

**THOMAS J DODD RESEARCH CENTRE
UNIVERSITY OF CONNECTICUT**

12th Raymond & Beverly Sackler Distinguished Lecture Series

Human Rights and State Responsibility

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1. Introduction

It is an honour to be asked to deliver the 12th Raymond and Beverly Sackler Lecture on Human Rights. I understand that Mr. and Mrs Sackler created the endowment to support this lecture when the Dodd Center was beginning its human rights emphasis more than a decade ago.

My work is in the general field of international law. I am not a human rights specialist, though I have worked on collective and minority rights and on democratic rights. Indeed colleagues complain that I am not a specialist at all since I flit from one thing to another all the time – if the word “flit” can be used for someone of my dimensions. But recently if I specialize it has been in the field of the international law of responsibility, especially state responsibility, through the work of the International Law Commission. Tonight I want to ask how the continuing international discussion and application of human rights relates to the fundamental structure of the law of State responsibility.

Of course there is a temptation for anyone speaking to a United States audience to take as a target current Administration attitudes towards international human rights and humanitarian law – attitudes which seem unduly negative, unduly strident, and apparently generated by a need to justify detention, trial and interrogation procedures which cannot be justified under international law. I will not address these issues – not because they are not important but because I hope and believe that those attitudes are exaggerated, do not reflect long-term United States policy or interests and will not be maintained by future United States administrations. Rather the focus here is on developments in the human rights debate which suggest that standard features of the system of state responsibility need to be modified or set aside in the pursuit of improved human rights enforcement. I want to address three such developments.

- (a) First, the international law of State responsibility proceeds on the basis of a rather firm distinction between the State and the private sector. This is challenged by those who wish the State to assume greater responsibility for human rights violations by non-State actors.
- (b) Second, the international law of State responsibility proceeds on the basis that States have, generally speaking, the prerogative of responsibility. Individuals (but so far not corporations) may be criminally responsible under international law, but only for a narrow range of crimes, by no means coextensive with the field of human rights. There is no such thing as international (non-criminal) responsibility of non-State actors for human rights violations. This is challenged by those who wish human rights to be given “horizontal effect”, and who

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hope to make private actors responsible for participating in human rights violations. It has particular salience in the US due to the unique possibility here of proceeding against private parties including corporations for wrongs against the law of nations under the Alien Tort Claims Act.

- (c) Third, the international law of State responsibility proceeds on the basis that though third States may be able to invoke the responsibility of another State for human rights violations without any showing of special interest or injury on their part (ILC Art 48), the normal rules about non-intervention and the protection of State autonomy nonetheless continue to apply. This is challenged by those who wish to develop a responsibility to protect.

Let me take these three areas in turn.

2. Attribution to the State of human rights violations by non-State actors

Individuals, business organizations, private associations and sub-State entities—i.e., territorial units or administrative organs belonging to a State but themselves not States—all might commit, or be complicit in, violations of human rights; and this has been so for as long as there has been a legal conception of human rights. However, while violations of human rights by non-State actors once were in most cases matters for municipal law except when their unlawful acts could be imputed to a State, it now is asked whether the responsibility of non-State actors under international law might be invoked directly. The salience of the question owes to the establishment of the position that States are not alone in bearing rights and responsibilities under international law, and it presents a number of further questions:

- Who might bear responsibility under international law for the violation—the non-State actor, or the State of which it is a national?
- Where the State might bear responsibility, what are the mechanisms—and their limits—by which responsibility is imputed to the State, from the conduct of the non-State actor?
- Does responsibility for the violation of human rights involve a special case of responsibility—i.e., a set of secondary rules distinct from those involved in responsibility generally?
- What examples from practice may be instanced, of responsibility being attributed to non-State actors, and what does the practice tell us about how, and to what extent, responsibility may be attributed to different types of non-State actors?

(a) Sub-State units and organs of the State

The position is clearest, where the entity performing an act is a unit of the State. The acts of the territorial subdivisions and administrative organs comprising the State are assimilated for purposes of international responsibility to the State itself. This holds, regardless of the position under municipal law. The international law of responsibility does not allow the State to escape responsibility by pleading separation between, for example, Arizona and the United States, or a French administrative agency and France, even as municipal law may assign legal consequences to the distinctions. The subsidiary parts and the State as a whole are treated, for purposes of responsibility, as one and the same. This position is reflected in the Draft Articles:

“Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever the position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

The rule set out in Article 4 was in play, in the several cases in which the United States was challenged under the Vienna Convention on Consular Relations for derogations of the rights of individuals sentenced to death for crimes under the laws of certain of the United States—e.g., Virginia (in *Breard (Paraguay v USA)*¹), Arizona (in *LaGrand (Germany v USA)*²) and Arizona, Arkansas, California, Illinois, Nevada, Ohio, Oklahoma, Oregon and Texas (in *Avena*).³

The position is the same with administrative organs as with territorial units. The International Court in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* said:

“According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule... is of a customary character.”⁴

The State will not avoid responsibility, merely by showing that its organ or individual agent “exceed[ed] its authority or contravene[ed] instructions.” Only where the acts in question have been done in a wholly private capacity, without colour of State authority, will responsibility be avoided. This rule is set out in ARSIWA Article 7:

“Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”

The rule of Article 7 has been expressed in the human rights setting. For example, the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case said

“This conclusion [that there has been a breach of the American Convention on Human Rights] is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.”⁵

(b) Private individuals and non-State entities

The more difficult cases, for determining whether the responsibility of the State is implicated, are those in which the acts in question are done by a private party.

