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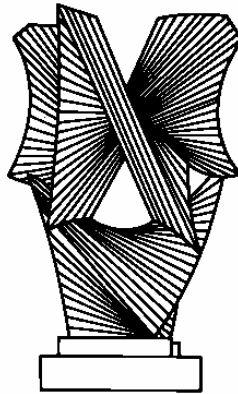
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An Economic Analysis of State and Individual Responsibility under International Law

Eric A. Posner & Alan O. Sykes¹

February 1, 2006

Abstract. The international law of state responsibility determines when states are liable for international law violations. States are generally liable when they have control over the actions of wrongdoers; thus, the actions of state officials can implicate state responsibility whereas the acts of private citizens usually do not. We argue that the rules of state responsibility have an economic logic similar to that of vicarious liability in domestic law: the law in both cases provides third parties with incentives to control the behavior of wrongdoers whom they can monitor and influence. We also discuss international legal remedies and individual liability under international criminal law.

Many of the most basic and fundamental doctrines of international law have yet to receive attention from economically-oriented scholars. In this paper, we employ an economic perspective to explore a heretofore neglected yet central set of questions—for what types of actions are states and individuals responsible under international law? In particular, what types of actions by state officials trigger state responsibility? What types of actions by private citizens trigger state responsibility? When does international law impose personal responsibility on individuals (usually criminal responsibility)? We consider these issues at a high level of generality rather than with reference to any particular body of international law, and view our contribution as having both positive and normative elements.

Recent events have brought these issues to the headlines. A number of recent incidents, for example, raise questions regarding the responsibility of states under international law for the acts of private individuals and groups. Consider:

—Many of the abuses that occurred at Abu Ghraib were caused by interrogators and linguists employed by private contractors hired by the U.S. army. In its assessment of the causes of the abuse at Abu Ghraib, the army found that many contractor employees were

¹University of Chicago Law School. Thanks to Michelle Ognibene for helpful research assistance.

inadequately trained, not appropriately monitored by army officials, not given clear guidance, and not subject to clear lines of authority.²

—Jonathan Idema and two other Americans were recently convicted by an Afghan court for operating a private jail and torturing prisoners in Afghanistan. The facts are murky, but apparently they were trying to capture al Qaeda fugitives—either at the behest of the U.S. government (their claim) or as bounty hunters who sought rewards offered by the U.S. army.³

—Executive Outcomes, a South African mercenary organization, was hired by the government of Sierra Leone to crush an insurgency, which it did. The American security companies, Triple Canopy and Blackwater USA, provided security for the Coalition Provisional Authority in Iraq. The U.S. military also hired DynCorp to provide security for Afghan President Hamid Karzai, and the British company Global Risk Strategies to protect Jay Garner in Iraq.⁴ Many people worry that mercenaries like Executive Outcomes, which used napalm against rebels in Sierra Leone, can commit war crimes without being held liable because they are not states.

—Aid workers hired by NGOs operating on behalf of the United Nations engaged in sexual exploitation of women and children in refugee camps in West Africa.⁵

—In 1990, Mexican nationals hired by the U.S. Drug Enforcement Agency kidnapped Humberto Alvarez-Machain, a doctor whom the DEA believed had assisted in the torture-murder of an American agent, and brought him to the United States for trial.⁶

Each of these cases raise delicate questions about state responsibility.⁷ Although it is clear that states are responsible for international law violations committed by state officials, it is not clear what happens when states contract out traditional state functions to private firms or organizations, which then engage in actions that would be considered violations of international law if the people involved had been state officials. Some authorities argue that the actions of private citizens cannot implicate state responsibility

²AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade, MG George R. Fay 47–52 [hereinafter Fay Report], available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>.

³See Carlotta Gall, *Mercenaries in Afghan Case Get 8 to 10 Years in Prison*, N.Y. Times, Sept. 16, 2004, at A12.

⁴See Daniel Berger, *The Other Army*, N.Y. Times, Aug. 14, 2005, § 6 (Magazine), at 29.

⁵ Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, 47 Wm. & Mary L. Rev. 135, 157-58 (2005).

⁶ See Gregory Townsend, *State Responsibility for Acts of de Facto Agents*, 14 Ariz. J. Int'l & Comp. L. 635, 672-73 (1977).

⁷ For other examples and discussions, see Dickinson, *supra*; Townsend, *supra*; Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 Stan. J. Int'l L. 75 (1998).

except in unusual circumstances; others argue that they can as long as the state exercised a sufficient degree of control over the private employees' behavior. On the first view, the abusive acts of the Abu Ghraib contractors would probably not be the responsibility of the United States; on the second view, they probably would be.

The responsibility of individuals for violations of international law has also attracted attention as a result of a series of trials of former leaders and henchmen over the last ten years.

—Former President Slobodan Milosevic of Serbia is on trial in an international court in the Hague for his role in the commission of atrocities during the civil war in the former Yugoslavia. Many lower level officials from Serbia, Croatia, and other powers involved in that war have already been convicted and imprisoned.⁸

—Perpetrators of the genocide in Rwanda in 1994 are being tried by an international court in Arusha, Tanzania, for committing genocide and crimes against humanity.⁹

—Augusto Pinochet was arrested in Britain pursuant to a Spanish warrant for his role in committing international crimes while dictator of Chile. He was later permitted to return to Chile for health reasons.¹⁰

—Saddam Hussein, the former dictator of Iraq, is on trial in Iraq. Although the court is a national court, Saddam is being tried for committing international as well as national crimes.¹¹

—At various times, U.S. Secretary of State Donald Rumsfeld, U.S. General Norman Schwarzkopf, and Israeli Prime Minister Ariel Sharon have been threatened with prosecution for war crimes by authorities in Spain and Belgium.¹²

—In 2002, the International Criminal Court began operations. It has jurisdiction over international crimes committed by nationals of any of its one hundred member states, and over crimes committed by foreign nationals on the territory of those states. The UN Security Council has asked the ICC to investigate crimes against humanity committed in the Sudan.¹³

⁸ Prosecutor v. Milosevic, Case No. IT-02-54-T, Amended Indictment (Bosnia) (Nov. 22, 2002).

⁹ Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal For Rwanda* (1998).

¹⁰ Regina v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte, [2000] 1 A.C. 147 (H.L. 1999).

¹¹ John F. Burns, *The Struggle For Iraq: Courtroom; At Hussein Trial, First Testimony and New Bluster*, N.Y. Times, Nov. 29, 2005, at A1.

¹² Craig S. Smith, *Belgium Plans To Amend Law On War Crimes*, N.Y. Times, June 23, 2003, at A9.

¹³ Warren Hoge, *International War-Crimes Prosecutor Gets List of 51 Sudan Suspects*, N.Y. Times, Apr. 6, 2005, at A6.

These recent events raise important positive and normative issues about international law. One broad issue concerns the scope of a state's responsibility for the actions of individuals. It is well established that state officials acting in their official capacity can trigger state responsibility by causing the state to violate international law, but the extent to which state responsibility may attach for ordinary people acting in the state's interest, or subject to the state's control, remains controversial. A theory that explains why states should be responsible for the actions of individuals, and when they should not be, would help resolve the controversy. It is also well established that individuals can commit international crimes, but there is no good theory that explains why individuals are usually not subject to international criminal responsibility, and why they are only under certain circumstances. A theory of the proper role for individual criminal responsibility under international law is needed.

