2011

Apportioning Responsibility Among Joint Tortfeasors for International Law Violations

Roger P. Alford
Notre Dame Law School, ralford@nd.edu

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I. INTRODUCTION

It is a privilege for me to participate in this symposium on the globalization of tort law. I am especially pleased to join this discussion with eminent torts scholars such as Richard Cupp, John Goldberg, Mike Green, Ellen Pryor, Allen Linden, Robert Rabin, Victor Schwartz, Jane Stapleton, and Stephen Sugarman. I am the lone figure at this event who approaches torts as a relative outsider, given my principal focus as a scholar is on international law. Therefore, I will present my reflections from the perspective of how international law can benefit from the mature and robust system of domestic tort law in the United States and elsewhere.

While the law of nations has been around for centuries, modern international law is young and immature, coming into its own only in recent decades. Modern tort law, by contrast, is an advanced system of law that has benefitted from over 150 years of analysis, established through thousands of cases in dozens of countries. Until recently there was little overlap between the two disciplines. For example, if one looks to the intellectual origins of modern tort law, Oliver Wendell Holmes sharply distinguished international

* Professor of Law, Pepperdine University School of Law; Visiting Professor of Law, Notre Dame Law School; J.D. New York University School of Law; LL.M. University of Edinburgh. The writing of this Symposium Article was supported by a summer research grant from the Pepperdine University School of Law. The author gratefully acknowledges the comments of Richard Cupp and Donald Childress and the research assistance of Bradley Easterbrooks.

law and torts, with the former based on duties owed by one sovereign to another, and the latter based on duties owed "from all the world to all the world."[1]

Of course, in the Westphalian past, international law was the "law of nations"—the special provenance and exclusive domain of nation-states. International law was "the body of rules which the civilized States consider legally binding in their intercourse," Lassa Oppenheim boldly declared in the 1920 edition of his famous treatise on international law.[2] It followed that "sovereign States exclusively are International Persons—i.e. subjects of International Law" and neither "monarchs, diplomatic envoys, private individuals . . . churches . . . chartered companies, nor . . . organized wandering tribes" enjoyed the status of "International Persons" who are "subject[s] of the Law of Nations."[3]

Today, the opposite is true. There is no question that international law grants rights and imposes duties on entities other than states. The latest edition of Oppenheim's treatise reflects this change: "The question whether there could be any subjects of international law other than states was at one time a matter of strenuous debate. . . . It is now generally accepted that there are subjects other than states, and practice amply proves this."[4]

Individuals, international organizations, private and public corporations, and territorial units other than states may, to a limited extent, be directly subject to rights and duties under international law.[5] "[I]n the modern era," the Second Circuit held in *Kadic v. Karadzic*, the law of nations does not "confine[] its reach to state action. . . . [C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[6]

Thus, at the time Holmes was writing, it was appropriate to separate tort law from international law because the latter imposed duties only on states. With the advent of modern international law, however, one can readily identify a category of international law—analogous to domestic tort law—that includes duties owed "from all the world to all the world."[7] With this dramatic change, tort law and international law are now inextricably connected.

A central paradigm of tort law—at least for intentional torts—is a prohibition on aggression, with liability attaching when a tortfeasor

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1. Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 5–6 (1870).

2. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 125 (3d ed. 1920).

3. *Id.* at 125–26.

4. 1 OPPENHEIM'S INTERNATIONAL LAW 16 n.1 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

5. *Id.* at 16–22.

6. Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

7. Holmes, *supra* note 1, at 6.

subordinates a passive victim to his will.[8] Almost all the modern cases holding defendants liable for human rights violations comfortably fit within that model. As George Fletcher has put it, "[t]here are no torts based on the modern [international law] offences—genocide, war crimes, and crimes against humanity . . . [y]et they all stand for the same paradigm of liability," namely that "the defendant dominates a passive victim and acts aggressively against him or her."[9] Despite the similarities between international human rights law and tort law, scholars in both fields continue to labor in their own vineyards, ignoring the benefits that could come from judicious grafting of the two varieties of delict.

Imposing international responsibility on individuals and corporations is of particular importance in the United States, where non-state actors are increasingly subject to claims for monetary damages for alleged violations of international law under the Alien Tort Statute ("ATS").[10] According to a recent study commissioned by the U.S. Chamber of Commerce, "there have been some 150 ATS cases filed against corporations, with 120 (~80%) arising in the past 15 years."[11] According to the study, "[w]hile most of the cases have resulted in dismissals, there have been more trials (mostly resulting in defense verdicts), plaintiffs' judgments (ranging from $1.5 million to $80 million), and settlements (ranging from $15.5 million to reportedly $30 million) in recent years."[12]

The largest jury award for an ATS violation was $766 million in

8. GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 107 (2008).

9. *Id.* at 128. For other rare instances in which the two disciplines are analyzed, see W.V.H. Rogers, *Tort Law and Human Rights: A New Experience, in* EUROPEAN TORT LAW 2002, at 35 (Helmut Koziol & Barbara C. Steininger eds., 2003); TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed., 2001).

10. *See* 28 U.S.C. § 1350 (2006) ("The 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.").

11. Jonathan Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, 5 (June 2010), http://www.instituteforlegalreform.com/images/stories/documents/pdf/international/thinkgloballysuelocally.pdf.

12. *Id.* The case of *Licea v. Curacao Drydock Co.*—in which the jury awarded $80 million in damages—illustrates the trend. 584 F. Supp. 2d 1355 (S.D. Fla. 2008). The plaintiffs alleged a conspiracy between a private corporation, Curacao Drydock, and the Cuban government to engage in human trafficking, forcing the plaintiffs to work under threat of imprisonment. *Id.* at 1357. After the district court denied the defendant's motion to dismiss the case based on *forum non conveniens*, the corporation failed to adequately defend the suit and a default judgment was rendered against it under the ATS. *Id.* A bench trial was held on the issue of damages and an award of $80 million was made against the corporation. *Id.* at 1363–66.

compensatory damages and $1.2 billion in punitive damages.[13]

Corporations are rightly exercised about this new trend, as domestic tort lawyers who have won billions in asbestos, toxic tort, and tobacco litigation are now entering the potentially lucrative new field of human rights and transnational tort litigation.[14] One of the central concerns expressed in these cases has been whether corporations may be liable for aiding and abetting government abuse and, if so, the appropriate standard for imposing liability—either "knowledge" of the government misconduct or some evidence of a "purpose" to facilitate it.[15] The Second Circuit recently challenged this trend, holding that claims against private corporations are not actionable under the ATS.[16] Scholars have presented competing views, debating whether corporations should be held liable for violating international law[17] and diverging on the appropriate standard for liability.[18]

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13. *See In re* Estate of Marcos Human Rights Litig., 910 F. Supp. 1460, 1464 (D. Haw. 1995), *aff'd*, Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

14. *See, e.g.*, *Human Rights*, MOTLEY RICE—ATTORNEYS AT LAW, http://www.motleyrice.com/anti-terrorism-and-human-rights/human-rights (last visited Nov. 11, 2010) ("Motley Rice represents individuals harmed by violations of international human rights law in the United States and abroad. We fight to expose and hold accountable individuals, organizations, corporations and government entities that infringe upon basic human rights . . . ."); *International Law*, CONRAD & SCHERER, http://www.conradscherer.com/practice/international_law.asp (last visited Sept. 8, 2010) ("From complicity in gross human rights violations to environmental disasters, the firm represents individuals, families, cooperatives, companies, unions, indigenous groups and governments in actions to hold multinational corporations accountable for wrongful conduct in Latin America."). Not surprisingly, defense counsels have established special practice groups to defend corporations against human rights litigation. *See, e.g.*, *Business and Human Rights*, STEPTOE & JOHNSON, http://www.steptoe.com/practices-263.html (last visited Nov. 11, 2010) ("[W]hereas the ATCA once lay in obscurity, it now has been invoked in nearly 120 lawsuits against corporations . . . . Steptoe advises companies on the scope and application of the human rights laws and expectations, and has defended clients in some of the most prominent ATCA cases to date.").