(i) Presumption that private parties are autonomous from the State

The conduct of any human being or legal entity, if it has a link of nationality, habitual residence or incorporation to a particular State, might be attributed to that State. But international law acknowledges the autonomy of individuals and the organisations they constitute, and it also views the State as distinct from its nationals. Thus there is a presumption, more or less strong depending on the context, that the conduct of private persons is not as such attributable to the State. This was

¹ ICJ Reports 1998 p 248.

² ICJ Reports 2001 p 466.

³ ICJ Reports 2004 p 12.

⁴ ICJ Reports 1999 p 62, 87 (para 62).

⁵ *Inter-Am Ct.H.R.* Ser C No 4 (1989), 95 ILR 259, 296 (para 170).

demonstrated by the *Tellini* case in 1923. An international commission had been established to delimit the border between Greece and Albania. Its Chairman and several of its members were assassinated on Greek territory. The League of Nations Council referred questions arising out of the incident to a Committee of Jurists. The Committee said:

“The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.”⁶

The rules of State responsibility are limitative, in the sense that a State is not responsible for the conduct of non-State actors, unless the State has specifically agreed to accept attribution or the circumstances fall under one of the exceptional categories identified in the rules. The Iran-United States Claims Tribunal said, “in order to attribute an act to the State, it is necessary to identify with reasonable certainty the actors and their association with the State.”⁷

Having established that the position is not absolute, that the conduct of private parties is not to be attributed to the State, it falls to be considered under what circumstances such conduct will implicate State responsibility.

(ii) Non-State actors as agents of the State

A non-State actor might be engaged by the State to “exercise elements of the governmental authority”. Where this is the case, conduct of the non-State actor may be attributed to the State. According to ARSIWA Article 5,

“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

There are various situations in which non-State actors are agents of a State. For example, in recent years, in some countries, public organs have contracted with private security firms to take over the management of prisons. This is an example of a private party acting as agent of the State—a situation in which its acts will be attributed to the State for international law purposes. Prison management, it would seem almost as a matter of course, is one area that gives rise to challenges under human rights law.⁸ Alfred Aman expresses concern that private prison companies might (1) influence public authorities to increase the number of sentences and thus the number of “clients”. Aman admits that “[t]here is no evidence that private providers attempt to either influence sentencing or statute drafting in order to increase the number of prisoners”—but identifies this as a risk nonetheless. In his view the removal of public monitoring organs from private prisons presents the risk that the prison managers will be unaccountable for violations of human rights.⁹

(iii) Non-State actors under the direction or control of a State

Situations also may be presented, in which the State, though it has not formally engaged a private party as its agent, nonetheless directs or controls its activity. Under Article 8 of the ILC Articles:

⁶ League of Nations, *OJ*, 5th Year, No. 4 (April 1924), p 524.

⁷ *Yeager v Islamic Republic of Iran* (1987) 17 *Iran-U.S.C.T.R.* 92, 101-2.

⁸ Some 140,000 prison beds in the U.S, UK and Australia are managed by private firms, and problems of international human rights law have been identified in this: Colin Fenwick, “Private Use of Prisoner’s Labor: Paradoxes of International Human Rights Law,” (2005) 27 *Human Rights Quarterly* 249.

⁹ Alfred C. Aman, Jr, “Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law,” (2005) 12 *Indiana J Global Legal Studies* 511, 543-5.

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

The rule set out in Article 8 has arisen in practice in connection with State support for insurrectionist movements opposing the government of another State.

(c) Armed opposition groups: attribution of their acts to the State

The actions of an armed opposition group, engaged, for example, in a civil war against government forces of a State, are not normally to be attributed to the State. However, there are situations in which the conduct of such a group may be attributed to the State on the territory of which it operates; or to another State. The position of armed opposition groups under the law of responsibility is particularly relevant to the question of human rights, as violations of human rights may proliferate in a situation of insurrection against the established government of a State.

Where an armed opposition group is acting on the instructions or under the direction or control of another State, the conduct of the group may be attributed to that State. The standard, however, is stringent, and international tribunals require a clear finding that particular conduct was effectively under the foreign State’s direction or control, or taking place on the foreign State’s instruction, before responsibility will be attributed to the foreign State. The International Court, in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* held that

“[D]espite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf... All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”¹⁰

The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia formulated the position somewhat differently—expressly distinguishing its approach from that of the International Court in the *Nicaragua case*. In *Prosecutor v Tadić*, the Chamber said:

“The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.”¹¹

The ICTY was concerned with the criminal responsibility of individuals, and this distinguishes its position from that of the International Court in the *Nicaragua case*, where State responsibility was in issue. Moreover, the question under consideration in *Tadić* was whether international humanitarian law applied to the case—not whether responsibility existed for particular acts.

