Republic of Iran v. United States of America*, Cases No. A15 (IV), A24, 32 Iran-U.S. Cl. Trib. Rep. 115 (1998)).

⁸³ *D. Eamshaw and Others (Great Britain) v. United States ("The Zafiro")*, United Nations Reports of International Arbitral Awards (UNRIAA), Vol. VI, p. 160 (1925), pp. 164-5.

⁸⁴ Commentaries, ILC Articles on State Responsibility (n. 1 above), Article 36, para. 5. In *Loayza Tamayo v. Peru* the IACtHR held that an individual's "life plan" (*proyecto de vida*) was an appropriate heading of damage that could be compensated after the Court was presented with a method for assessing its value. IACtHR, *Case of Loayza-Tamayo v. Peru*, Reparations and Costs, Judgment of 27 November 1998. Series C No. 42, para. 117.

issues often develop in doctrine and national practice before being presented to an international tribunal.

The extent to which a court may adhere to a strict hierarchical approach to reparations and require full compensation for all assessable injuries not redressed by restitution – as opposed to reserving some matters for non-monetary satisfaction – may depend not only upon the factors cited in the ILC commentary, but also upon whether the court in question views its primary role as inducing compliance with a legal regime,⁸⁵ deciding cases or settling disputes. Settling a dispute in a manner that lessens the likelihood of future conflicts or disputes between the parties may or may not conform with the goal of full reparations for the injured State, but some international tribunals may consider it to be as important a value as upholding the international rule of law, and to be more important than ensuring fulfilment of all claims of reparations. Although the ILC Articles on State Responsibility constrain discretion, they do not eliminate it.

There are numerous precedents indicating the range of compensable losses, headings of damage and methods of quantification. Replacement costs for destroyed property, costs of repairing damaged property and lost profits have all been awarded; more difficult to assess is loss of life, arbitrary detention and other personal injury. Prior practice demonstrates that these losses, although difficult to quantify, are nonetheless financially assessable. In any event, the Permanent Court of International Justice (PCIJ) noted that even a declaratory judgment alone can serve "to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned".⁸⁶

Turning to jurisprudence, several environmental disputes provide some lessons for possible ESC rights litigation on breach of transnational obligations. The most famous of these is the *Trail Smelter* arbitration.⁸⁷ Cross-border pollution from a Canadian smelter of zinc and lead ores poured sulphur dioxide onto US territory, leading to an international claim for injury to crops, cleared and uncleared land and livestock. The arbitral tribunal asserted a general duty on the part of a State to protect other States from injurious acts by individuals within its jurisdiction and agreed that the precautions taken by a State to prevent transnational injury should be the same as those it would take to protect its own inhabitants. It concluded that:

[U]nder principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons

⁸⁵ Human rights tribunals typically see this as their primary function and compensate for injuries on an equitable basis.

⁸⁶ Judgment No. 11, interpreting Judgments Nos. 7 and 8 (*Factory at Chorzów (Germany v. Poland)*, Judgment of 16 December 1927, 1927 PCIJ Series A, No. 13, p. 20), Vol. 1, No. 463.

⁸⁷ *Trail Smelter Arbitration* (11 March 1941), 3 UNRIAA 1938, 1965.

therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁸⁸

This famous quote is rich in content. First, it establishes a threshold of "serious consequence" before State responsibility will arise for transfrontier harm. Second, it requires that evidence of that harm be demonstrated by "clear and convincing evidence". Third, the rationale of the Tribunal for imposing State responsibility to prevent and remedy transboundary harm is broad enough to extend to transnational conduct beyond environmental matters. Indeed, the International Court of Justice (ICJ) seems to have applied the basic holding of *Trail Smelter* in the *Corfu Channel Case*.⁸⁹ What was left uncertain by the opinion is the standard of care imposed on States to prevent transboundary harm: Was Canada responsible solely because harm occurred, which would open States to liability for accidental transboundary pollution, or was Canada deemed to have acted deliberately or recklessly in permitting the activity to continue after harm began to occur as a result of the air pollution? In other words, is a State strictly liable for transboundary harm or only for failure to exercise due diligence? The latter seems to be the accepted standard, but there is little clarity, much less unanimity, on the issue.

Recovering compensation for environmental harm requires a consideration of the amount of damage that has occurred and proving that the damage is a result of the challenged conduct. In some instances, identifying the harm is not only important to compensation, but is critical to establish standing to bring the claim. In the *Amoco Cadiz* case, for example, an oil tanker grounding caused extensive harm to the coastline of Brittany in 1978.⁹⁰ The French government, various French administrative departments, numerous towns, businesses, associations, individuals and the insurers of the cargo brought suit in the United States, invoking international and domestic law. A 435-page opinion on damages assessed the types of claims for which recovery was possible. Amongst its findings, the court rejected a claim for damage to quality of life and public services, as well as a claim for decline in tourism in the affected area, because the proper parties had not raised the matter and there was no causal link between the pollution and the alleged harm to those who did raise it.

Even when an injured State seeks redress from a private actor, there may be problems of standing and proof. A recent notable case brought by the Government of the Dominican Republic against the US company AES Corporation is illustrative.⁹¹

⁸⁸ Ibid.