Much has been written on these topics from doctrinal, historical, and philosophical perspectives, but nothing from an economic perspective.¹⁴ Taking this perspective, we assume that individuals are rational and respond to incentives; we also assume that the leaders and officials of states rationally use state power in order to pursue their interests or the interests of constituents. Also, we assume for the sake of argument that states comply with international law, at least sometimes, in order to avoid reputational sanctions or retaliation from other states.¹⁵ In approaching the topic of state responsibility, we draw heavily on the economic literature addressing the liability of corporations and their agents under domestic law. We treat citizens of states as analytically similar to the employees of firms, on the assumption that the economic analysis of individual and vicarious liability of employers holds lessons for the economic analysis of citizen and vicarious liability for states. Of course, states are not the same as employers, and we also pay attention to the extent to which the analogy fails.

We come to several conclusions. First, a state should be responsible for the acts of

¹⁴ Economic analysis of international law is at an early stage. For a survey of the literature, see Alan O. Sykes, *Public International Law*, in *Handbook of Law and Economics* (A. Mitchell Polinsky & Steven Shavell eds., forthcoming).

¹⁵ This is the approach we took in Eric A. Posner & Alan O. Sykes, *Optimal War and Jus ad Bellum*, 93 *Geo. L.J.* 993 (2005). For discussions of why rational states would comply with international law, see Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005); Andrew Guzman, *A Compliance Based Theory of International Law*, 90 *Cal. L. Rev.* 1823 (2002).

its citizens (whether state officials or private actors) that harm other states only when the state can engage in cost-effective monitoring of those citizens, and the remedies available against the citizens directly are inadequate to produce proper deterrence of harmful acts. The inadequacy of direct remedies may result because the citizens are judgment proof, immune from suit, or beyond the jurisdiction of domestic courts. Second, citizens should be personally responsible under international law for harms they cause to other states only if the combination of state responsibility with the available remedies under domestic law is inadequate to produce proper deterrence of harmful acts. Third, and related, international criminal liability may be justified for citizens because they are judgment proof or otherwise insulated from adequate incentives for proper behavior when state responsibility alone exists, but makes little sense for states. Fourth, the remedy for violation of international law should be compensatory, as distinguished from restitutionary or punitive remedies. States and individuals should internalize the costs of the harms that they cause, at least when valuable monitoring will result, and the compensatory remedy achieves this objective. These are the basic propositions that emerge from our argument, but there are many wrinkles which we will discuss in due course.

I. The Economic Rationale for State and Individual Responsibility

We assume throughout this paper that the primary function of international law is to discourage harmful acts. The nature of the harm varies greatly across areas of law, of course, and our analysis abstracts from the details of any particular harm. The assumption that international law exists primarily to discourage harmful acts suggests that international law is much akin to tort, criminal and contract law in a domestic setting. A rich economic literature already exists on these subjects, which focuses on the general problem of achieving the optimal deterrence of harmful acts (torts, crimes, breaches of contract). In this section, we draw on many lessons from this literature, and suggest some additional wrinkles that arise with state actors and international law.

Our focus will be on the *efficient* deterrence of harmful acts, by which we mean a system of deterrence that appropriately balances the costs and benefits of deterrent measures. Such a system must take account not only of the costs of a harmful act, but the

costs of doing something about it—because deterrence itself is costly, optimal deterrence will fall short of complete deterrence. Likewise, an efficient system of deterrence must be attentive to possible problems of overdeterrence, whereby socially valuable acts are discouraged or socially wasteful defensive measures are encouraged as an unintended consequence of the deterrence mechanism.

In emphasizing matters of economic efficiency, we do not mean to suggest that efficiency is the sole objective or rationale for international law. Our claim is much more modest, and amounts simply to the suggestion that economic efficiency is relevant in thinking about international law—relevant to a positive account of its structure, and relevant to the normative question of whether its structure can be improved. In later sections of this paper, we will undertake to demonstrate its relevance on both fronts.

We begin with the proposition that state responsibility under international law is closely akin to corporate responsibility under domestic law. The economic learning on optimal corporate or vicarious liability thus has much to say about the economics of state responsibility, as does the literature on optimal damages for corporate wrongdoing, a claim that we develop in Section A. Section B considers the choice between civil and criminal deterrence mechanisms for states and individuals, focusing especially on the question of when individual criminal responsibility is a useful supplement to state responsibility.

A. State Responsibility as “Vicarious Liability”

Neither states nor corporations commit harmful acts—people do. The acts may be committed by prime ministers, CEOs, soldiers, or employees. Corporate liability involves the imposition of liability on the owners of a corporation for the harmful act of some actual or apparent agent of the corporation. So too, state responsibility under international law involves the imposition of some penalty on the citizenry of a nation as a whole for the harmful act of individual government agents or citizens. In both cases, individuals with no direct connection to the harmful act, other than their status as part owner or citizen in the entity to be sanctioned, bear a cost. That cost may be termed “vicarious liability,” by which we mean the imposition of a sanction on one party simply by virtue of that party’s status in relation to the individual who commits the harmful act.

We begin this section with a brief review of the economic literature on vicarious liability in private firms, and on calibrating the magnitude of liability. Many of the lessons from this literature apply more or less directly to the economics of state responsibility. States differ from corporations in important ways that affect the analysis, however, raising issues that we address below as well.

1. Vicarious Liability in the Private Sector

Suppose that an employee of a company commits a harmful act that causes injury to someone unconnected to the company.¹⁶ Perhaps a truck driver for Sears causes an accident with another motorist, for example. Assuming that the injury is wrongful under the law, is it desirable from an economic standpoint for the employer of the injurer to bear vicarious liability for the injury?

To answer this question, one must first make some assumptions about what it means for the employer to bear liability. The literature on vicarious liability generally proceeds on the assumption that vicarious liability does not alter the amount of damages that the injured party is allowed to collect. Likewise, it typically assumes that the employee/injurer is subject to personal liability for the harmful act, whether or not the employer bears vicarious liability. These assumptions are accurate most of the time when the issue arises under domestic law. We recognize that these conditions may not hold when we consider violations of international law, however, and will address that issue in due course.

a. The Conventional Case for Vicarious Liability

If vicarious liability simply allows the injured party to sue the employer as well as the employee for the same amount of damages, the first question to ask is, what is the point of vicarious liability? Does it simply add another party to litigation without otherwise affecting what the injured party recovers?

¹⁶ Throughout this discussion unless otherwise indicated, we assume that the injured party has no contractual relationship with the injurer. Where a prior contractual relationship exists, the analysis becomes more complicated because market penalties may attach to harmful conduct in addition to penalties associated with legal liability. Our assumption avoids the need to address those complications, and is a defensible simplification in that parties injured by violations of international law commonly (although not always) have no contractual relation with the injurer.

In some cases, the answer to this last question is “yes.” Indeed, the literature suggests a kind of indifference theorem, specifying circumstances under which vicarious liability is of little or no practical consequence. It may be stated as follows: If (a) employees have the financial resources to pay all judgments against them; (b) employers and employees can reallocate liability by contract costlessly regardless of where the law initially places it; and (c) injured parties can always secure and execute judgments against employee/injurers when they alone are liable, then a rule of vicarious liability has no consequences. The caveat is that vicarious liability may have some effect on litigation costs, although its importance and magnitude is unclear.

The proof of this proposition rests on very simple intuition.¹⁷ Imagine first that the employee alone is liable for harm, and that an optimal allocation of that liability exists between employer and employee that takes account of their attitudes toward risk-bearing and the employee’s incentives to avoid causing harm. Perhaps the employee should bear all of the liability to motivate him to be careful, or perhaps the employer should assume some of the liability because of the employee’s aversion to risk. Whatever the optimal allocation, assume that the employer and the employee enter a contract to achieve it. Now imagine that a rule of vicarious liability is imposed on the employer, and that injured parties choose to collect their judgments from the employer rather than the employee. Whatever allocation of liability was optimal before will still be optimal, because the amount of liability has not changed. Accordingly, on the assumption that the employer and the employee can costlessly reconstruct that allocation by contract, they will do so. It follows that vicarious liability will have no affect on the amount that the injured party collects or how the burden of liability is distributed between the employer and the employee. Likewise, the allocation of risk between employer and employee will remain the same, as will the employee’s incentives to avoid harm.