¹⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Merits, ICJ Rep 1986 p 14, 62, 64-5 (para 109, 115).

¹¹ Case IT-94-1, *Prosecutor v Tadić* (1999) 38 ILM 1518, 1541 (para 117) (emphasis original).

A non-State group may find itself exercising a public function, where the government of the State has disappeared, and the exercise of the public function is necessary. In such a situation, the conduct of the non-State group may be attributed to the State. This is an exceptional case, but not unheard of: Post-revolutionary situations, for example, may give rise to this form of attribution, as did the situation during the Islamic Revolution in Iran.

The position is set out in the Articles on State Responsibility:

“Article 9

Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.”

It is a well-established position, reflected, for example, in the early 20th century Mexican and Venezuelan mixed claims commissions, that the activities of an insurrectionist movement, which then succeeds in taking over the State, are attributable to the State. Article 10 of the Articles on State Responsibility address this situation:

- “1. The conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.”

Article 10 does not include a mere riot or civil disturbance, nor does it include insurrections which have not won the fight for supremacy in the State, or situations in which the existing government has prevailed. The State, as a general matter, is not responsible for acts carried out by an organized, armed opposition movement—unless some special consideration applies, such as that set out in Article 9: i.e., the opposition movement has come to exercise governmental functions, in default of official government power, in circumstances calling for the exercise of those functions. The situation envisaged in Article 9 overlaps with, if it is not coterminous with, that in which the established government breaches good faith or is negligent in suppressing the insurrection. In such a situation, the presumption that the State is not responsible for the acts of the insurrectionist movement may be displaced.

To summarise then, there is a duty to prevent; there may be a duty to punish (genocide); but there are limits, and these duties do not displace the basic proposition that except in special cases of agency (including agency of necessity) the State is not responsible for the acts of private parties.

3. Eroding the State’s prerogative of responsibility: direct international responsibility of non-State actors for human rights violations

I move to the second area of potential development. Can we establish the direct responsibility of non-State actors for human rights violations, thereby eroding the State’s prerogative of responsibility? As a general matter the answer has traditionally been no, at least in the civil arena (and in the criminal arena has there been direct responsibility only since 1945 and only then to a very limited extent). It is sometimes suggested that this is not a fundamental question of structure but merely one of jurisdiction: the reason non-State actors cannot be responsible in international law for human rights and other egregious violations is simply that there is no forum with jurisdiction over them. But the

matter goes deeper than that: it is not a mere historical accident. The material content of international law has never been dependent on the existence of inherent third party jurisdiction, and there is no reason to think that this is true here.

But there are at least tentative steps in the other direction which may be reviewed. Let me deal with two of them.

(a) Direct responsibility of armed opposition groups

The rules set out in the Articles on State Responsibility relate to the responsibility of States. They are without prejudice to the general law of responsibility. Moving beyond the question of attribution of the acts of an insurrectionist movement to a State, it may be asked whether such a movement might incur responsibility on its own under international law—for example, for acts in violation of the law of human rights.

Protocol I to the 1949 Geneva Conventions extends the protections of common Article 2 of the Conventions, *inter alia*, to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.” Subscription to Protocol I is incomplete, and, even on its terms, it is not explicit as to the responsibility of armed opposition groups involved in internal armed conflict. It may be that, because the Protocol extends to such groups the substantive rights earlier reserved to situations of inter-State warfare, the Protocol also establishes their responsibility on a footing similar to State responsibility. A further, and perhaps decisive, limit on the effect of Protocol I, as regards the responsibility of non-State groups involved in armed conflict, are the disagreements as to the definition of “national liberation movement” and similar groups—disagreements which date to the drafting conference of the Protocol and continue.

Zegveld makes the point that much of the law concerning internal armed opposition relates to the rights of victims—i.e., to violations of the human rights and humanitarian interests of civilians caught up in an internal conflict; and that this focus of the law involves a neglect of the question of attribution of responsibility—i.e., of the question against whom to oppose the victims’ rights.¹²

Though international bodies have hesitated to attribute human rights violations to armed opposition groups, there have been instances in which human rights violations have been identified in internal armed conflicts. For example, the Inter-American Commission, in its Second Report on the Situation of Human Rights in Colombia (1993), stated that the activities of armed groups “are detrimental to the exercise of the most important human rights.”¹³ The special rapporteurs and working group chairpersons of the UN Commission on Human Rights once noted “the adverse effects [the actions of armed groups] might have on the enjoyment of human rights.”¹⁴ The UN Secretary-General in his 1999 report on Fundamental Standards of Humanity, noted that “some argue that non-State actors should also be held accountable under international human rights law, especially in situations where the State structures no longer exist or where States are unable or unwilling to mete out punishment for crimes committed by non-State actors.”¹⁵ This is however rather equivocal, the practice of the international human rights bodies by no means establishing decisively the international responsibility of armed opposition groups engaged in hostilities against the State. Indeed, in various

¹² Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press, 2002, p 3.

¹³ Inter-American Commission Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84, p 213 (1993).

¹⁴ UN Commission on Human Rights, E/CN.4/1997/3, para 44: Report of the Meeting of Special Rapporteurs/Representatives Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and the Advisory Services Programme, 30 September 1996. Quoted in Zegveld, 38-9.