15. *Compare* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) ("[W]e hold that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone."), Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 277 (2d. Cir. 2007) (Katzmann, J., concurring) (requiring a showing that the defendant acted "with the purpose of facilitating the commission of [the] crime"), *and* Abecassis v. Wyatt, 704 F. Supp. 2d 623, 654–55 (S.D. Tex. 2010) (adopting purpose test), *with Khulumani*, 504 F.3d at 288, 291 (Hall, J., concurring) (arguing that liability should be found where an actor "knowingly and substantially assist[s] a principal tortfeasor . . . ."), *and In re* S. African Apartheid Litig. v. Daimler AG, 617 F. Supp. 2d 228, 262 (S.D.N.Y. 2009) (concluding liability may extend where the "aider and abettor know[s] that its actions will substantially assist the perpetrator . . . .").

16. *See* Kiobel v. Royal Dutch Petroleum Co., No. 06-4800, 2010 WL 3611392, at *22 (2d Cir. Sept. 17, 2010) (holding that human rights abuse claims may not be brought against corporate defendants under the ATS "because the customary international law of human rights does not impose any form of liability on corporations (civil, criminal, or otherwise)").

17. *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 524 (2001) (posing a theory of corporate aiding and abetting liability based on the grounds that a "corporation's duties to protect human rights increase as a function of its ties to the government"). *But see, e.g.*, Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 924–29 (2007) (opposing the extension of aiding and abetting liability under the ATS to corporations absent further action from Congress); Julian G. Ku, *The Third Wave: The Alien Tort States and the War on*

In my own scholarship, I have avoided expressing an opinion on these contentious subjects, concentrating instead on the ramifications of this new trend and suggesting new ways to think about apportioning responsibility among joint tortfeasors.[19] Focusing on the contractual rights of corporations to pursue contribution or indemnification claims against sovereign joint tortfeasors in international arbitration, I have suggested that:

> To the extent that corporations are increasingly subject to third-party claims for human rights violations arising out of or related to a contract with a sovereign, one can anticipate that in the future corporations will seek to shield themselves from this third-party risk by invoking the arbitration clause in the contract against the sovereign. In short, human rights litigation will lead to "who pays" arbitration.[20]

Of course, an unstated assumption for any claim of contribution is that a tortfeasor is jointly and severally liable and, therefore, subject to damages above and beyond the harm caused by that tortfeasor's unlawful conduct. Indeed, the unstated assumption in almost all international law litigation appears to be that every defendant is jointly and severally liable for all harms caused by the unlawful acts of every other joint tortfeasor.

The definitive work on remedies in international human rights law omits any discussion of the subject of apportioning responsibility among co-defendants.[21] Nor is the broader academic literature of any assistance. It

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Terrorism, 19 EMORY INT'L L. REV. 105, 126–27 (2005) (predicting a new wave of ATS lawsuits against corporations designed to challenge U.S. conduct in the war on terrorism).

For various views on the topic of corporate liability for human rights abuses, see generally HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, (Michael K. Addo ed., 1999); NICOLA M.C.P. JÄGERS, CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY (2002); Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153 (1997); William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 HUMAN RTS. Q. 368, 374–79 (1996).

18. *See, e.g.*, Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304 (2008) (a broad discussion of the competing "knowledge" and "purpose" tests of liability in international law); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 90 (2008) (advocating that liability be found where the corporation has "knowledge that [its] acts assist or facilitate the commission" of a human rights violation); Teddy Nemeroff, Note, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After* Sosa, 40 COLUM. HUM. RTS. L. REV. 231, 285 (2008) (favoring a "purposeful" conduct test). For a general discussion of historical standards of corporate liability in international law, see generally Ratner, *supra* note 17.

19. Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 517–29 (2008).

20. *Id.* at 526.

21. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2d ed. 2005).

seems the question of apportioning responsibility among joint tortfeasors for international law violations has been almost completely ignored.[22] At a time when individuals, corporations, and states are all subject to claims for taking joint action to violate international law, this is a puzzling state of affairs.

There are numerous instances in which the question of apportioning responsibility among joint tortfeasors has arisen in international practice. Yugoslavia sued Canada before the International Court of Justice for the injuries it suffered from NATO bombings of Kosovo. Canada is a member of NATO but did not participate in the bombing campaign. Nonetheless, Yugoslavia argued that joint and several liability could be imputed to Canada because of the integrated command structure of NATO.[23] Canada responded that "[j]oint and several liability for acts of an international organization, or for the acts of other States acting within such an organization, cannot be established unless the relevant treaty provides for such liability."[24]

Similarly, Holocaust victims sued German corporations in New York federal court, alleging that they conspired with the Nazi regime to aid and abet various Holocaust atrocities.[25] In settling the case, the German government and German corporations jointly contributed almost $5 billion to a settlement fund, with the German government paying 75% and German industry paying 25%.[26] On what legal basis should the German government and German industry have apportioned responsibility for payment of this settlement amount?

In *Bowoto v. Chevron Texaco Corp.*, Nigerian plaintiffs sued Chevron, alleging that it aided and abetted human rights abuses of the Nigerian government.[27] According to plaintiffs' version of events, Chevron aided and abetted the death, torture, and inhumane treatment of innocent, peaceful protesters by military personnel acting in concert with Chevron employees.[28]

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22. For a rare (but now dated) exception, see John E. Noyes & Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability,* 13 YALE J. INT'L L. 225 (1988). Addressing joint responsibility for the unlawful conduct of states, Ian Brownlie has noted that "[t]he principles relating to joint responsibility of states are as yet indistinct . . . . A rule of joint and several liability in delict should certainly exist as a matter of principle, but practice is scarce." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 457–58 (7th ed. 2008).

23. Transcript of Request for the Indication of Provisional Matters at 10, Yugoslavia v. Canada (May 12, 1999), *available at* http://www.icj-cij.org/docket/files/106/4625.pdf.

24. *Id.*

25. *See* Otto Graf Lambsdorff, *The Negotiations on Compensation for Nazi Forced Laborers, in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 170, 172 (Michael J. Bazyler & Roger P. Alford eds., 2006).

26. *See id.* at 173; Lothar Ulsamer, *German Economy and the Foundation Initiative: An Act of Solidarity for Victims of National Socialism, in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 181, 185 (Michael J. Bazyler & Roger P. Alford eds., 2006).