Conditions (a)–(c) above need not hold in all cases, however, and a departure from any one of them suggests how a rule of vicarious liability may begin to matter importantly. First, employees often have limited assets that are insufficient to pay for the

¹⁷ A formal treatment of this proposition may be found in Alan O. Sykes, *An Efficiency Analysis of Vicarious Liability under the Law of Agency*, 91 *Yale L.J.* 168 (1981), and in Lewis Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 *Cal. L. Rev.* 1345 (1982).

harms that they cause. Second, the costs of reallocating liability by contract between employers and employees may be significant at times, and the initial allocation of liability under the law may “stick” or may require costly contracts to undo it. Third, cases may arise in which the injured party has difficulty identifying the individual employee responsible for the harmful act, or in which judgments against the employee cannot be executed (perhaps the employee has fled the jurisdiction).

The first and third possibilities are widely considered the most important, and afford the conventional economic justification for imposing vicarious liability on employers. To understand this justification, assume that the damages payable to injured parties approximate the value of the harm that they have suffered. Then, in the absence of vicarious liability and if employees are judgment proof or for some other reason cannot be sued successfully, businesses will not bear the full costs of the harms that they cause (either directly, or indirectly through the liability borne by employees and passed along to the corporation via the wage bill). The consequence is not simply a loss of compensation to the injured. When businesses do not pay for the harms that they cause, their costs of doing business are lower than they should be from a social standpoint, resulting in lower prices and an undue expansion of risky activity. Further, a lack of proper incentive to avoid harm arises. Employees lack proper incentive because they escape liability in whole or in part and thereby “externalize” some of the costs of the harms that they cause. Employer will have no incentive to induce greater care by employees because they bear no liability themselves.¹⁸

Vicarious liability addresses both problems. It forces businesses to bear the full cost of harms caused by employees—i.e., it leads to “cost internalization”—and these costs become reflected in prices.¹⁹ When the price of goods and services provided by businesses reflects their full social costs, the scale of business activity will adjust to the efficient level at which the marginal value of what the business produces (captured by

¹⁸ It is conceivable that a highly risk averse employee may take precautions at an appropriate level even if his assets are limited, but this possibility does not undermine the key point that employees will typically take too little care when they do not bear the full costs of the harms that they cause.

¹⁹ Here, our assumption that injured parties have no prior contractual relationship with the injurer is particularly important. If victims were customers, for example, and if they are well-informed about the risks of dealing with the injurer, then the injurer will suffer a price penalty for harms imposed on customers by employees that can create incentives comparable to the imposition of civil liability.

consumer willingness to pay for it) just covers the social marginal costs.²⁰ Further, businesses will have an incentive to take all available cost-effective precautions to avoid those harms.²¹

b. Monitoring Ability and the Gains from Vicarious Liability

The extent of the economic gains from vicarious liability depend importantly on the ability of employers to induce employees to take greater precautions against harm—the employers’ “monitoring ability.” In some cases, employers can do a great deal to monitor employees, and in some cases their ability to do so is extremely limited.

For example, suppose that the ideal precaution against causing harm involves some action by employees that the employer can cheaply observe and verify. The employer can then announce a policy of requiring the precaution, along with a substantial punishment for failing to take the precaution (such as firing the employee or withholding all wages). The employer can cheaply enforce the policy by hypothesis, and employees may be expected to take the ideal precaution.²²

At the other extreme, suppose that the ideal precaution involves some act by employees that the employer cannot observe or verify (perhaps because the employee operates in a remote location), and that employees would rather not take because it is costly to them. Assume further that harm may occur even if the precaution is taken, so that the mere occurrence of harm does not suffice for an inference that the employee was careless. In such cases, the employer’s ability to induce care by the employee is limited and perhaps altogether ineffective. The most that the employer can do is to threaten

²⁰ We suppress a theoretically important complication, namely, adjustments in the scale of activity by potential victims of harm. If injurers are made to bear the full costs of harm, victims may respond by exposing themselves to greater risk. Because of this problem, it may be impossible to optimize the scale of activity for both injurers and victims using conventional liability rules. See Steven Shavell, *Strict Liability versus Negligence*, 9 *J. Legal Stud.* 1 (1980); Ronald Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1960).

²¹ These and a number of related points are developed in greater detail in Sykes, *supra* note ___, Kornhauser, *supra* note ___, and in Alan O. Sykes, *The Economics of Vicarious Liability*, 93 *Yale L.J.* 1231 (1984).

²² One caveat is that even when the employer is an extremely good monitor, it is conceivable that active monitoring may produce a paper trail that can be used against the employer in litigation. If so, employers may be discouraged from monitoring despite their ability to do so effectively. See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 *J. Legal Stud.* 833 (1994); C.Y. Cyrus Chu & Yingyi Qian, *Vicarious Liability Under a Negligence Rule*, 15 *Int’l Rev. L. & Econ.* 305 (1995).

employees with some sanction any time harm occurs (even though the employee will insist that he was careful beforehand). Perhaps the employer threatens to fire all employees who cause harm, for example, or to seek indemnity from them to the limit of their assets. But if employees do not place a high value on retaining their jobs because comparable jobs are available elsewhere, and if they have few assets at risk in an indemnity action, these types of threats may be of little avail. Further, a threat to impose heavy penalties on any employee who causes harm, even if that employee claims (perhaps truthfully) to have been careful, may impose great risk on workers generally, and the risk premium that they demand to bear it may make the policy unattractive.

Many intermediate cases can be imagined, but the key point is that the economic benefits of vicarious liability depend significantly on the employer's monitoring ability, an ability that is highly variable. When monitoring ability is poor, it is possible that vicarious liability is nevertheless useful because of its effect on prices (through cost internalization) alone, but such gains may be modest by themselves depending on the circumstances, and offset wholly or in part by the fact that vicarious liability may lead to greater litigation costs.

These considerations offer some basis for the domestic legal rule that employers are usually not held liable for harms caused by their "independent contractors." Imagine, for example, that a homeowner employs a plumber to fix a leak, and that the plumber carelessly cause an accident that damages neighboring property. Should the homeowner be held vicariously liable for the plumber? The answer under domestic law is generally no because the plumber is an independent contractor. This rule has a sensible economic rationale. First, plumbing contractors are independent businesses that will often have considerable assets, so that the concern for the judgment-proof problem in such cases is much reduced. Second, the homeowner's ability to monitor care by a plumber is typically poor, primarily because most homeowners will lack the relevant expertise to know what precautions are required. The imposition of vicarious liability on the homeowner may then accomplish little more than to force the homeowner (or the homeowner's insurer) to hire a lawyer and participate in litigation.

c. Causation Issues and Vicarious Liability

The cost internalization argument for vicarious liability presupposes that the harm caused by the employee is a “cost” of the employer’s business. But employees engage in many harmful acts that have little or no connection to the business of the employer. For example, suppose that an employee has a fight at a bar after work, and incurs tort liability for assault and battery. It would seem odd if the employment relationship led to vicarious liability for such “personal” torts, and indeed it usually does not because they occur outside the “scope of employment.” From an economic standpoint, the absence of vicarious liability in such cases has two justifications: (a) the employer’s monitoring opportunities are usually rather poor, and (b) the harm is not properly viewed as a cost of the employer’s business, because the harm is equally likely to occur, as a first approximation, in the absence of the employment relationship. Vicarious liability will do little to discourage harmful acts when monitoring ability is poor, and if the harm is not a cost of the employer’s business, it is economically *undesirable* for it to be reflected in the employer’s costs and prices. The latter proposition follows from the fact that the imposition of such costs on the employer will lead to a situation in which price exceeds the social marginal cost of the goods or services produced by the employer, leading to an excessively small scale of operation.²³