¹⁵ Report of the Secretary-General on Fundamental Standards of Humanity, Commission on Human Rights, E/CN.4/1999/92 (para 13), 18 December 1998. Quoted in Zegveld, 47.

instances in which governments alleged violations of human rights by armed opposition groups, the Commission on Human Rights resisted characterizing acts of armed groups as violations of human rights.¹⁶

One obstacle may be ambiguity as to the status of the groups. Provost asks whether recognition of opposition groups as “national liberation movements” opens the door to the application of international human rights rules to the conflicts in which they are engaged—regardless of how the State they are fighting characterizes them.¹⁷ To consign the matter to the self-characterization of an interested State seems excessively to limit the potential for application of international law to such conflicts; but to make the question one of third State recognition presents the problem of conflicting third State views.

(b) Direct responsibility of private sector entities for complicity with the State

United States federal law presents the possibility of private litigants establishing the direct responsibility of private sector entities for complicity with the State in violations of human rights. This position, which is unusual in national legislation generally, owes to the Alien Tort Claims Act, which provides that “[t]he [federal] district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁸ After a long period of obscurity, the Act was applied to establish jurisdiction over a claim by Paraguayan nationals against a Paraguayan official for alleged acts of torture, *Filartiga v Pena-Irala*¹⁹ triggering a modern discussion over the meaning of the 18th century expression “violations of the law of nations.”²⁰ Lower courts oscillated between a restrictive view, that the expression “law of nations” referred to international law as it existed in 1789,²¹ and an expansive one, that the Act establishes a cause of action under any international law rule now in force. The Supreme Court adopted the expansive view in *Sosa v Alvarez-Machain*.²²

Two post-*Sosa* decisions in federal courts address the attribution of serious violations of human rights rules to private sector entities. *Sarei v Rio Tinto Plc*, decided 7 August 2006 by a three-judge panel of the Court of Appeals for the Ninth Circuit, arose out of activities of a British mining company on the island of Bougainville in Papua New Guinea.²³ *Presbyterian Church of Sudan v Talisman Energy Inc.*, decided 12 September 2006 by the District Court for the Southern District of New York, arose out of activities of a Canadian mining company in the Sudan.²⁴ In both, federal jurisdiction was asserted on the basis of the Alien Tort Claims Act. The cases present questions concerning the responsibility (“liability”) of private sector actors under international law for acts of their own; and concerning the complicity of private sector actors in acts done by the State on the territory of which they operate.

The plaintiffs’ case in *Rio Tinto* had been dismissed by the District Court on grounds that it presented non-justiciable political questions, or was barred under act of state doctrine and the doctrine of international comity. The Court of Appeals set out the facts as alleged by the plaintiffs:

“[T]he defendant Rio Tinto, an international mining company, with the assistance of the PNG Government, committed various egregious violations of jus cogens norms and customary international law including racial discrimination,

¹⁶ Zegveld 46 and n 132.

¹⁷ René Provost, *International Human Rights and Humanitarian Law* (Cambridge, Cambridge University Press, 2002) 292-6.

¹⁸ Judiciary Act of 1789, ch 20 2 9(b), 1 Stat 73, 77 (1789), codified at 28 USC s 1350.

¹⁹ 630 F.2d 876 (2nd Cir 1980).

²⁰ Some of the issues were identified immediately after *Filartiga*: see, e.g., Daniel Dokos, “Enforcement of International Human Rights in Federal Courts After *Filartiga v Pena-Irala*,” (1981) 67 *Virginia Law Review* 1379.

²¹ See *Tel-Oren v Libyan Arab Republic*, 726 F.2d 724, 823 (D.C. Cir. 1984, Bork J concurring).
²² 542 U.S. 692 (2004).

²³ 456 F.3d 1069 (9th Cir. 2006; Fisher CJ; Bybee CJ dissenting).

²⁴ F.Supp.2d , 12 September 2006 (Cote J).

environmental devastation, war crimes and crimes against humanity, with severe repercussions for many citizens of PNG.”²⁵

Black labourers in Rio Tinto’s copper and gold mining operations were alleged to have lived in “slave-like” conditions. Their mental and physical health was damaged, as was the surrounding environment, by the waste products of the mining operations. A civil war erupted between the Bougainvilleans and the PNG, the former seeking to secede from the latter. This lasted ten years and involved serious violations of human rights and humanitarian law.²⁶ The lower court, though dismissing on the grounds noted, held that “if proven, the allegations supported liability against Rio Tinto for certain acts committed by the PNG government” and that the plaintiffs had stated “cognizable ATCA claims for racial discrimination, crimes against humanity and violations of the laws of war.”²⁷

The PNG government made various statements to the effect that it either supported or did not object to the continuation of proceedings against Rio Tinto in United States court.²⁸

The Alien Tort Claims Act gives a cause of action, where claims are based “on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigm.”²⁹ The Court of Appeals accepted that the peremptory norms that the plaintiffs alleged Rio Tinto to have violated belong to “the least controversial core of modern day ATCA jurisdiction.”³⁰ The Court of Appeals further held that the rules of the UN Convention on the Law of the Sea pleaded by the plaintiffs are part of customary international law.³¹