27. 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004).

28. *See* Bowoto v. Chevron*: The Murder and Torture of Nigerians Protesting the Oil Company*, CTR. FOR CONST. RIGHTS, http://ccrjustice.org/bowoto (last visited Nov. 16, 2010).

According to Chevron's version of events, its employees simply reported criminal conduct of violent protesters and sought assistance from the government to help rescue its workers who were held hostage by Nigerian kidnappers.[29] In December 2008, Chevron was cleared of all charges in a jury trial in San Francisco,[30] but the case starkly presented circumstances of potential joint tortfeasor liability, as well as plaintiffs' potential comparative fault.

Finally, in perhaps the most ambitious example of an assertion of joint tortfeasor liability for alleged international law violations, plaintiffs brought suit against dozens of multinational corporations for allegedly supporting the South African apartheid regime.[31] The prayer for relief argued that the corporations facilitated the South African government's unlawful practices, including discriminatory employment practices, arbitrary arrest and detention, forced exile, geographic separation, rape, torture, and extrajudicial killings.[32] This case presents extraordinarily difficult questions regarding joint and several liability for injuries suffered by thousands of victims of apartheid.

With the new wave of claims against corporations for human rights violations—particularly in the context of aiding and abetting government abuse—there are unusually difficult problems of joint tortfeasor liability. In many circumstances, one tortfeasor—the corporation—is a deep-pocketed defendant, easily subject to suit, but only marginally involved in the unlawful conduct. Another tortfeasor—the sovereign—is a central player in the unlawful conduct, but, with limited exceptions, is immune from suit under the Foreign Sovereign Immunities Act.[33] A third tortfeasor—the low-level security personnel—accused of actually committing the atrocity, is beyond the jurisdictional reach of the forum and is an insolvent, judgment-proof defendant.

How should an adjudicator apportion responsibility among these joint tortfeasors? Does it matter that the principal players are immune or insolvent, while the marginal player is not? In apportioning responsibility, is it relevant that one tortfeasor simply knew of the misconduct or was negligent with respect to its likely occurrence, although it did not intend for the violation to occur? Despite the saliency of these questions, international

29. *See* Pamela A. MacLean, *Corporate Liability Key in* Chevron *Case*, NAT'L L. J., Oct. 20, 2008, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202425371532.

30. *See Background: Hostage Takers Sue Chevron*, CHEVRON.COM, http://www.chevron.com/bowoto/background.aspx?view=2 (last updated April 2009).

31. *See In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 241–42 (S.D.N.Y. 2009).

32. *See id.*

33. 28 U.S.C. §§ 1604–05 (2006).

law does not provide the answers.

These problems are only exacerbated by the fact that international law violations can be pursued in multiple arenas—in national courts, international tribunals, and international arbitral bodies. As a general rule, international tribunals will resolve the question of apportioning liability using public international law, while domestic courts will resolve the question by recourse to private international law, and arbitral panels will rely on the governing law of the contract. The approach for resolving questions of apportionment will differ in these contexts, although each will resort to domestic tort law in one way or another.

II. PUBLIC INTERNATIONAL LAW APPROACH

With international law claims brought before international tribunals, both the wrong and the remedy must be determined by reference to public international law. As suggested above, this poses a problem because there is insufficient guidance under international law with respect to questions of apportioning responsibility. Neither international conventions nor custom typically addresses such matters, and therefore international tribunals must resort to general principles of international law to fill the void.

General principles, of course, are an accepted source of international law, derived from the major legal systems of the world.[34] International tribunals will typically examine national systems in an effort to "identify certain basic principles, or... 'common denominators' in those legal systems."[35] General principles, "if common to a broad spectrum of national legal systems, disclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject."[36] In short, common domestic law norms percolate upward to become part of international law.

In the absence of existing international law on the subject, it is appropriate to examine domestic tort laws to discern basic principles and common denominators for apportioning responsibility among joint tortfeasors. Such an approach focuses not on one domestic law, but instead on the major legal systems of the world in order to formulate an appropriate standard for international law. If a comparative analysis of tort law identifies common denominators regarding the apportionment of responsibility among joint tortfeasors, then domestic tort laws may be used

34. Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945); *see, e.g.*, Shannon and Wilson, Inc. v. Atomic Energy Org. of Iran, Iran Award No. 207-217-2 (1985), *reprinted in* 9 IRAN-U.S.C.T.R. 397, ¶ 17.

35. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 439 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf (footnote omitted).

36. *Id.*

to ascertain general principles of international law.[37]

There is no comprehensive analysis of domestic tort laws on this question. However, preliminary research suggests that joint and several liability is the accepted standard for apportioning liability, at least when the defendants are acting in concert.[38] The practice is sufficiently consistent that one can accurately describe it as a general principle of law, embodied in the major systems of the world.

At the international level, the strongest support for this conclusion comes from Judge Brunno Simma's separate opinion in the *Oil Platforms* case.[39] In *Oil Platforms,* the United States alleged that Iran violated its treaty obligations by laying mines in the Persian Gulf during the decade-long Iran-Iraq war.[40] The United States could not prove that Iran, and not

37. *Id.*

38. This comparative research focused on scholarly commentary of tort laws in Austria, Belgium, Canada, China, the Czech Republic, Denmark, England, Finland, France, Germany, Ireland, Israel, Italy, the Netherlands, New Zealand, Poland, Portugal, Scotland, South Africa, Spain, Sweden, Switzerland, and the United States. *See* Paul Ward, *Ireland, in* 2 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: TORT LAW 246 (Sophie Stijns ed., 2009) (discussing joint and several liability in Ireland); Stephen Todd, *New Zealand, in* 3 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: TORT LAW 425–31 (Sophie Stijns ed., 2008) (discussing joint and several liability in New Zealand); Hailing Shan, *China, in* 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: TORT LAW 163–64 (Sophie Stijns ed., 2005) (discussing joint and several liability in China); UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS (W.V.H. Rogers ed., 2004) (discussing joint and several liability under Austrian, Belgian, Czech, English, German, Israeli, Italian, Dutch, Polish, Portuguese, South African, Spanish, Swedish, Swiss, and United States law); GERT BRÜGGEMEIER, COMMON PRINCIPLES OF TORT LAW: A PRE-STATEMENT OF LAW 163–73 (2004) (discussing joint and several liability in Germany); JOHN COOKE, LAW OF TORT 370–73 (6th ed. 2003) (discussing joint and several liability in England); SIMON DEAKIN, ANGUS JOHNSTON & BASIL MARKESINIS, MARKESINIS AND DEAKIN'S TORT LAW 1033–42 (6th ed. 2008) (discussing joint and several liability in England); BASIL S. MARKESINIS & HANNES UNBERATH, THE GERMAN LAW OF TORTS: A COMPARATIVE TREATISE 843 (4th ed. 2002) ("Where several persons have caused harm, there is only one case where it is right to combine their spheres of responsibility and thus make each responsible for the contribution to the harm made by the others, and that is when . . . the various persons causing the harm caused it by means of 'a wrongful act committed jointly.'"); G.H.L. FRIDMAN, THE LAW OF TORTS IN CANADA 885–907 (2d ed. 2002) (discussing joint and several liability in Canada); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 15 (2000) ("When persons are liable because they acted in concert, all persons are jointly and severally liable for the share of comparative responsibility assigned to each person engaged in concerted activity."); WALTER VAN GERVEN, JEREMY LEVER & PIERRE LAROUCHE, TORT LAW 430–66 (2000) (discussing joint and several liability in England, France, and Germany); 1 CHRISTIAN VON BAR, THE COMMON EUROPEAN LAW OF TORTS 334–38 (1998) (discussing joint and several liability in Denmark, England, Finland, Ireland, New Zealand, Scotland, and Sweden); JOHN G. FLEMING, THE LAW OF TORTS 288–301 (9th ed. 1998) (discussing joint and several liability law in Canada).

39. Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 324 (Nov. 6) *available at* http://www.icj-cij.org/docket/files/90/9735.pdf (separate opinion of Judge Simma).

40. *Oil Platforms*, 2003 I.C.J. at 174, ¶ 23, *available at* http://www.icj-cij.org/docket/files/90/9715.pdf (majority opinion).

Iraq, was the sole cause of any particular mine laying activity.[41] Judge Simma's solution was to undertake a comparative analysis of domestic tort laws and hold Iran jointly and severally liable for all of the mine laying activity in the Persian Gulf.[42] As Judge Simma put it:

> I have engaged in some research in comparative law to see whether anything resembling a "general principle of law"... can be developed from solutions arrived at in domestic law to come to terms with the problem of multiple tortfeasors. I submit that we find ourselves here in what I would call a textbook situation calling for such an exercise in legal analogy.... [R]esearch into various common law jurisdictions as well as French, Swiss and German tort law indicates that the question has been taken up and solved by these legal systems with a consistency that is striking.[43]

Thus, a survey of American, Canadian, British, French, Swiss, and German tort law led Judge Simma to conclude that joint and several liability "can properly be regarded as a 'general principle of law'...."[44] When elevated to the level of international law, this approach "would lead to a finding that Iran is responsible for damages... that it did not directly cause."[45] Thus, Judge Simma argued that cases such as *Summers v. Tice*—in which two hunters were held liable for one injury to the plaintiff's eye[46]—should become a source for international law, such that two nations laying mines in navigable waters can be held responsible for the resulting injuries without evidence of direct causation.[47]

What is far less clear from a comparative analysis is whether joint and several liability is the accepted standard when multiple tortfeasors are not acting in concert. In undertaking his analysis of American law, Judge Simma relied on the *Restatement (Second) of Torts* and the famous case of *Summers v. Tice*[48] to support his conclusions regarding joint and several liability. But he ignored the *Restatement (Third) of Torts* published three years before his separate opinion in *Oil Platforms*. The most recent *Restatement* concludes that "there is currently no majority rule" on the question of liability for independent tortious conduct of multiple tortfeasors

41. *Id.* at 175, ¶ 23; 217, ¶ 123.

42. *Id.* at 353–54, ¶¶ 64–67 (separate opinion of Judge Simma).

43. *Id.* at 354, ¶ 66.

44. *Id.* at 358, ¶ 74.

45. *Id.* at 357, ¶ 73.

46. 199 P.2d 1 (Cal. 1948).

47. *Oil Platforms*, 2003 I.C.J. at 354–55, ¶ 67 (separate opinion of Judge Simma). The majority of the Court rejected Judge Simma's approach, concluding that "[t]he United States has not demonstrated that the alleged acts of Iran actually infringed the freedom of commerce" in violation of Iran's treaty obligations. *Id.* at 217, ¶ 123 (majority opinion).

48. *Summers*, 199 P.2d 1.

who cause an indivisible harm.[49] Instead, the *Restatement* presents five independent tracks for apportioning liability: (1) joint and several liability;[50] (2) several liability;[51] (3) joint and several liability with reallocation;[52] (4) hybrid liability based on a threshold percentage of comparative responsibility;[53] and (5) hybrid liability based on the type of damages.[54] These different tracks reflect different approaches adopted by the fifty states, which take a number of factors into account, including allocating the risk of a tortfeasor's insolvency or immunity, the relevance of the plaintiff's comparative responsibility, the degree of fault among joint tortfeasors, and the type of harm caused by the tortious conduct.[55] Significantly, the approach suggested by Judge Simma—that of pure joint and several liability—is embraced by less than one-third of the jurisdictions in the

49. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000).

50. *Id.* § A18 ("If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each person is jointly and severally liable for the recoverable damages caused by the tortious conduct."). Fifteen jurisdictions in the United States have adopted some form of this track, although Minnesota also follows another track. *See id.* § 17 cmt. a.

51. *Id.* § B18 ("If two or more persons' independent tortious conduct is the legal cause of an indivisible injury, each defendant, subject to the exception stated in § 12 [intentional tortfeasors], is severally liable for the comparative share of the plaintiff's damages assigned to that defendant by the factfinder."). Sixteen jurisdictions in the United States have adopted some form of this track, although Michigan also follows another track. *See id.* § 17 cmt. a.

52. *Id.* § C18 ("If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each person is jointly and severally liable for the recoverable damages caused by the tortious conduct, subject to the reallocation provision of § C21."). This approach imposes the financial risk of insolvency on all legally responsible parties, including plaintiffs and defendants, in proportion to their responsibility. *See id.* § C21 cmt. a. Eleven jurisdictions in the United States have adopted some form of this track, although four states—Michigan, Minnesota, Montana, and New Hampshire—also follow another track. *See id.* § 17 cmt. a.

53. *Id.* § D18 ("If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each defendant who is assigned a percentage of comparative responsibility equal to or in excess of the legal threshold is jointly and severally liable, and each defendant who is assigned a percentage of comparative responsibility below the legal threshold is, subject to the exception in § 12 (intentional tortfeasors), severally liable."). One rationale for this threshold approach is based on the unfairness of requiring a minimally responsible tortfeasor to pay all of the plaintiff's recoverable damages. *See id.* § D18 cmt. c. Ten jurisdictions in the United States have adopted some form of this track, although six states—Hawaii, Iowa, Montana, New Hampshire, New York, and Ohio—also follow another track. *See id.* § 17 cmt. a.

54. *Id.* § E18 ("If the independent tortious conduct of two or more persons is a legal cause of an indivisible injury, each defendant is jointly and severally liable for the economic-damages portion of the recoverable damages and, subject to the exceptions stated in § 12 (intentional tortfeasors) and § 15 (persons acting in concert), is severally liable for that defendant's comparative share of the noneconomic damages."). The rationale for this approach is to impose the financial risk of insolvency of a legally responsible party on defendants for the plaintiff's economic damages and on the plaintiff for the plaintiff's noneconomic damages. *See id.* § E18 cmt. d. Eight jurisdictions in the United States have adopted some form of this track, although four states—Hawaii, Iowa, New York, and Ohio—also follow another track. *See id.* § 17 cmt. a.

55. *Id.* § 10 cmt. a, § 17 cmt. a.