In some cases, however, employers may have the ability to monitor employees well even if they are engaged in activities of an essentially “personal” nature. If so, vicarious liability may still be desirable from an economic standpoint. Consider, for example, acts of sexual harassment by employees against co-workers. The employers’ business enterprise may not “cause” such misbehavior, in that the employee might behave similarly if working for any other business, or might behave similarly if unemployed altogether. The employer may nevertheless be able to discourage sexual harassment effectively by having a strict policy against it, coupled with a procedure under which the targets of harassment can report it to superiors. Employees who might otherwise be inclined to commit acts of harassment may then refrain from doing so for

²³ The scope of employment limitation on vicarious liability is the focus of Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563 (1988).

fear of punishment. Further, if the anti-harassment policy is highly effective, acts of harassment will be rare and the impact of vicarious liability on the employer's costs and prices will be minimal. Under such conditions, vicarious liability may yield net economic gains even though the harmful acts in question are not "caused" by the employer's enterprise.²⁴ By contrast, when the employer cannot cheaply monitor and discourage harmful acts, vicarious liability may simply cause the employer (and its ultimate customers) to bear costs that are not properly attributed to the employer's business, leading to an undesirable contraction in the scale of the employer's activity.²⁵

d. Calibrating Damages under Vicarious Liability

The analysis to this point presupposes that the damages imposed under a rule of vicarious liability are an accurate measure of the harm caused by the employee's harmful act. Only if this condition is met will vicarious liability produce appropriate cost internalization, and induce the employer to engage in monitoring that is socially cost-effective.

Plainly, if damages understate the harm caused by the harmful act, there will be inadequate cost internalization and an inadequate incentive to monitor. Likewise, if damages overstate the harm, the costs borne by the employer's enterprise will be excessive, and an excessive incentive to take precaution against harm will arise. This last proposition has an important implication that is not fully reflected in domestic law: vicarious liability should not include *punitive* damages, by which we mean damages that are in excess of the amount required to place the full social cost of the harm on the employer.

To be sure, an upward adjustment in ordinary compensatory damages may sometimes be required if the employer is to bear, *in expectation*, the full cost of harm. Suppose, for example, that when an employee commits a harmful act, it can be traced back to the employee or to the employer only half the time. Then, if employers only pay

²⁴ Carrying the analysis slightly further, the ideal form of vicarious liability may be a negligence-based or conditional vicarious liability – the employer bears liability only if it fails to establish and enforce a policy against the undesirable acts in question. See *id.*

²⁵ See also Ranier Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 *J. L. Econ. & Org.* 53 (1986).

damages when the harm is traceable, they bear on average only 50% of the cost of the harm that they cause. In such cases, it is appropriate to double the damages payable in cases where the harm is traceable. The employer will then bear twice the value of the harm half the time, which is equivalent in expectation to bearing all of the harm all of the time. Putting aside some technical caveats, such a system should create the proper degree of cost internalization and proper incentives for care. An upward adjustment in damages of the sort we describe here might be termed “punitive damages,” but that term is a misnomer. Damages are set not for the purpose of “punishment,” but for the purpose of ensuring that employers bear the full costs of the harms that they cause, on average.²⁶

Any damages in excess of what is required to place the full costs of harms on employers in expectation might be termed *true* punitive damages. Such damages are undesirable because they will induce employers to take measures to avert liability that are socially wasteful. This problem may arise even when punitive damages are unobjectionable if they are imposed on employees alone.

To illustrate, suppose that an employee commits an act of theft. Theft is economically wasteful because it entails an expenditure of resources to transfer property from one party to another—as a first approximation, theft accomplishes a simple transfer at positive cost that is a pure economic loss. It will cause additional losses if the threat of thievery induces property owners to expend resources to guard against theft, and if the thief happens to place a lower value on the stolen property than the rightful owner. When the reverse situation prevails (the thief values it more highly), the transfer of property ought be possible through a voluntary market transaction. Hence, a strong presumption arises that theft is undesirable.

If an individual who commits theft is caught, it is reasonable to require the thief to make good on the harm caused, and perhaps to punish the thief as well. Punishment may be costly, but a prospect of stiff punishment may deter thievery and make the cost worthwhile. Further, society does not worry much about overdeterrence of theft—the ideal level of theft is presumably zero, a target that society fails to attain mainly because the costs of deterring theft are substantial. The imposition of true punitive liability on

²⁶ See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869 (1968); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319 (1996).

thieves, therefore, does not lead to “excessive cost internalization” by thieves. It simply punishes a strictly undesirable behavior.

Does it follow that the employer of the thief should also bear (true) punitive liability for the theft if it occurs during the course of employment? The answer is no, because the employer’s liability will also affect other things—the prices for the employer’s goods and services, and the amount of monitoring that employers undertake to discourage their employees from becoming thieves. Vicarious liability for employee theft in excess of the social costs of it will lead to uneconomically high prices and an undesirably low scale of business operations, as well as to socially excessive monitoring by employers (because the value to them of deterring employee theft exceeds the value to society). Even if the imposition of true punitive damages on thieves can be justified, therefore, their imposition on employers of thieves cannot.

e. Calibrating Damages in Contractual Relationships

To conclude this review of prior literature, let us move away from the assumption that the employee’s act involves some tort-like behavior, and imagine instead that the employee’s act results in a breach of contract. Standard contract damages compensate for the lost expectation of the non-breaching party, and in principle make that party whole. One economic defense for this rule of “expectation damages” is that it may facilitate “efficient breach” of contract—if the breaching party can make the other party whole and still come out ahead, breach is desirable.²⁷ To be sure, the renegotiation of contracts can also ensure that “breach” occurs when it is efficient, but renegotiation may be quite costly under certain circumstances, and an expectation damages rule may then have an advantage. In the contractual setting as well, therefore, punitive damages are often problematic. If the legal rule requires the party who contemplates breach to pay an amount that overcompensates the non-breaching party, and if negotiations over a possible agreement on a lesser amount of compensation are too costly, parties may perform their contractual obligations even when breach is desirable.

This concern has direct applicability to international law. Much of international law involves treaties, which may be viewed as contracts among states. The possibility for

²⁷ See Steven Shavell, *Damage Measures for Breach of Contract*, 11 *Bell J. Econ.* 466 (1980).

efficient breaches thus arises under treaties as well. Where the function of international law is to encourage proper adherence to treaty commitments, an argument for “expectation damages” of a sort emerges. Indeed, renegotiation of treaties can be particularly difficult and expensive, so that a proper calibration of the sanction for breach may be absolutely essential for efficient breach to occur.²⁸

2. States vs. Corporations

State responsibility is a form of vicarious liability, in that some penalty is borne by the citizenry as whole because of actions taken by their “agents.” Many of the basic economic lessons regarding corporate vicarious liability have direct bearing on the economics of state responsibility. First, state responsibility is most often justified because the individual actors whose actions violate international law will not bear the costs—they may be beyond the jurisdiction of any foreign entity with the capacity and authority to sanction them, they may be immune from any personal liability under applicable domestic law, and their personal assets may be far smaller than the harm that they have caused. Second, the benefits of state responsibility will be greater, the greater the capacity (and inclination) of the state to monitor its “agents” and to discourage their harmful acts. Third, state responsibility is generally more useful when the harmful act is “caused” by the activities of the state, and less so if the act is of a more “personal” nature on the part of its agents or citizens. If the state is highly effective at monitoring acts in the latter category, however, state responsibility may be appealing nonetheless. Finally, rules of state responsibility must be attentive to the calibration of the remedy—insufficient penalties may lead to inadequate deterrence of harmful acts, while excessive penalties may lead to wasteful monitoring behavior or to the deterrence of socially valuable acts (such as, perhaps, the efficient breach of certain international obligations).