The Court of Appeals recognised however that it may not be straightforward, to impute to a private sector actor, responsibility for acts done by the State:

“Another potential jurisdictional complication is the plaintiffs’ efforts to hold Rio Tinto liable under theories of vicarious liability for alleged war crimes and crimes against humanity committed at its behest by the PNG army. A predicate question is whether... claims for *vicarious liability* for violations of jus cogens norms are actionable under the ATCA. We conclude that they are. Courts applying the ATCA draw on federal common law, and there are well-settled theories of vicarious liability under federal common law.”³²

The Court added, as a footnote, the assertion that “violations of the law of nations have always encompassed vicarious liability”—which it supported by reference to a 1795 opinion of the (U.S.) Attorney General and a 1790 federal statute.

Perhaps the most striking proposition in *Rio Tinto* is that responsibility for acts of national military authorities might be attributed to a private corporation, on reasoning that the former were acting effectively as agents, or at least on the direction, of the latter. As noted above, it is well-established, that responsibility for acts of a non-State actor might be attributed to a State, on the basis of agency (ARSIWA Article 5) or on grounds that the non-State actor takes direction from, or is directed or controlled by, the State (ARSIWA Article 8). However, these propositions are well-established only in the direction stated: If they are two-way streets, that remains to be clarified in practice. *Rio Tinto* nevertheless takes the view that attribution of responsibility from the State to a private actor is perfectly plausible:

²⁵ 456 F.3d 1069, 1074.

²⁶ *ibid*, 1075.

²⁷ *Sarei v Rio Tinto PLC*, 221 F. Supp.2d 1116 (C.D. Cal. 2002), 1148-9, 1139-63.

²⁸ 456 F.3d 1069, 1076-7.

²⁹ 456 F.3d 1069, 1077, quoting *Sosa v Alvarez-Machain*, 542 U.S. 692, 720 (2004).

³⁰ 456 F.3d 1069, 1078.

³¹ *Ibid*, citing Lori Damrosch et al, *International Law: Cases and Materials* (4th ed 2001) 1386.

³² 456 F.3d 1069, 1078.

“The second question is whether the plaintiffs have sufficiently alleged Rio Tinto’s liability for the PNG military’s alleged war crimes. We agree with the district court that they have. The plaintiffs allege, for example, that ‘Rio Tinto knew that its wishes were taken as commands by the PNG government and Rio intended that its comments would spur the PNG forces into action,’ that ‘Rio... understood that... [I]f Rio did not direct and/or encourage a military response... none would have been initiated,’ and similar allegations that Rio Tinto officials exercised control over the behaviour of PNG forces with regard to the conflict around the mine. Based on these allegations, the district court concluded that ‘plaintiffs have adequately alleged that PNG’s actions are fairly attributable to Rio Tinto’ and that ‘Rio Tinto controlled [PNG’s] actions...’ Taking the allegations of Rio Tinto’s control over PNG forces as true, we agree with the district court that the plaintiffs have adequately alleged vicarious liability under the ATCA. Based on the plaintiffs’ uncontested (for our purposes) allegations, we are satisfied that we have jurisdiction to proceed.”³³

This is not an unqualified statement that responsibility may be attributed to a private sector entity for purposes of international law: The case was a case in United States court, and the Court of Appeals applied United States law to reach a finding respecting federal jurisdiction. As such, *Rio Tinto* cannot be treated as a blanket statement concerning international responsibility. Yet the Court of Appeals did not treat the matter as one merely of private sector “involvement” or “complicity” in State acts; it characterized the private sector entity as playing the lead, even commanding, role. *Rio Tinto* suggests the development of an international law of responsibility, under which attribution to non-State actors ‘comes of age’ or ‘catches up’ with the wider diversification of international legal personality.³⁴ In any event, the decision, in its result, offers an interesting alternative to the undue extension of State responsibility for violations in the private sector.

A word should be said about the dissent in *Rio Tinto*. Judge Bybee—who, with John Yoo, was at the centre of Guantanamo Bay policy at the Office of Legal Counsel in the Department of Justice—dissented, on the ground that the exhaustion of local remedies requirement applies to the Bougainvilleans’ claims. Judge Bybee says that exhaustion of local remedies might be a substantive element of an international claim and that for this, among other reasons, the Court of Appeals should have dismissed, without prejudice. According to Bybee J:

“Litigation of foreign claims in American courts may undermine local governments, who may be seen as weak or unresponsive when they were given no opportunity to address the problem in the first instance... By use of domestic remedies, ‘the intervention of outsiders is avoided (it is noteworthy that *any* intervention, no matter how skilful and tactful, is invariably disliked as such); and it is possible to avoid the publication of the dispute to the world at large, which often causes exacerbation.’ The local remedies rule ‘functions similarly to the principles of comity, avoiding friction between states by permitting peaceful settlement before conflicts erupt.’... Second, exhaustion of remedies gives other countries the opportunity to address their own conflicts and craft their own solutions.”³⁵

³³ 456 F.3d 1069, 1078-9.