⁸⁹ *Corfu Channel (U.K. v. Albania)* (Merits), Judgment of 9 April 1949, ICJ Reports 1949, p. 4 (holding Albania responsible for failing to warn Britain of mines that Albania should have known were in the international strait and affirming that no State may use its territory contrary to the rights of other States).

⁹⁰ *Republic of France v. Amoco Transport Co. (The Amoco Cadiz)*, US Court of Appeals (7th Circuit) (14 September 1993).

⁹¹ *Government of Dominican Republic v. AES Corporation*, 466 F.Supp.2d 680 (ED VA 2006).

AES generated hazardous coal ash as a byproduct of its operation of a power plant in Puerto Rico. There were no commercial uses for the coal ash, and because safe disposal would have cost up to \$200,000 per day, AES allegedly entered into a conspiracy with the other defendants and former Dominican Republic officials to dump the coal ash in the Dominican Republic. After the first barge carrying the coal ash was refused offloading for lack of an environmental permit, AES obtained a permit by bribery, threats and intimidation.⁹² During 2003 and 2004, before the permit was revoked, AES transported at least 57,000 tons of coal ash on ten barges to Manzanillo and Samana Bays in the Dominican Republic. The Dominican Academy of Sciences found the coal ash to contain high levels of arsenic, cadmium, nickel, beryllium, chromium and vanadium. The Dominican Republic alleged that defendants' actions resulted in severe ecological damage to the two bays and caused health problems in the areas surrounding the coal ash dump sites. The Dominican Republic sought damages for the ecological and health injuries, invoking the Alien Tort Statute,⁹³ and argued that its own courts could not impartially consider the claim due to the actions of defendants to prohibit discovery, investigation and prosecution of their actions. The companies moved to dismiss the claims on numerous grounds, including lack of standing.

The US District Court for the Eastern District of Virginia held that recognised foreign sovereigns with whom the United States is at peace have standing to bring civil suit in the same way as domestic corporations or individuals in the federal courts of the United States. However, although the Dominican Republic had standing to bring suit against American companies for damages to remediate the pollution caused by dumping coal ash, it did not have standing to assert economic claims for a general decline in tourism or to assert claims for the costs incurred by its State-run health system in treating its inhabitants injured by the pollution, because the injury was not "concrete enough" to establish standing and each individual who suffered injury to health must personally sue for damages.⁹⁴

The Court found that the general decline in tourism, although factually demonstrated by evidence of a decline in hotel occupancy in the Samana Bay region of 70 per cent, was nonetheless not concrete enough to establish standing. In fact the Court seemed to be indicating that the decline could not be proven to be due to the pollution. In addition, the Court noted that the damage was caused to the tourist industry, not the government, and therefore the government lacked standing to pursue the claim. These types of injuries are typical of those that might be raised in a case of transnational violation of economic rights, and demonstrate some of the litigation hurdles presented by the causality requirement.

⁹² For purposes of a motion to dismiss the alleged facts are taken as true.

⁹³ The Alien Tort Statute (28 USC § 1350) allows an alien to bring an action in a federal court for a tort only committed in violation of a treaty to which the United States is a party or "the law of nations".

⁹⁴ *Government of Dominican Republic v. AES Corporation* (n. 91 above), para. XX.

The causal link between a culpable act and the damage suffered must be established, and the damage must not be too remote or too speculative. Transnational pollution, like economic activities, poses specific problems for several reasons. First, the distance separating the source from the place of damage may be hundreds or even thousands of miles, creating doubts about the causal link even when the specific originating activities can be identified. Second, the harmful consequences may not be felt for years or decades after the act. Third, some types of damage occur only if the activity continues over time. Proof of causation also is made difficult by the fact that some activities cause little harm in isolation, but are catastrophic in combination. Imputing responsibility to one source rather than another is difficult. Finally, the same activity may not always produce the same deleterious effects due to differences in the circumstances of where it takes place. For the environment, dumping polluting substances in a river will not cause the same level of damage during times of drought and times of high water volume. In matters of economic policy, the impact of an agricultural subsidy on foreign producers will vary considerably from one country to another according to economic conditions.

Even identifying the source of harm can be problematic in both pollution cases and those concerning injury to economic rights. There may be multiple contributors whose cumulative impacts are disastrous, although each individual act is not necessarily harmful. In some domestic forums, the solution has been a shifting of the burden of proof after the injury is shown and the various sources of the pollution are identified. Each actor is required to prove the part of the injury for which it is not responsible.

In conclusion, the law of State responsibility, which originated in bilateral relations concerned with the treatment of aliens, has evolved somewhat to respond to the needs of modern multilateral agreements, in which obligations are often vertical rather than horizontal. Given its traditional concerns and structures, it may actually function better in respect to economic and social rights – where specific States might be able to prove injury, or at least a breach of an obligation (shifting the burden to the defendant State to show that the injury is not due to the breach) – than is the case with violations of civil and political rights. There nonetheless remains considerable need to define the content of transnational obligations and determine how to make the requisite causal link between breach of obligations and the lack of enjoyment of ESC rights.