Yet, it would be mistaken to suppose that the analysis of corporate liability can be transplanted without modification. States differ from corporations in many ways, and state responsibility under international law differs from the monetary liability of

²⁸ See Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Settlement in the World Trade Organization*, 31 *J. Legal Stud.* S179 (2002).

corporations under domestic law in important respects. In this section, we consider the implications of several important distinctions.

First, corporations are generally assumed to act as profit-maximizing entities, at least as a first approximation, an assumption that is important to predictions about how corporations will respond to the incentives created by liability. By contrast, states do not maximize profits, and indeed their “objective functions” are quite unclear. It is also unclear in some cases whether any entity has the capacity to monitor state “agents.”

Second, the scale of corporate activity is determined in the marketplace, with equilibrium output typically imagined to occur (under competitive conditions) where price equals the marginal cost of production. State activity is not in general “priced,” and the determinants of the scale of state activity in equilibrium are much less clear.

Third, corporate liability for compensatory damages at least in principle imposes a monetary penalty equal to the value of the harm done. The remedial consequences of state responsibility under international law may be quite different, both in theory and in practice.

Fourth, international law must attend to the fact that it may overlap or parallel domestic law. If behavior that violates international law is also a violation of domestic law, the need for a remedy under international law is diminished or perhaps eliminated.

Each of these distinctions has some important implications for the economics of state responsibility. As shall be seen, these implications are not always crisp ones.

a. Do States Have a “Principal,” and How Will It Respond to State Responsibility?

The economic analysis of vicarious liability in the private sector is an application of the theory of principal and agent. It implicitly imagines that senior corporate actors—top level managers, board members, large shareholders, and so on—serve as the “principal” and respond to liability with cost-effective measures to monitor the “agents” that expose the corporation to liability. Although corporate monitoring can no doubt break down, the notion that a profit-maximizing “principal” sits in the background to economize on the civil liability of corporations is probably not a bad simplifying assumption most of the time.

Do states have such a “principal?” In democratic states, the analogue to shareholders is voters. When the electorate becomes displeased with the policies of elected officeholders, it can turn them out, but only at specified times (elections). There is no board of directors or large shareholder with the ability to replace officials in between elections, and no takeover market. Further, in contrast to the corporation in which the single or primary objective of every shareholder is thought to be the maximization of profit, voters are concerned about a wide array of disparate issues. The consequences for the nation (or for the typical taxpayer) of acts that trigger state responsibility under international law may be far down the list of issues that affect the choices of voters. Except on issues of great national importance, therefore, it seems unlikely that the democratic process will exert much direct discipline over such acts.

Does it follow that state responsibility will have little or no consequence in democratic states? We believe that the answer in many cases is “no.” First, to the degree that state responsibility is accompanied by monetary liability (reparations), some government entity must pay the cost. Even though a bureaucratic entity does not maximize profit, it will often face a budget constraint and will prefer not to waste resources. It has thus been suggested in the literature on governmental tort liability under domestic law that bureaucracies may respond to monetary liability with behavior approximating *cost minimization*.²⁹ If that suggestion is right, bureaucracies will respond to monetary liability in much the same way as a profit-maximizing entity, at least to the extent of adopting cost-effective measures to economize on liability. We are unaware, however, of any empirical literature supporting this thesis, and thus it remains for now an optimistic conjecture.

Even if governments will not necessarily respond to monetary liability with cost-effective preventive measures, however, liability will still in all likelihood have political consequences. Governments face budget constraints, as noted, and liability inevitably diverts government funds from other things. Political officials will prefer to avoid such diversion because it leaves them with fewer resources to satisfy the demands of domestic constituencies that will reward them for delivering desired projects. The political

²⁹ See Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 *Sup. Ct. Rev.* 249.

“opportunity cost” of funds used to pay for governmental liability be all the greater when funds are disbursed to non-citizens on account of violations of international law. Thus, we suggest that governments will respond to monetary liability with measures to avoid it that are at least “politically cost-effective,” and that will discourage acts that trigger state responsibility to some degree.

If state responsibility results in other than monetary penalties, similar forces will often be at work. Suppose, for example, that the consequence of state responsibility is some economic or trade sanction. Such sanctions will damage the economic interests of domestic constituencies. Indeed, foreign governments may select such measures precisely for the purpose of maximizing their political impact in the target country. Those interest groups will have an incentive to mobilize to eliminate the sanctions, and to support policies that will avoid them in the future.

Finally, state responsibility can interfere with the international agenda of elected officials in democratic states. Most nations are constantly involved with various diplomatic initiatives, many of which may culminate in international legal agreements. The ability of officials to negotiate credibly on various issues will turn in part on their ability to deliver compliance with prior agreements. Officials thus have a reputational interest in avoiding violations of international law quite apart from their desire to avoid the political costs of formal sanctions, and will act to protect that interest.³⁰

For these reasons, state responsibility will generally be costly to states that violate international law, at least to an extent. Political officials will respond to state responsibility or to a prospect of it with politically cost-effective measures to address the problem. The relation between political cost-effectiveness and economic cost-effectiveness is unclear, although the mapping may sometimes be reasonably close. In any event, we would expect a positive correlation between them—state responsibility will lead democratic states to reduce violations of international law, much as it leads corporations to curtail the behavior that exposes them to liability.

³⁰ See Andrew Guzman, A Compliance Based Theory of International Law, 90 Cal. L. Rev. 1823 (2002).

Thus far, we have focused on the consequences of state responsibility for democratic states. To what extent does the analysis apply to other systems of government?

Often, the differences may be minimal. Authoritarian states may have a long-term interest in international cooperation on various fronts, and that interest may be furthered by their demonstrated ability to comply with commitments under other bodies of international law. Indeed, authoritarian states may be even better than democratic states in policing violations of international law by their own officials if senior leaders find it in their interest to do so.

But there is an important class of cases in which we might expect state responsibility *per se* to have little or no impact on an authoritarian state, owing to the fact that the most senior leaders in such states are often accountable to no one but themselves. If an authoritarian leader is determined to violate international law (Hitler's invasion of Poland, for example), there may simply be no entity in the polity with the capacity to discourage such behavior. The "agent," in effect, has become the "principal," and one can no longer distinguish the effects of vicarious liability on behavior from the effects of personal liability in any coherent way.³¹ We do not mean to suggest that international law becomes irrelevant in such cases. Perhaps it helps other nations to orchestrate effective opposition to the actions of an authoritarian leader, and may well influence the outcome of conflict. Our point is simply that any effects of international law operate through their direct impact on the personal interests of the authoritarian leader, and not through any monitoring mechanism put in place by his "principal." An obvious problem then arises—because these individual leaders cannot be made to bear the costs of the harms that they cause given their own limited assets and their likely insulation from seizure, and because no superior can restrain their behavior, it is especially difficult for international law to deter their misconduct. Section C will return to this case in its discussion of personal criminal liability.

³¹ This problem can arise to a degree in democratic states as well. For example, if a U.S. President is determined to violate international law, and cares little about reelection or the future of any political party, then a future prospect of state responsibility may have little impact on behavior. A distinction still arises, however, in that rules of state responsibility can provide democratic states with an incentive to put *ex ante* measures in place to limit the powers of even their highest leaders, such as a requirement that decisions pass through the legislature before they can be enacted.

b. The Scale of Government Activity

In addition to providing an incentive for cost-effective monitoring, vicarious liability in the private sector has the further virtue of forcing businesses to internalize the full social costs of their operations. These costs become reflected in prices and in the scale of business activity, which will tend toward its socially optimal level.