³⁴ The Court addresses *Alperin v Vatican Bank*, 410 F.3d 532 (9th Cir 2005), in which it had dismissed a claim under ATCA for war crimes. The plaintiff in *Vatican Bank* had alleged that the Vatican Bank was complicit in war crimes under the Ustasha government in Croatia during World War II. The problem, the Court said, was that “the broad allegations tied to the Vatican Bank’s alleged assistance to the war objectives of the Ustasha... essentially call on us to make a retroactive political judgment as to the conduct of the war... [and] are, by nature, political questions”: 410 F 3d 532, 548. The Court judged *Rio Tinto* to be more like *Kadic v Karadzic*, 70 F 3d 232 (2nd Cir 1995), in which “the claims... focused on the acts of a single individual during a localized conflict rather than asking the court to undertake the complex calculus of assigning fault for actions taken by a foreign regime during the morass of a world war”: 70 F 3d 232, 562.

³⁵ 456 F 3d 1069, 1115-6 (footnotes omitted).

Several observations may be made. First, it is at least open to question, whether the claim here at issue is international. The effect of ATCA is to make the claim a claim under federal law, and it is thus not an international claim in the usual sense. As a claim arising under ATCA, the claim has been pursued in proceedings before a United States federal court, not before an international tribunal—a further respect in which the claim, in the usual sense, is not international. This is not to say that the rationale behind the exhaustion rule still might not be relevant. The rule of exhaustion of local remedies has the purpose of giving national tribunals a chance to rectify misconduct of their own State, before a claimant pursues a remedy elsewhere. This rationale well may apply equally, whether the possible alternative forum is an international one—e.g., an arbitral tribunal or international court—or a national one—e.g., United States federal courts. The position in early modern Europe, when the exhaustion rule was in its nascence, was usually that the rule stayed the hand of one State’s monarch from taking steps against nationals of another State, where one of the monarch’s subjects alleged misconduct by the other State. It was not a rule concerning international tribunals, as none then in the modern sense existed. But the usual situation in the modern context is that the exhaustion rule applies to protect the right of a State to remedy harm that it has done, before a claimant takes its cause to an international—not another national—tribunal. The situation in *Rio Tinto* is distinctive, insofar as the question is not one of transferring a claim from PNG courts to an international tribunal—but, rather, to a United States court, and on terms that would appear to have transformed the claim to one under federal law. Bybee identifies an arguable point, relative to the exhaustion rule and the rights of PNG.

However, it does not reflect the received view today, to say that the question of the substantive or procedural character of the exhaustion requirement “is by no means resolved.” The International Law Commission did *not* “adopt[] the substantive view in the 1970s,” though Judge Bybee says it did.³⁶ And the Articles on State Responsibility do not “stop short of declaring when international responsibility attaches.” Article 44 is clear that exhaustion is a matter of attribution or invocation. Judge Bybee says:

“The elements of those substantive causes of action are defined by international law, not by our domestic law, and may be subject to an exhaustion requirement if international law would recognize exhaustion of remedies as an international law norm.”³⁷

It is certainly right to say that international law recognizes exhaustion of remedies “as an international law norm.” But that norm is substantive not procedural in character where what is at stake is as claim of denial of justice, and such a claim cannot be made out, until the local remedies have been tested. In other situations, the rule is one of admissibility only.

A third observation is that the claim in *Rio Tinto* was made against a private sector entity—not against a State. The rule of exhaustion of local remedies is closely related to the position that the State holds as respondent in the classic international claim. The State, in the classic international claim, is the respondent, whether the claim arises out of diplomatic protection (whereby the State of the injured party adopts the claim as its own) or is a claim made by a private party under a treaty. The rationale for the exhaustion rule is that the State, as respondent, should be given the chance to exercise its jurisdiction over the claim before the State is subject to international process. This consideration does not apply with the same force, where the respondent is a private entity. It is noteworthy that the several sources Judge Bybee cites in support of the exhaustion requirement relate to situations where the question is one of the international responsibility of the *State*—not of non-State actors.

On the other hand, perhaps there is reason to apply the exhaustion rule in *Rio Tinto* after all. The Alien Tort Claims Act was adopted to address, primarily, piracy on the high seas—where no national jurisdiction obtained—and, it would seem to a lesser extent, violations against diplomatic personnel—who ordinarily would have been immune from process in the receiving State. The former

³⁶ 456 F 3d 1069, 1111 n 10.

³⁷ 456 F 3d 1069, 1106.

is certainly not a situation in which the exhaustion requirement would have applied. By contrast, a case arising in the territory of a State could be addressed in national courts.