United States, fewer jurisdictions than the number that employ pure several liability.[56]

Other countries also employ several liability for independent actions of multiple tortfeasors.[57] For example, China utilizes joint and several liability for joint action, but otherwise each tortfeasor who commits independent acts will "bear corresponding compensation liabilities respectively in appropriate proportion to the extent of their faults . . . ."[58] New Zealand has a similar approach, applying joint and several liability for the joint action, but several liability where "there is a coincidence of separate acts that by their conjoined effect cause damage."[59] If two tortfeasors act independently of one another, then each is liable only for that portion of the damage caused.[60] Israel also has adopted joint and several liability where tortfeasors act in concert, but several liability where there is independent action.[61] "The general rule is that tort liability is individual: every tortfeasor is held liable for the damage caused by his own person."[62]

These disparate approaches suggest that there is no settled standard for apportioning liability for independent acts of multiple tortfeasors.[63] One comparative scholar surveyed the laws of fifteen countries and concluded

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56. *Id.* § 17 cmt. a. Fifteen jurisdictions adopt pure joint and several liability: Alabama, Arkansas, Delaware, District of Columbia, Maine, Maryland, Massachusetts, Minnesota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Virginia, and West Virginia. *See id.* Sixteen jurisdictions adopt pure several liability: Alaska, Arizona, Colorado, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nevada, New Mexico, North Dakota, Tennessee, Utah, Vermont, and Wyoming. *See id.* The remaining twenty jurisdictions adopt hybrid approaches. *See id.*

57. *See* Bernhard A. Koch & Peter Schwarzenegger, *Multiple Tortfeasors Under Austrian Law, in* UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS 9, 12 (W.V.H. Rogers ed., 2004) (where tortfeasors acted independently, general rule is several liability); Johann Neethling, *Multiple Tortfeasors Under South African Law, in* UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS 175, 177 (W.V.H. Rogers ed., 2004) (several liability under South African law where multiple tortfeasors acting independently of one another cause harm to a victim); Bill Dufwa, *Multiple Tortfeasors Under Swedish Law, in* UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS 215, 221 (W.V.H. Rogers ed., 2004) (several liability under Swedish law where multiple tortfeasors acting independently of one another cause divisible harm to a victim); Christine Chappuis, Gilles Petitpierre & Bénédict Winiger, *Multiple Tortfeasors Under Swiss Law, in* UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS 231, 238 (W.V.H. Rogers ed., 2004) (several liability under Swiss law for low-fault tortfeasor where multiple tortfeasors acting independently of one another cause harm to a victim).

58. Hailing Shan, *China, in* 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: TORT LAW 163 (Sophie Stijns ed., 2005).

59. Stephen Todd, *New Zealand, in* 3 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: TORT LAW 425 (Sophie Stijns ed., 2008).

60. *Id.*

61. Israel Gilead, *Israel, in* 2 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: TORT LAW 179 (Sophie Stijns ed., 2003).

62. *Id.*

63. The absence of a consensus across domestic systems itself is important, "as it may throw light on the intricacies of the problem involved." HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 72 (Elihu Lauterpacht ed., 1970).

that an appropriate standard would impose several liability for independent tortfeasors who cause divisible harm but joint and several liability where they cause indivisible harm.[64]

In sum, preliminary research would suggest that joint and several liability is a generally accepted norm when a tortfeasor "knowingly participates in or instigates or encourages wrongdoing by others which causes damage to the victim . . . ."[65] It is not clear, however, that the same applies when tortfeasors act independently of one another.[66] Establishing a general principle of international law based on a survey of domestic tort laws requires a careful appreciation of such nuances.

Finally, it is worth emphasizing that recourse to general principles is controversial in this context because, in Ian Brownlie's words, "municipal analogies are unhelpful" for discerning principles for joint responsibility of states.[67] Commentary on the International Law Commission's *Draft Articles on State Responsibility* underscores that one should not

> assume that internal law concepts and rules in this field can be applied directly to international law. Terms such as "joint," "joint and several" and "solidary" responsibility derive from different legal traditions and analogies must be applied with care. In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it . . . . The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.[68]

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64. W.V. Horton Rogers, *Comparative Report on Multiple Tortfeasors, in* UNIFICATION OF TORT LAW: MULTIPLE TORTFEASORS 271, 308–09 (W.V.H. Rogers ed., 2004).

65. *Id.* (The quote is an excerpt from a proposed Model Law on apportioning liability among multiple tortfeasors.).

66. This scenario, of course, more closely fits the facts of the *Oil Platforms* case: Iran and Iraq were not acting in concert when they laid mines in the Persian Gulf, although tort laws often have special rules when tortfeasors act independently of one another but the source of the harm is unknown.

67. Brownlie, *supra* note 22, at 457.

68. INT'L LAW COMM'N, DRAFT ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, WITH COMMENTARIES art. 47, cmt. 3 (2001), *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; *see also* Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. 240, 258–59, 262 (June 26), *available at* http://www.icj-cij.org/docket/files/80/6795.pdf.

Of course, as the circumstances of international law change, the appropriateness of recourse to general principles also changes. As Hersch Lauterpacht put it, "[t]he proper task . . . is not to disdain the search for general legal principles on the ground that the relations of States are wholly different; [the] task is . . . to ascertain the general principle in question and then to relate it to the specific character, if any, of international relations . . . ."[69] Now that international law has been transformed into a system that imposes rights and duties on non-state actors, it is uncertain whether this traditional approach is still appropriate. Nor is it clear whether a non-state actor can invoke this rule to argue that it should only be held responsible for conduct attributable to it. Given this confused state of affairs, it is surprising that there has been so little effort by the bar, the bench, or the academy to clarify the situation.

III. PRIVATE INTERNATIONAL LAW APPROACH

International law violations brought before domestic courts present different issues. In such circumstances, domestic tort law is critically important when addressing remedies, either by reference to the *lex fori* (the law of the forum) or the *lex loci delecti* (the law of the place of the wrong).

If one relies on the *lex fori,* then the substantive law would be determined by international law and the remedy by the domestic law of the forum.[70] As Joseph Story put it in his 1834 *Commentaries on the Conflict of Laws*:

> It is universally admitted and established that the forms of remedies and the modes of proceeding and the execution of judgments are to be regulated solely and exclusively by the laws of the place where the action is instituted; or, as the civilians uniformly express it, according to the lex fori. . . . All that any nation can therefore be justly required to do, is to open its own tribunals to foreigners, in the same manner and to the same extent as they are open to its own subjects, and to give them the same redress, as to rights and wrongs, which it deems fit to acknowledge in its own municipal code . . . .[71]

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69. LAUTERPACHT, *supra* note 63, at 72.

70. That does not mean, however, that every question of remedies is resolved by reference to the law of the forum. In many jurisdictions, the type of remedy is governed by substantive law, while the calculation of remedies is governed by the *lex fori.* Michael Pryles, *Tort and Related Obligations in Private International Law,* 227 RECUEIL DES COURS 21, 192–93 (1991); J. G. COLLIER, CONFLICT OF LAWS 60, 65 (3d ed. 2001).

71. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 773–74 (8th ed. 1883); *see also* David Bederman, *Compulsory Pilotage, Public Policy, and the Early Private International Law of Torts,* 64 TUL. L. REV. 1033, 1070 (1990) ("[W]hen a cause of action arose abroad, the *lex loci* governed the rights at issue, while the law of the forum (*lex fori*) ruled the procedure and remedies available.").