This argument for cost internalization is much less convincing when applied to states. With some exceptions, government services are not priced in the marketplace. And even when they are, prices may or may not be a true reflection of costs. In general, the scale of government activity will be determined by the interplay of interest groups. The resulting political equilibrium may lead to a scale of activity that is too large when measured against some idealized benchmark, or to one that it is too small.

The literature on government takings illustrates the point. Proponents of an expansive concept of takings argue that the requirement of just compensation will force government to internalize the costs of taking private property, and tend to ensure that it is not taken unless its value in government hands is higher.³² Critics have responded, however, that the government actors who decide on what property to use for public purposes do not bear the costs of that decision, or receive the benefits. It is by no means clear that “cost internalization” by the government will lead to optimal decision making.³³

The same line of reasoning applies to costs associated with the violation of international law. Consider, for example, violations of the laws of war by soldiers in an army. Will the imposition of stare responsibility on the nation that employs the army lead to an “optimal” scale of war? We doubt it. State responsibility will likely lead the army to take the rules of war more seriously, and to introduce measures to discourage violations as we argued above—the monitoring gains from state responsibility. But any effects on the “scale” of war seem far less clear. Most of the time, the costs of state responsibility will be inframarginal, in the sense that they do not affect the decision to go to war, how

³² See Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

³³ See Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 *Cal. L. Rev.* 569 (1984); Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine*, 78 *N.Y.U. L. Rev.* 30 (2003).

many troops to commit, or other decisions regarding “scale.” Wars that many observers deem imprudent will still occur, and wars that might seem socially justified (such as inexpensive humanitarian interventions) will still not occur because the nations that bear the costs do not reap the benefits.

In sum, although state responsibility may promote a kind of cost internalization by governments, the consequences of cost internalization in the public sector are much less clear. It is certainly possible that it leads to a useful correction in the scale of government activity some of the time, but one cannot claim that cost internalization will have this effect in general. Hence, the stronger argument for state responsibility rests on its ability to induce monitoring. Where monitoring is unlikely to occur or to be effective, the case for state responsibility is weak.

These last observations also suggest a “theory of the second-best” caveat regarding the gains from state responsibility. Suppose that state responsibility may lead to a scale of government activity in some area that is too small. Even if it also leads to otherwise useful efforts at monitoring government agents to prevent violations of international law, the two effects are offsetting and the net effect may be ambiguous. As a simple illustration, imagine a humanitarian military intervention that would halt a genocide, and that informed observers deem clearly desirable. Suppose further, however, that a nation with the ability to intervene is hesitant to do so because its citizenry will bear the costs but the benefits will flow to others. Conceivably, a prospect of state responsibility for any violations of the laws of war during the intervention could tip the balance against intervention, and thus be counterproductive.³⁴

c. The Remedy When State Responsibility Is Triggered

The literature on vicarious liability in the private sector generally assumes that liability is monetary, and equal to the value of the harm caused by the act that triggers liability. This assumption is essential to developing the proposition that vicarious liability induces socially cost-effective monitoring and tends to result in an optimal scale of business activity.

³⁴ For further discussion of scale issues, see Eric A. Posner, *International Law: A Welfarist Approach*, *U. Chi. L. Rev.* (forthcoming).

We have already suggested two difficulties with any effort to transplant this reasoning to cases of state responsibility: (a) states will engage in *politically* cost-effective monitoring, but not necessarily socially cost-effective monitoring; and (b) there can be no presumption that state responsibility optimizes, or even improves, the scale of government activity. We now add a third concern that relates closely to both of these points—there may be little connection between the harm done by violations of international law and the sanction imposed on the state whose agents commit the violation.

As we detail at length in the later sections of this paper, the remedy when state responsibility is triggered varies immensely. In some instances, the violator bears no formal sanction unless it refuses to cure its violation within a reasonable time (this is the remedy under WTO law, for example). Here, the state bears no penalty for the harm done up to the point where its obligation to cure arises. In other cases, nations aggrieved by a violation may employ self help measures immediately in the form of various diplomatic or economic sanctions. The relation between the cost of these sanctions and the harm done is a loose one. Sanctions are generally constrained under international law by the principle of “proportionality,” but the meaning of this concept is fuzzy and its enforceability is even less clear. To be sure, cases arise in which states are obligated to pay monetary reparations for the harm done by violations of international law. These cases present the closest analogue to vicarious liability in the private sector, but even here it is unclear whether reparations will accurately measure the harm done by the violation of international law. Rarely does any mechanism exist to provide an objective assessment of the value of that harm.³⁵

For these reasons, one must be particularly attentive in the analysis of state responsibility to the possibility that a sizeable gap exists between the penalty for violations of international law and the harm caused by violations. This possibility provides yet another reason to doubt that state responsibility can induce “optimal” behavior except perhaps by chance.

³⁵ The most extreme remedy for violations of international law is the breakup of states. The German, Ottoman, and Austro-Hungarian empires were divided after World War I, and Germany was divided after World War II, while Japan lost its colonies. States may also be deprived of their sovereignty through occupation and control. We will put aside these remedies, for, although they are important, they are relatively rare.

From a normative standpoint, however, the ideal penalty for violations of international law is generally the same as it is for cases of corporate vicarious liability—the value of the harm done by the harmful act. That penalty forces states to bear the costs of the harms that they cause, “internalizing the externality” imposed on other states. Even if the amount of internal monitoring that results from such a penalty may not be optimal from a cost-benefit perspective, and even if there can be no presumption that the resulting scale of government activity will be optimal, at least the costs of those imperfections are borne internally by the state that creates them. As such, they are arguably of no concern to international law. As long as other states are protected against harm, each state can be left to its own devices in deciding how best to economize on its international liability costs.

It is also important, of course, that the penalties for violations of international law be imposed in the cheapest way possible. Different types of sanctions will have different costs associated with their administration, and these costs are appropriate to consider in assessing whether international law has adopted the proper approach to state responsibility.³⁶

d. Overlapping Domestic Remedies

International law often imposes obligations that do not exist under domestic law, and the international remedy for harmful acts that violate international law is then exclusive. But many acts that violate international law may also violate domestic law. Given the importance of calibrating sanctions properly, it is important to take account of any domestic legal remedies in designing an appropriate international remedy (and vice-versa).

Tortious conduct toward a foreign official, for example, may violate international norms, but may also constitute a tort or crime under domestic law for which an adequate domestic remedy is available. In such circumstances, there is no need for any international remedy at all. As another example, misconduct by soldiers during wartime may violate international law, but may also violate domestic laws applicable to the

³⁶ See the discussion of whether monetary damages are the cheapest form of sanction under international law in Andrew Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 *J. Legal Stud.* 303 (2002), and Alan O. Sykes, *Public versus Private Enforcement of International Economic Law: Standing and Remedy*, 34 *J. Legal Stud.* 631 (2005).

conduct of soldiers. The need for an international remedy again turns on the adequacy of the domestic remedy.³⁷

The general point is that international and domestic legal remedies are substitutes for each other, albeit not perfect substitutes. Domestic remedies are potentially superior in many settings for at least two reasons. First, differences across countries may justify differences in the approach to monitoring individuals who may commit harmful acts, which will be reflected in the way that domestic legal systems are tailored. Second, domestic legal systems typically have greater coercive authority to enforce their decisions than international tribunals, and may also be cheaper to employ because their tribunals are located closer to the relevant parties.