In *Presbyterian Church of Sudan v Talisman Energy*, current and former nationals of the Sudan brought an action against the Sudan and Talisman, under the Alien Tort Claims Act, for alleged violations of international law in the Sudan.³⁸ The plaintiffs alleged that Sudan committed, and Talisman was complicit in, genocide, crimes against humanity and war crimes, including the forcible transfer of civilians and military attacks intentionally targeting civilians. The U.S. District Court for the Southern District of New York granted summary judgment to Talisman, on the ground, generally, that the plaintiffs “failed to locate admissible evidence that Talisman has violated international law.”³⁹

In granting summary judgment, the District Court specifically identified problems of causation:

“The plaintiffs repeatedly describe ‘Talisman’ as having done this or that, when the examination of the sources to which they refer reveals that it is some other entity or an employee of some other company that acted. They assert that this or that event happened, when the documents to which they refer consist of hearsay embedded in more hearsay. Indeed, most of the admissible evidence is either statements made by or to Talisman executives, and the plaintiffs’ descriptions of their own injuries, with very little admissible evidence offered to build the links in the chain of causation between the defendant and those injuries.”⁴⁰

Talisman’s motion for summary judgment was not challenged by the plaintiffs, insofar as the motion sought to dismiss their claim that Talisman itself violated international human rights law. The plaintiffs did seek to preserve their claim that “Talisman conspired with and aided and abetted its sole co-defendant, the Republic of Sudan, to commit those same violations of customary international law.”⁴¹

The District Court summarized the facts behind the conspiracy claim as follows:

“The conspiratorial agreement, formed between the Government and Arakis [a company in the Sudanese oil sector which had encountered financial difficulties but then was acquired by Talisman], was to clear the oil concession and surrounding area of all non-Muslim, African civilians. Talisman joined the conspiracy to displace residents with knowledge of its goal, and furthered its purpose principally by (a) designating new areas for oil exploration understanding that that would require the Government to ‘clear’ those areas, (b) paving and upgrading the Heglig and Unity airstrips with knowledge that Government helicopters and bombers would use them in launching attacks on civilians, and (c) paying royalties to the Government with the knowledge that the funds would be used to purchase weaponry.”⁴²

The District Court accepted that the alleged displacement of civilian populations by force is a “crime against humanity and a violation of customary international law.”⁴³ However, in the matter of attribution, the Court found that the plaintiffs’ case was problematic. According to the Court, the conspiracy claim had to be rejected, on two grounds of international law: (1) “the offense of conspiracy [in international law] is limited to conspiracies to commit genocide and to wage aggressive

³⁸ I should disclose that I gave expert evidence on behalf of Talisman in connection with these proceedings. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 306 (SDNY 2003, Schwartz J) (19 March 2003).

³⁹ Decision, p 2 [__ F.Supp 2d __].

⁴⁰ Ibid, p 2.

⁴¹ Ibid, 20.

⁴² Ibid, 21.

⁴³ Ibid, 21.

war”; and (2) “international law does not recognize a doctrine of conspiratorial liability that would extend [as far as it does under U.S. case law].”⁴⁴

The Court’s analysis raises a question of attribution—in particular, whether attribution is to be sought under international law or under United States law. To make out a claim under the Alien Tort Claims Act, the plaintiff must show that the acts complained of constitute violations of international law. For purposes of international law, the substantive offence and doctrines of attribution are distinct. The question is whether, for purposes of ATCA, the substantive offence and attribution are both to be analyzed under international law; or whether, once the Court is satisfied that a plaintiff has made a prima facie showing of a substantive offence, attribution can be sought under United States law. The answer in *Talisman* was that both elements have to be considered under international law, if the claim is to pass into United States jurisdiction under ATCA. In my opinion this is correct—otherwise what is sanctioned is not an offence against the law of nations.

4. Expanding the State’s power to intervene abroad to protect human rights: the so-called responsibility to protect

I move to a third area for potential development away from the paradigm of the individual State responsible for human rights violations on its territory but able to assert its monopoly of responsibility for such violations. A challenge to such assertions, perhaps less distinctive to our time than we like to think, is the so-called “responsibility to protect”, which was set out in the Outcome Statement of the 2005 World Summit in the following terms:

“Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.
140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.”⁴⁵

⁴⁴ Ibid 21.

⁴⁵ Follow-up to the outcome of the Millennium Summit, 15 September 2005, A/60/L.1, p 31.

Paragraph 139 treats the responsibility to protect as a multilateral responsibility. It is not entirely clear whether the responsibility on the part of individual States takes precedence over this. The multilateral responsibility is to be invoked when “peaceful means [are] inadequate and national authorities manifestly fail to protect their populations.” However, paragraph 139 does not say that the international community has “responsibility to use appropriate... means” *only* after national authorities have failed to fulfil the responsibility to protect. Paragraph 138, though it provides chiefly for the responsibility of individual States for compliance with the prohibition against genocide and other acts, also indicates that the “international community should encourage and help States to exercise this responsibility”. Both paragraphs make provision for preventive measures—paragraph 138 calling for the establishment with the participation of the international community of an “early warning capability”; paragraph 139 stating the intention to assist States “before crises and conflicts break out.” This suggests that multilateral action is not limited to situations in which a State or States already has “manifestly failed” to protect.