More recent commentary supports this view. "In international private law the distinction between substance and procedure is an important one since matters of substance are generally determined by the *lex causae* while matters of procedure are governed by . . . the law of the country to which the court where any legal proceedings are taken belongs."[72] One component of procedural law is, of course, remedies.[73] As such, the wrong is determined by international law, but the remedy by the law of the forum.

> The remarkable pre eminence [sic] of the *lex fori proceduralis* over the applicable substantive *lex causae* . . . has shown itself to be a legal tool capable of accommodating a variety of forum interests and standards. These are local or national forum standards often distinct from those provided by the applicable law. They comprise the calculation of damages, limitation periods and most of the other equitable remedies . . . .[74]

Given that the United States is the principal domestic forum for resolving international human rights violations, its approach to apportioning liability will be of particular importance. While the question remains unsettled, one can hazard the standard courts will apply to apportion damages based on the standard they have applied to measure damages.

In the United States, damages for transnational torts are assessed in light of numerous choice-of-law principles, with the law of the state having the dominant interest typically being determinative.[75] That is, the law of the state with the most significant relationship to the conduct and the parties will generally apply, taking into account where the tortious conduct and injury occurred, where the parties are domiciled or have their place of business, and where the parties' relationship is centered.[76] Other factors taken into account include (1) the needs of the international system; (2) the policies of the forum, other interested states, and the particular field of law; (3) "the protection of justified expectations"; (4) concerns for certainty,

72. GERNOT BIEHLER, PROCEDURES IN INTERNATIONAL LAW 7 (2008).

73. *See, e.g.*, COLLIER, *supra* note 70, at 64–66.

74. BIEHLER, *supra* note 72, at 31.

75. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 171 (1971). Of course, the several States have adopted widely-divergent choice-of-law regimes. With respect to torts, twenty-four states apply the *Restatement (Second) of Conflict of Laws* approach, ten states apply a traditional *Restatement (First) of Conflict of Laws* approach, and the remaining eighteen jurisdictions (including D.C. and Puerto Rico) adopt some other approach. Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey,* 58 AM. J. COMP. L. 227, 231–32 (2010); Donald Earl Childress, III, *When* Erie *Goes International,* 105 NW. U. L. Rev. (forthcoming 2011).

76. *Id.* §§ 145, 171.

predictability, and uniformity; and (5) ease in determining and applying the law.[77]

Not surprisingly, with so many factors in the mix, courts have wide discretion to use the law with which they are most comfortable. In the United States, courts assessing damages for international law violations have politely nodded in the direction of other countries but typically applied remedies in reliance on local law.

In addressing choice-of-law questions regarding remedies for international law violations, courts have devised a federal common law approach that relies on the law of a foreign jurisdiction when it does not frustrate Congress's purpose in outlawing international law violations,[78] but otherwise courts will fashion a common law remedy based on principles derived from federal or international law.[79]

For example, in *Filartiga v. Pena-Irala*,[80] the Eastern District of New York, on remand from the Second Circuit,[81] emphasized that when Congress enacted the Alien Tort Statute, it gave federal courts the "power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law."[82] The court's emphasis was on the nature of the offense and the transcendent "interests of the global community," and it sought to fashion a remedy that fit the offense.[83] "If the courts of the United States are to adhere to the consensus of the community of humankind, any remedy they fashion must recognize that this case concerns an act so monstrous as to make its perpetrator an outlaw around the globe."[84]

Given that all relevant facts in *Filartiga* occurred in Paraguay, the court stressed that the strong nexus to Paraguay required it to "look first to Paraguayan law in determining the remedy for the violation of international law."[85] But because Paraguay would not hold the perpetrator responsible for

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77. *Id.* §§ 6, 145.

78. Tachiona v. Mugabe, 234 F. Supp. 2d 401, 418 (S.D.N.Y. 2002) ("[L]ocal law of the state where the wrongs and injuries occurred and the parties reside may be relevant and may apply . . . insofar as it is substantively consistent with federal common law principles and international law and provides a remedy compatible with purposes of the ATCA and pertinent international [law] norms . . . ."); Doe v. Saravia, 348 F. Supp. 2d 1112, 1158 n.4 (E.D. Cal. 2004) ("If a choice of law analysis is necessary to determine the applicability of punitive damages, this Court may look to the law of El Salvador, but only to the extent it does not frustrate the very purpose of the ATCA.").

79. Tachiona, 234 F. Supp. 2d at 411 (citing Doe I v. Unocal, 395 F.3d 932, 948 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005)); Abebe-Jera v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996); *In re* Estate of Marcos, 25 F.3d 1467, 1476 (9th Cir. 1994); Xuncax v. Gramajo, 886 F. Supp. 162, 189–91 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1547–48 (N.D. Cal. 1987).

80. 577 F. Supp. 860 (E.D.N.Y. 1984).

81. 630 F.2d 876 (2d Cir. 1980).

82. *Filartiga*, 577 F. Supp. at 863.

83. *Id.* at 863–64.

84. *Id.* at 863.

85. *Id.* at 864.

his conduct, the court concluded it would be unfair to apply that law.[86] It also concluded that, despite Paraguayan law precluding punitive damages and the paucity of international tribunal precedent supporting punitive damages, such damages were appropriate.[87] The court reasoned that the "objective of... making torture punishable as a crime can only be vindicated by imposing punitive damages"[88] and awarded $385,364 in compensatory damages and $10 million in punitive damages.[89]

Likewise in *Doe v. Saravia*,[90] a federal court in California concluded that application of El Salvadorian law would frustrate the purpose of the Alien Tort Statute because it did not support the award of punitive damages.[91] Relying on *Filartiga* and similar cases, the court devised a federal common law remedy, concluding that "even under a choice of law analysis, plaintiff is entitled to punitive damages" totaling $5 million.[92]

By contrast, in *In re Estate of Marcos Human Rights Litigation*, the court ruled that "[b]ecause Congress . . . offered no methodology as to how damages should be determined, federal courts are free to and should create federal common law to provide justice for any injury contemplated by the Alien Tort Statute and the TVPA or treaties dealing with the protection of human rights."[93] In crafting a federal common law remedy, the court relied on Philippine law—which permitted exemplary damages—to award $1.2 billion in exemplary damages against the estate of Ferdinand Marcos.[94]

These cases, of course, are not dealing directly with the question of apportioning liability among joint tortfeasors. But these and similar cases suggest that courts will fashion federal common law in determining not only the measure of damages, but also the division of damages among joint tortfeasors.

As of yet, there is no clear federal authority on the appropriate standard for apportioning liability for international law violations. On occasion, courts have awarded joint and several liability for international law violations, but they have done so without analysis.[95] In other cases, courts

86. *Id.*

87. *Id.* at 864–65.

88. *Id.* at 864.

89. *Id.* at 867.

90. 348 F. Supp. 2d 1112 (E.D. Cal. 2004).

91. *Id.* at 1158 n.4.

92. *Id.* at 1159.

93. 910 F. Supp. 1460, 1469 (D. Haw. 1995).

94. *See* Hilao v. Estate of Marcos, 103 F.3d 767, 772, 780, 787 (9th Cir. 1996) (discussing application of Philippine law by district court).