Two potentially important limitations on the adequacy of domestic remedies are sovereign and official immunity. Many domestic legal systems limit the circumstances under which the government is liable for acts of misconduct by its agents. Likewise, individual agents are often immunized from personal liability for acts within the course of their discretion, usually on the theory that personal liability will chill the performance of their public duties. Such doctrines can diminish the adequacy of the domestic remedy and may make state responsibility under international law desirable.

To be sure, if sovereign and official immunity under domestic law have sound economic justification, international law must be careful not to undermine their purpose by imposing overbroad responsibility internationally. The mere fact that some immunity renders the domestic remedy “inadequate,” therefore, does not automatically justify state responsibility under international law. In many cases, however, we suspect that domestic immunities, particularly immunities for governments (as distinguished from individual officials) may have their origins in foolish legal fictions (“the king can do no wrong”) rather than sound public policy. Further, domestic immunities may be tolerable because of alternative political checks on government that protect the citizenry from government abuse. Foreigners, by contrast, are unlikely to be able to participate in the domestic political process, and may need an international remedy to overcome the obstacles presented by certain doctrines of domestic immunity.

³⁷ This is a general principle of international law; see Lori F. Damrosch et al., *International Law: Cases and Materials* 755 (4th ed. 2001).

B. Civil vs. Criminal Liability for Enterprise and Individual Wrongdoers

In domestic law, both civil and criminal penalties are employed to deter harmful acts. Modern developments in international law also allow the use of criminal penalties, particularly against certain types of individual actors. In this section, we consider the circumstances under which criminal penalties generally, and criminal liability for individuals in particular, may be a useful supplement to state responsibility.

1. Civil vs. Criminal Liability for Corporations/States

Criminal sanctions are sometimes imposed against corporations under domestic law, and there has been some suggestion that certain acts by states under international law ought to be labeled “criminal.” To a considerable extent, however, the distinction between “civil” and “criminal” penalties for corporations and states is a meaningless one. Neither can be incarcerated, and the same array of alternative sanctions may be employed regardless of the label that attaches to them.

A shift to “criminal” sanctions against states and corporations can have practical consequences, to be sure, if the nature or magnitude of the sanction changes. Corporate criminal liability, for example, may be accompanied by a shift from monetary liability based on the harm caused to punitive monetary liability. We have discussed the wisdom of such policies above, noting that the imposition of true punitive liability on corporations is undesirable. The same general concern arises with monetary or other sanctions associated with state responsibility. Excessive sanctions can lead to socially wasteful monitoring and can discourage economically valuable actions (such as efficient breach of contract).

In sum, the possibility of “criminal” liability for states is of little importance in itself. The important issue relates to the proper calibration of sanctions for breach of international law, whatever label they may carry.

2. Civil vs. Criminal Liability for Individual Actors

The difference between civil and criminal liability for individual actors is a more important one, at least to the degree that the sanction of incarceration is limited to the criminal domain. Incarceration is generally a far more expensive sanction to employ than

monetary penalties, and for this reason conventional economic wisdom holds that monetary penalties are preferable when they are adequate to the task. But when the assets of individuals who commit harmful acts are too small in relation to the properly calibrated monetary penalty, incarceration may be necessary as a substitute or supplement. Likewise, if individuals have proclivities to commit harm that cannot be deterred, incarceration may be useful to incapacitate such individuals from committing further harm.

The literature on corporate liability also recognizes a potentially useful role for criminal liability at the individual level, even when the corporation is liable for all of the harm caused by an employee's wrongful act.³⁸ The reason again relates to the limited assets of employees, and to the possibility that a threat of incarceration may be needed to deter employees adequately. Corporations are unable to incarcerate employees, and so it may be useful for the state to impose the penalty of incarceration in addition to whatever monitoring and punishment system the employer has put in place. When employees are subject to criminal penalties, however, those penalties become indirect costs of doing business to the employer to the degree that employee wage demands rise to compensate for the danger of incurring the penalties. Unless the liability imposed on the employer is adjusted downward accordingly, the total costs imposed on the employer associated with employee wrongdoing may exceed the harm caused, leading to the problems noted earlier that result from excessive sanctions.

Criminal penalties for individual actors may also be a useful supplement to state responsibility under international law, albeit for somewhat different reasons. As in the corporate setting, individual actors who cause violations of international law will often lack the assets to pay for the harms that they cause. States may have difficulty imposing "civil" penalties that are large enough to dissuade their officials from committing harmful acts, and sanctions such as incarceration may be a valuable supplement. But in contrast to the corporate setting, states do have the power to incarcerate individuals. Thus, it is not necessary for international law itself, or for international institutions, to impose criminal penalties on individual actors simply because of their limited assets. Properly calibrated

³⁸ See A Mitchell Polinsky & Steven Shavell, *Should Employees be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 *Int'l Rev. L. & Econ.* 239 (1993).

sanctions for state responsibility can induce states to incarcerate individual actors under domestic law when such penalties are useful to ensuring compliance with international obligations.

Criminal penalties under international law are necessary, therefore, only when state responsibility alone will not induce states to employ proper deterrence measures, including incarceration if appropriate, against the individual actors whose harmful acts trigger state responsibility. We suggest five reasons why this might be true.³⁹

First, consider the situation noted earlier in which the state agent who violates international law has no “principal” (the Adolph Hitler example). Because no entity exists to monitor the actor at the time that he undertakes to violate international law, a prospect of state responsibility for the violation will have little or no effect on the actor’s incentives.⁴⁰ A prospect of individual criminal penalties under international law, however, may have some deterrent effect, with its magnitude obviously dependent on the actor’s beliefs about his ability to escape punishment.

Second, suppose that the actor who violates international law does so as an official of an exceedingly weak or “failed state.” If such a state has few assets with which to pay for the harm it has caused, either monetarily or by incurring some other type of sanction, state responsibility will be ineffective at inducing it to police the behavior of its agents. This case presents a rough analogue to the imposition of vicarious liability on an insolvent corporation. In these cases, penalties imposed directly by international law on actors who cause harm may be necessary if they are to face any prospect of sanction. The criminal penalty of incarceration may again be the best option because of individual actors’ limited assets.

Third, and related, imagine that the imposition of sanctions associated with state responsibility is for some reason undesirable or counterproductive. Perhaps the state that has violated international law has been defeated in a war, for example, and further sanctions would contribute to a humanitarian crisis. If the unwillingness of the

³⁹ These reasons might also offer a rationale for individual, *civil* liability under international law. The sparseness of such remedies perhaps owes to the fact that individual actors are typically judgment proof, and so the criminal alternative is necessary.

⁴⁰ Of course, if Hitler had thought that a defeat of Germany was reasonably likely, and that a requirement for Germany to pay reparations might have led a new German regime to punish him, state responsibility might have had some impact on his incentives.

international community to impose sanctions is anticipated, it saps the deterrent effect of state responsibility. A prospect of individual criminal penalties can be useful here as well.

Fourth, and also related, circumstances may arise in which states largely disregard the rules of state responsibility. We think this problem may be especially acute when states are at war with each other. International law is effective at disciplining the behavior of states only because violations of international law lead to some adverse consequence for the violator, whether a formal sanction or a reputational penalty. In wartime, however, where belligerents are fighting to destroy or incapacitate each other, each nation may already be inflicting the maximum costs on the other that it is able or willing to inflict. If so, there may be little or no penalty “at the margin” for violations of international law that harm the opposite belligerent.⁴¹ If the violation implicates the interests of third states, some cost to violations may remain, but they may be insufficient in relation to the value of the harm caused by violations. We also doubt that a prospect of reparations after the end of conflict will necessarily discipline states during conflict—reparations tend to be one way, from the loser to the victor. States that expect to prevail in conflict will also expect to avoid reparations. Thus, individual criminal responsibility may become a particularly useful supplement to state responsibility for violations of international law during war.