The responsibility to protect, at first blush, might appear to entail both a primary obligation and a secondary obligation. States are obliged to refrain from acts violating the prohibition against genocide, war crimes, ethnic cleansing and crimes against humanity. The international community “also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect...” (para 139). The word “responsibility”, however, is not used in connection with Chapter VII measures, nor is it used in a sense that clearly requires States or the international community to act, in situations where the primary obligation to protect (i.e., to refrain from violations) has been breached. The States parties to the Outcome Statement “*are prepared* to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect...” (emphasis added). Article 139 does not say that the States parties “*have an obligation* to take collective action...” It certainly does not indicate “an unambiguous acceptance of the principle that the Security Council must assume collective responsibility to act under Chapter VII,” even if only “as a last resort.”⁴⁶ A draft of Article 139 reportedly contained language to establish a responsibility on the Security Council to intervene, but objection was raised to this by the United States and other States.⁴⁷

Less categorical formulations have been suggested. For example, according to one writer, by adopting the Outcome Statement, States “committed themselves to the principle that the rule of non-intervention is not sacrosanct in cases where a government commits genocide, mass-killing, and large-scale ethnic cleansing within its borders.”⁴⁸ This may be correct as far as it goes, but it would not add anything to international law to accept “the principle” that certain considerations may supersede the rule of non-intervention. In situations in which a colonial administering power resists decolonization, for example, the rule of non-intervention had been qualified as long as thirty years ago.

The responsibility to protect was reaffirmed by the Security Council, though without further specification of its content or scope.⁴⁹ This was not the first occasion on which the Security Council

⁴⁶ Though this expansive interpretation has been suggested: see Ved P. Nanda, “The Global Challenge of Protecting Human Rights: Promising New Developments,” (2006) 34 *Denver Journal of International Law & Policy* 1, 6. And to similar effect, Surakiart Sathirathai (then-Deputy Prime Minister of Thailand), “Renewing Our Global Values: A Multilateralism for Peace, Prosperity, and Freedom,” (2006) 19 *Harvard Human Rights Journal* 1, 9.

⁴⁷ Ian Johnstone, ‘Discursive Power in the UN Security Council,’ (2005) 2 *Journal of International Law & International Relations* 73, 81-2.

⁴⁸ Nicholas J. Wheeler, ‘A Victory for Common Humanity: A Responsibility to Protect after the 2005 World Summit,’ (2005) 2 *Journal of International Law & International Relations* 95, 95.

⁴⁹ SC res 1674, 28 April 2006, para 4: “[r]eaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”

had addressed preventive action. The Security Council earlier had taken up the matter in resolution 1366 of 30 August 2001. Resolution 1366 also

“[s]tress[ed] that the essential responsibility for conflict prevention rests with national Governments, and that the United Nations and the international community can play an important role in support of national efforts for conflict prevention and can assist in building national capacity in this field and *recognizes* the important supporting role of civil society.”

A certain support can be found for a “responsibility to protect” in the positions taken by individual States—though, again, the result is hardly the establishment of an obligation to intervene, as some would have it. The United States, for example, expressed support for a “responsibility to protect.” A Department of State official identified the responsibility to consist in two parts: (1) “the responsibility of nations to protect their own citizens”; and (2) “the responsibility of the international community, acting through the Security Council, to act in cases of genocide and other threats.”⁵⁰ The U.S. Permanent Representative to the United Nations, reporting on the World Summit, told the U.S. Senate Foreign Relations Committee as follows:

“Related to the issue of preventing conflict is the important progress we made in the section on the ‘Responsibility to Protect,’ which moves us toward a new strengthened international moral consensus on the need for the international community to deal with cases involving genocide, war crimes, ethnic cleansing, and crimes against humanity. We were successful in making certain that language in the Outcome Document guaranteed a central role for the Security Council. We were pleased that the Outcome Document underscored the readiness of the Council to act in the face of such atrocities, and rejected categorically the argument that any principle of non-intervention precludes the Council from taking such action.”⁵¹

Notably, in all these statements, the meaning of the expression “to act” was left unspecified. Despite all this, therefore, it is doubtful whether the Outcome Statement was intended to establish special secondary rules of responsibility for cases in which there have been violations of human rights. I say this for several reasons. First, the Outcome Statement is hortatory, not mandatory in form, and does not suggest an intention to establish new obligations. Secondly to posit a “responsibility” to take action in response to acts done in territory not under the jurisdiction of the responding State would be largely to re-conceive territorial relations in international law. It is not that an omission (as distinct from an act) may not entail responsibility of a State under international law. But to make an omission to do something outside one’s own jurisdiction (in the absence of a specific commitment to act) would make it difficult or impossible for a State to know the scope of its responsibilities, which would extend in principle to all territory all the time. It is assumed that a State is informed as to acts done in its jurisdiction; it cannot be assumed that it is informed as to acts done beyond its jurisdiction.

5. Conclusion

In short, I argue against special secondary rules of responsibility for human rights violations, against the undue extension of State responsibility for violations in the private sector and against the undue extension of the responsibility to protect on the territory of other States.

⁵⁰ U.S. Department of State Briefing No. 2005/1201, 20 December 2005, quoted John R. Crook (ed), ‘Contemporary Practice of the United States Relating to International Law’: (2006) 100 *AJ* 463, 464.

⁵¹ John Bolton, ‘Challenges and Opportunities in Moving Ahead on UN Reform,’ 18 October 2005 (statement before the Senate Foreign Relations Committee), quoted, Cook, 100 *AJ* 463, 464.