95. *See, e.g.*, Aguilar v. Imperial Nurseries, No. 3-07-CV-193(JCH), 2008 WL 2572250 (D. Conn. May 28, 2008) (ordering default judgments against defendants, jointly and severally); Stern v.

simply have assumed that joint and several liability applies because that is a traditional remedy in the domestic context.[96] The most prominent analysis of the problem, that of Judge Reinhardt's concurring opinion in *Doe I v. Unocal*,[97] was vacated by the Ninth Circuit en banc. Thus, to date there is no authoritative pronouncement establishing a federal common law remedy of joint and several liability for international law violations.

Perhaps an approach similar to the one courts have developed in calculating damages will emerge: rely on the law of the foreign jurisdiction when it does not frustrate Congress's purpose in outlawing international law violations; otherwise, fashion a remedy based on principles derived from federal law or international law embodied in federal common law.[98] That approach would be consistent with the *Restatement (Second) of Conflict of Laws*, which adopts a multi-factor test for addressing joint torts.[99] It is also consistent with the *Restatement's* approach for determining the applicable law for apportioning liability, which "will usually be the local law of the state where the injury occurred."[100]

Of course, because the question of apportioning liability for international law violations has yet to be resolved in the United States, one should exercise caution in making assumptions. This is particularly so given that federal courts, in apportioning liability, typically rely principally on the *Restatement of Torts* to assist them in fashioning federal common law.[101] As

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Islamic Republic of Iran, 271 F. Supp. 2d 286, 292 n.5 (D.D.C. 2003) ("Hizbollah's 'acts, which were intentionally committed by Sutherland's captors, are attributable to the defendants because the defendants substantially funded and controlled Hizbollah . . . [.] As such, the defendants are liable under the tort doctrines of respondeat superior and joint and several liability.'").

96. *See, e.g.*, Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1172 n.3 (C.D. Cal. 2005) ("Defendant has not directly challenged whether joint and several liability theories are available under the TVPA. However, the Court has no reason to think that it is unavailable."); Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 358 (C.D. Cal. 1997) ("Unocal contends, without authority, that this long-established rule only applies in some subset of 'usual cases.' The fact that the underlying torts at issue here are not 'ordinary' does not establish, as Unocal would have it, that a joint tortfeasor found liable for those torts is not subject to the usual joint and several liability.").

97. 395 F.3d 932, 971 (9th Cir. 2002) (Reinhardt, J., concurring) ("The principle that a member of a joint venture is liable for the torts of its co-venturer is well-established in international law and in other national legal systems. International legal materials frequently refer to the principle of joint liability for co-venturers. . . . The status of joint liability as a general principle of law is supported not only by international law sources but also by the fact that it is fundamental to 'major legal systems.'").

98. *See supra* text accompanying notes 78–79.

99. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 171, 172 (1971).

100. *Id.* § 172.

101. *See, e.g.*, Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 327 (2d Cir. 2009) ("[A]s a general matter, the Supreme Court and this Court have often turned to the *Restatement (Second) of Torts* for assistance in developing standards in a variety of tort cases."); United States v. Hercules, Inc., 247 F.3d 706, 717 (8th Cir. 2001) ("The universal starting point for divisibility of harm analyses in CERCLA cases is the *Restatement (Second) of Torts*, which provides for the apportionment of damages among two or more parties when at least one is able to show either (1) 'distinct harms' or (2) a 'reasonable basis for determining the contribution of each cause to a single

noted above, the most recent *Restatement (Third) of Torts: Apportionment of Liability* "takes no position on whether joint and several liability, several liability, or some combination of the two should be adopted for independent tortfeasors who cause an indivisible injury."[102] If the tortfeasors acted in concert or committed an intentional tort, then the matter is relatively straightforward: joint and several liability will apply.[103] Absent those circumstances, courts are divided and forced to make hard choices about allocating risk between the plaintiffs and defendants on matters such as a tortfeasor's insolvency, immunity, and settlement.[104]

IV. HYBRID INTERNATIONAL ARBITRATION APPROACH

With the proliferation of human rights litigation, it is increasingly plausible that non-state actors will be held liable for international law violations in domestic courts and subsequently seek a contribution claim against a sovereign joint tortfeasor in international arbitration. As I have explained in detail elsewhere, human rights litigation in domestic courts typically precludes claims against states and state entities because of sovereign immunity.[105] In lieu of such a claim, plaintiffs will bring an action against a corporation for aiding and abetting government abuse. If the corporation is held liable, it often will have a contractual right to pursue arbitration against the sovereign for contribution.[106] As I have argued:

> If a corporation is engaging in joint action with government actors, then almost by definition the parties are acting pursuant to some contractual relationship . . . . If this is so, then the contract between the corporation and the sovereign may well govern the question of shared responsibility for third-party harms . . . . [A]n arbitration

harm.'").

102. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 17 cmt. a (2000).

103. *Id.* § 12 ("Each person who commits a tort that requires intent is jointly and severally liable for any indivisible injury legally caused by the tortious conduct."); *id.* § 15 ("When persons are liable because they acted in concert, all persons are jointly and severally liable for the share of comparative responsibility assigned to each person engaged in concerted activity.").

104. *Id.* § 10 cmt. a, § A19 cmts. d–e, § B19 cmts. d–e, § C19 cmts. d–e, § D19 cmts. d–e, § 24.

105. *See* Alford, *supra* note 19, at 517–28.

106. There are numerous instances in which courts have upheld the right to pursue contribution claims in arbitration and have enforced arbitral awards granting contribution among joint tortfeasors. *See, e.g.*, TD Ameritrade, Inc. v. McLaughlin, Piven, Vogel Sec., Inc., 953 A.2d 726, 737–38 (Del. Ch. 2008); CBP Res., Inc. v. SGS Control Servs. Inc., 394 F. Supp. 2d 733, 738–47 (M.D.N.C. 2005); Branigan v. Alex. Brown & Sons, Inc., 978 F. Supp. 547, 547–50 (S.D.N.Y. 1997); Gershen v. Hess, 558 N.Y.S.2d 14, 15 (N.Y. App. Div. 1990); *see also* Alford, *supra* note 19, at 522–24 (discussing cases involving arbitration of contribution claims).

> clause in an international agreement with a sovereign is an extraordinarily common vehicle to secure accountability for sovereign breaches or other illegal conduct arising out of or relating to the agreement.[107]

Assume, for example, that in litigation in the United States, a corporation is found to be 10% at fault (and the government 90% at fault) for an international human rights violation against third-party victims committed in a developing country. Under the emerging federal common law standard outlined above, the corporation might be held jointly and severally liable and required to pay $10 million in damages. That corporation could then pursue a contribution claim against the sovereign joint tortfeasor in international arbitration pursuant to the arbitration clause in the contract.

How would an international arbitral panel seized with such a matter resolve the question? Absent a governing law clause, it might use either a public or private international law approach to resolve the question of contribution. More typically the contract would include a governing law clause and also specify the situs for arbitration, thereby establishing the *lex arbitri* governing the dispute. Thus, in a typical arbitration clause, both substantive and procedural law would be chosen by the parties to the arbitration, and with limited exceptions, the panel would be bound to apply those choices in resolving the dispute. International arbitration thus presents a "hybrid" approach because the standard for joint and several liability applied by a domestic court in a claim by a victim against one tortfeasor may not be the same as the standard applied by an international arbitral panel resolving a question of contribution between one tortfeasor and another.

