

The Court's support for normative against factual reasoning is clear. By a large majority the Court relied on general legal reasoning about the nature of international obligations to reject Nigeria's arguments. Only Judges Koroma and Rezek and Judge Ajibola, the *ad hoc* judge for Nigeria, dissented on the issues of *effectivités*, historical consolidation and validity of the 1913 Treaty. The Court affirmed the principle that treaties can operate independently and may be invoked by parties in spite of conflicting realities, unless it is proved that a party invoking a treaty has *consented* to the replacement of a legal regime embodied in a treaty by a different regime dictated by factual circumstances. Nigeria's argument on the invalidity of the 1913 Treaty did not succeed; hence the Court was unable to hold that when the tribal entities which were parties to the 1884 Treaty disappeared, Nigeria acquired territorial title. This approach, in conjunction with the Court's attitude with regard to the continued operation of the Henderson-Fleuriau Exchange of Notes, evidences the Court's consolidated view that the content of normative instruments prevails over factual realities conflicting with it, and these realities can give rise to rights and duties only in so far they do not conflict with the relevant normative instruments.

ALEXANDER ORAKHELASHVILI

#### CONSTRUCTING MANSLAUGHTER IN DRUG ABUSE CASES

WHERE a victim dies from the injection of a drug, is it possible to convict the person who supplied the drug of a homicide offence? The most obvious offence is constructive manslaughter, for which it is necessary to establish that the defendant committed an unlawful and dangerous act which caused death. This offence may have been committed where the supplier has injected the victim, as was recognised in *Cato* [1976] 1 W.L.R. 110. The unlawful act was there held to be the administration of a noxious thing, contrary to section 23 of the Offences Against the Person Act 1861, regardless of the victim's consent to the administration; and it was this administration which caused the death. But what of the case where the victim injected himself? This was the scenario which was considered by the Court of Appeal in *Dias* [2001] EWCA Crim 2986, [2002] 2 Cr.App.R. 5.

The defendant prepared a syringe of heroin with which the victim injected himself. The victim died from injecting the drug and the defendant was charged with constructive manslaughter. The

jury convicted the defendant following the trial judge's ruling, founded on the decision of the Court of Appeal in *Kennedy* [1999] Crim. L.R. 65, that the relevant unlawful act was the defendant's assistance in and encouragement of the unlawful self-injection by the victim. This ruling was rejected by the Court of Appeal on the ground that it is only an offence to supply or to possess heroin and it is not an offence to use it, so the defendant had not assisted the victim in the commission of a substantive offence. The defendant's conviction was consequently unsafe, unless it could be established both that he had committed an unlawful act and that this act had caused death. Since this could not be shown, the defendant's conviction was quashed. It apparently follows from *Cato* and *Dias* that the liability of the defendant will depend simply on whether or not he injected the victim. But is this really a morally significant distinction?

In determining the legitimacy of the decision in *Dias* it must first be established whether the defendant had indeed committed an unlawful act. With the acceptance that the use of heroin is not an offence, and because the defendant had not administered the drug himself, the obvious unlawful act that he had committed was the supply of a prohibited substance, as the Court of Appeal recognised. But did the unlawful act of supply cause death? The Court of Appeal concluded, surely correctly, that it did not, because the victim's self-injection was a voluntary act which broke the chain of causation (*Goodfellow* (1986) 83 Cr.App.R. 23, 27 interpreting the earlier case of *Dalby* [1982] 1 W.L.R. 425 where, on similar facts to *Dias*, the defendant's conviction was quashed). Where the defendant injects the victim, it is the defendant's own act which causes the death, and so the difference between *Cato* and *Dias* turns not on the recognition of a different unlawful act as such, but on whether the appropriate unlawful act had caused death. The Court of Appeal did recognise that in cases of self-injection a causative link from the supply to the death might be established, but did not explain when this would be the case. Causation might be proved if the victim was unaware of what he was injecting, or was mistaken as to the strength of the substance, since the victim would presumably not have injected the substance had he known what was being injected. Then the supply of the particular drug would have been a substantial cause of death. But if the victim knows what he is administering, as in *Dias*, then the voluntariness of the administration must break the chain of causation. It is only where the voluntariness of the administration can be qualified in some way (whether it be by mistake, duress or

incapacity of some kind, such as where the victim is an inexperienced child) that causation might be established.

In *Dias* an alternative unlawful act can be identified, but the hurdle of causation remains a difficult obstacle to surmount. Although the victim had not committed an offence in injecting himself with the drug, he had committed the offence of possessing a prohibited drug and, since the defendant had prepared the drug for use, he was surely an accessory to the commission of this offence. But this assistance in the commission of the possession offence did not cause the victim's death because, again, the victim had voluntarily injected himself.

The Court of Appeal did recognise an alternative route to securing the conviction of a defendant who has supplied the drug, namely the crime of gross negligent manslaughter, but the court did not show how this offence would operate. It would still be subject to the same difficulties of establishing causation. This is because the offence requires the prosecution to establish that the defendant owed a duty of care which was breached and which caused the death. If the victim has self-injected the drug then this still constitutes a break in the chain of causation, since the injection is a voluntary act. But by emphasising the breach of duty rather than the unlawful act, it might be possible to establish the necessary causative link. A duty of care will presumably be owed where the defendant has supplied the drug. Whether breach of this duty will have caused death will turn on the particular facts of the case, but causation might be established if, for example, the defendant remained present whilst the victim injected himself and did not do anything to assist once it became apparent that the victim was dying. In such a case the defendant might owe a duty to help the victim, by virtue of their jointly engaging in a hazardous activity (Smith and Hogan, *Criminal Law*, 10th edn. (2002), p. 64). However, even this argument would not have secured a conviction in *Dias* because the defendant had not left the victim until he had arranged for a passer-by to call for help. This would probably be sufficient to ensure that there was no liability for a failure to act.

So we are left with a fundamental distinction between those cases where the defendant has injected the victim and those where he has merely supplied the drug. This distinction is, ultimately, defensible, by virtue of the operation of the rules on causation. It was the failure to consider the significance of causation in some of the earlier drug abuse cases which created an inconsistent body of law. The law is now on a much more secure footing following *Dias*.

GRAHAM VIRGO