To illustrate this situation, assume in the above hypothetical that the corporation and government entity executed a joint venture agreement that included a waiver of sovereign immunity and a broadly-worded arbitration clause providing for "any dispute arising out of or in connection with the contract" to be subject to international arbitration. Assume further that the contract was governed by either English law with arbitration in England, or alternatively, New York law with arbitration in New York.

In the first scenario, English law authorizes a contribution claim brought by one joint tortfeasor against another, stipulating that "any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage."[108] Assessing the allocation of fault is subject to the sound discretion of the court, with English law stipulating that "the amount of the contribution recoverable

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107. Alford, *supra* note 19, at 517–18, 520.

108. Civil Liability (Contribution) Act, 1978, c. 47, § 1(1) (U.K.), *available at* http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1978/cukpga_19780047_en_1; *see generally* DEAKIN, JOHNSTON & MARKESINIS, *supra* note 38, at 1034–40; COOKE, *supra* note 38, at 370–73.

from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question."[109] Significantly, the Civil Liability (Contribution) Act of 1978 imposes a significant limitation on claims for contribution: "References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage . . . ."[110]

This provision was intended to clarify that

> a contribution can only be recovered in respect of foreign liabilities that would be recognised by English law. A failure to do so would have left open the possibility that a claim that could not have been enforced directly against the defendant in England could be enforced against him indirectly by means of an action for contribution.[111]

In other words, if the original plaintiff could not pursue the claim directly against the sovereign entity in English court because of foreign sovereign immunity,[112] then the corporate joint tortfeasor likewise has no authority under English law to do so indirectly through a contribution claim.

Applying section 1(6) of the 1978 Act, an international arbitral panel likely would follow suit and preclude a claim of contribution by the corporation against a sovereign joint tortfeasor. If, however, section 1(6) did not foreclose the original claim against the sovereign entity,[113] then the arbitral panel would have broad discretion to apportion liability between the tortfeasors according to its understanding of what is fair and equitable in the

109. Civil Liability (Contribution) Act § 2(1). The court also has the power to exempt a party completely, or order a complete indemnity. *Id.* § 2(2); DEAKIN, JOHNSTON & MARKESINIS, *supra* note 38, at 1036–37.

110. Civil Liability (Contribution) Act § 1(6).

111. Office of Fair Trading v. Lloyds TSB Bank plc., [2006] EWCA (Civ) 268, [108] (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2006/268.html.

112. *See* State Immunity Act, 1978, c. 33, § 1 (U.K.), *available at* http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1978/cukpga_19780033_en_1.

113. If, for example, one of the exceptions to foreign sovereign immunity applied. *See id.* §§ 2–11; Summers v. Stubbs, [2002] EWHC (QB) 3213, [28] (U.K.) ("[I]s the action brought against Milan as a public body acting as such or against it acting as any private individual, the answer is, in my judgment, that the claim for contribution is a matter of private law notwithstanding that it would be brought against a public authority against the background of its exercise of public law functions."). A contractual right to contribution or indemnification also would be enforced notwithstanding section 1(6). *See* Civil Liability (Contribution) Act § 7(3) ("[N]othing in this Act shall affect—(a) any express or implied contractual or other right to indemnity; or (b) any express contractual provision regulating or excluding contribution . . . .").

circumstances.

The second scenario involving arbitration in New York applying New York law is similarly complex, but presents a strikingly different result. New York has adopted a threshold approach for joint and several liability, meaning that if the corporation was less than fifty percent responsible, then it is not jointly and severally liable for any non-economic harm. Article 16 of the New York Civil Practice Law and Rules provides that:

> [W]hen a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable . . . and the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss . . . .[114]

The purpose of the law, according to the New York Court of Appeals, is to "remedy the inequities created by joint and several liability on low-fault, 'deep pocket' defendants,"[115] precisely the situation contemplated under our hypothetical. Article 16 further stipulates that this threshold requirement would apply to a claim for contribution, unless "the parties acted knowingly and intentionally, and in concert, to cause the acts . . . upon which liability is based."[116] Thus, an international arbitration panel seated in New York applying New York law could apply the threshold limitations of Article 16 to award a contribution claim that would severely limit the monetary liability of a corporate joint tortfeasor.

These two scenarios highlight the complex nature of contribution claims brought in international arbitration following domestic litigation involving international law violations. Applying English law, a low-fault, deep-pocket corporation would have little recourse in pursuing a contribution claim against a sovereign joint tortfeasor in arbitration. But applying New York law, that same corporation may have most or all of its liability shifted to the sovereign joint tortfeasor.

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114. N.Y. C.P.L.R. § 1601 (McKinney 1997); *see generally* Joel Slawotsky, *New York's Article 16 and Multiple Defendant Product Liability Litigation: A Time to Rethink the Impact of Bankrupt Shares on Judgment Molding*, 76 ST. JOHN L. REV. 397 (2002).

115. Rangolan v. Cnty. of Nassau, 749 N.E.2d 178, 182 (N.Y. 2001).

116. N.Y. C.P.L.R. § 1602 ("The limitations set forth in this article shall: 1. apply to any claim for contribution or indemnification . . . . 11. not apply to any parties found to have acted knowingly or intentionally, and in concert, to cause the acts or failures upon which liability is based . . . ."); *see also* Frank v. Meadowlakes Dev. Corp., 849 N.E.2d 938, 939–40 (N.Y. 2006); Morales v. Cnty. of Nausau, 724 N.E.2d 756, 757–59 (N.Y. 1999); Roseboro v. N.Y.C. Transit Auth., 729 N.Y.S.2d 472, 473–76 (N.Y. App. Div. 2001); Siler v. 146 Montague Assocs., 652 N.Y.S.2d 315, 318–19 (N.Y. App. Div. 1997); Didner v. Keene Corp., 593 N.Y.S.2d 238, 243 (N.Y. App. Div. 1993); Rezucha v. Garlock Mech. Packing Co., 606 N.Y.S.2d 969, 972–73 (N.Y. Sup. Ct. 1993).

V. CONCLUSION

International law and tort law share a common assumption: that a victim of aggression should have legal recourse when a perpetrator unlawfully uses violence to subordinate his will on the victim.[117] As international law increasingly creates rights and imposes duties on non-state actors, it is inevitable that questions of joint responsibility will arise. Questions surrounding the apportionment of fault among joint tortfeasors who violate international law are, or soon will be, among the most important and unsettled in human rights litigation.

In establishing general principles of international law, the tort laws of all major legal systems are relevant. In fashioning a federal common law for domestic litigation, the tort law of the United States will be of preeminent importance. When arbitral panels apply the choices of the contracting parties to resolve apportionment issues, one domestic tort regime chosen by the parties will be central, and it may differ from the law applied in the original action. Eventually international tribunals, domestic courts, and arbitral panels will face the issue involving joint liability for international law violations. When they do, principles derived from domestic tort law will be of critical importance for their resolution.

117. *See supra* text accompanying notes 8–9.

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