A final reason for the use of individual criminal penalties under international law is that it can avoid the costs associated with sanctions for state responsibility. International sanctions may take the form of monetary reparations, but often involve other measures (trade sanctions, for example) that create substantial deadweight losses.⁴² It can also be expensive to calibrate sanctions in accordance with the general international law principle of proportionality. The notion in the economic literature that incarceration is a comparatively expensive sanction, therefore, may simply be incorrect when the alternative sanction associated with state responsibility is also quite costly to administer and enforce.

⁴¹ Nations may still refrain in some cases from certain violations of the laws of war (such as rules about the treatment of POWs) out of a fear that violations will result in a reciprocal violation that is highly costly to them. This limited compliance with international law, however, does not change the fact that the sanctions available to be imposed on an opposing belligerent may be extremely limited and inadequate for many purposes.

⁴² Monetary sanctions can also create significant deadweight costs as argued in Sykes, *supra* note ____.

C. Summary

The analysis to this point suggests that the basic rationale for state responsibility under international law is akin to the rationale for vicarious liability under domestic law. The individual actors who cause violations of international law will often escape personal responsibility for the harms that they cause, either because they are judgment proof, immune from suit under domestic law, beyond the jurisdiction of any domestic court, or perhaps simply impossible to identify. Where the remedy against these individual actors is inadequate to deter harmful acts properly, a *potential* case for state responsibility arises. This case is a strong one only if state responsibility will induce valuable monitoring behavior by states. The other common justification for vicarious liability in the domestic context—to optimize the scale of activity of private firms—is much less convincing as an argument for the liability of governments in general, and under international law in particular. In the next Part of this paper, we will suggest that international law tracks this reasoning to a considerable extent.

As in the domestic context, it is important to recognize the implications of potentially overlapping remedies. If the remedy against the state (or the individual actor) is adequate under domestic law, there may be no need for an international remedy at all. This observation portends some of the situations we discuss below in which the existence of an international remedy turns on the *inadequacy* of the domestic remedy.

Related, our analysis suggests that the proper remedy against a state in general, and under international law, should be a compensatory remedy. Such a remedy forces states to internalize the costs of the harms that they cause, and no more. This will tend to encourage an appropriate level of monitoring in the cases where useful monitoring is feasible, and facilitate efficient breach of international obligations. Although imperfections in monitoring and breach will still arise because the political process will often fail to yield economically ideal outcomes, at least the costs of those imperfections will be borne internally by the state that must compensate other states for harmful acts.

Finally, and again as in the domestic context, individual criminal responsibility may be a valuable supplement to state responsibility. The rationale here, however, is different. In the domestic setting, a useful role for criminal liability arises when employers cannot impose adequate sanctions on judgment proof employees because they

lack the power to incarcerate. Here, of course, states are not hampered by that constraint. The need for *international* criminal responsibility is accordingly diminished because state responsibility alone will often induce states to incarcerate bad actors under domestic law when incarceration is a valuable penalty. But we have identified several settings in which we would not expect states to respond properly in this fashion, suggesting some role for international criminal liability on individual actors.

II. Legal Applications

In this Part, we use the conclusions from Part I to discuss the general rules of state responsibility and some cases that illustrate those rules. Throughout much of the discussion we will rely on the International Law Commission's draft articles on state responsibility.⁴³ Although these articles are not formally rules of international law because they have not been ratified by states, many of them are thought to reflect the accepted customary international law principles of state responsibility. However, some of the articles go beyond existing international law, and reflect the ILC drafters' views about what international law should be; we note these articles as we discuss them.

A. *Conduct Imputable to the State*

The first issue to examine in the law of state responsibility concerns the imputation of conduct to states—for what behavior is the state responsible under international law? Many of the basic rules here closely track the rules that govern vicarious liability for private entities under domestic law, and for the most part have a similar economic logic.

1. State Officials vs. Private Citizens

Acts of state officials implicate state responsibility unless the officials are acting in a personal capacity. ILC article 4 provides:

⁴³ See ILC draft articles on state responsibility. We have taken many of our examples from the ILC's commentary on its draft articles. See U.N. International Law Commission, Report on the work of its fifty-third session (23 April - 1 June and 2 July - 10 August 2001), U.N. G.A.O.R., 55th Sess., Supp. No. 10, U.N. Doc. A/56/10.

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 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.

ILC article 5 provides:

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.

ILC article 7 provides:

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.

Article 4 establishes that official government acts by “organs” or institutions such as (to use American examples) Congress, the president, a federal court, an army on the field, or a state legislature implicate state responsibility. Article 5 provides that individuals who act in an official capacity but not necessarily in a way that can be attributed to any particular state organ can also implicate state responsibility. Article 7 says that state responsibility occurs as long as the person or entity has official powers. The state does not avoid responsibility if the act was the result of abuse of the official powers, that is, if it was illegal or unconstitutional under domestic law. Numerous reported cases also make clear that ordinary legislative, executive, and judicial acts—statutes, enforcement and military actions,⁴⁴ and judicial decisions⁴⁵—are acts of state. Cases also make clear that in federal systems the acts of local units—regional units, cities—are acts of state.⁴⁶

⁴⁴ *Laura M. B. Janes (U.S.) v. United Mexican States*, 4 R.I.A.A. 60 (1926) (cited in 2 D.P. O’Connell, *International Law* 949 (2d ed. 1970)).

⁴⁵ *Costa Rica Packet Case (Gr .Brit. v. Neth.)*, reported in 5 J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* 4948 (1897) [hereinafter *Moore’s International Arbitrations*] (cited in O’Connell, *supra*, at 949); *B.E. Chattin (U.S.) v. United Mexican*

These principles are consistent with our theory of vicarious liability. Recall the proposition that state responsibility for the actions of agents is most desirable when (1) individual actors will not bear the costs because they have few assets or are beyond the reach of ordinary domestic judicial process, and (2) the state has the ability to monitor and control the agent. The first condition is typically satisfied for acts by state officials. Such officials are generally beyond the reach of the domestic legal remedies of the victim state. They usually cannot be sued in foreign courts on account of their actions because they are out of the victim state's effective control. Officials on their home territory cannot be seized by the victim state without a military invasion, which is almost always out of the question. And even when officials are on foreign territory, international norms and agreements ensure that the host country has no jurisdiction over them, and can only expel them for committing crimes and similar acts. Similarly, official actors are often insulated from suit in their own domestic legal systems by various doctrines of official immunity; so if foreign victims try to obtain a domestic legal remedy, they are likely to fail. Finally, the personal assets of official actors will often be far less than the amount required to compensate the victim state for the harm that they cause even in the rare cases where they can be reached by judicial process under domestic law.

The second condition is also likely to be satisfied. Clearly, states usually have considerable power over their own personnel acting in their official capacities, and this includes formal organs such as courts and legislatures. The internal rules of states determine the powers of officials, provide incentives and punishments, determines how they will be selected and trained, and so forth. The typical relationship between a state and its officials is thus essentially an employer-employee relationship, and it comes as no surprise that states bear responsibility for acts of their "employees" within their "scope of employment."

Consistent with this view, state responsibility does not exist when officials act in a purely personal capacity, in ways that are not easily controlled by the state. A government official who runs over an alien while on a private errand is no more easily monitored by the state than a private citizen who runs over an alien while on a private

States, 4 R.I.A.A. 282 (1927) (procedural irregularities such as failing to allow accused to confront witnesses).

⁴⁶ LaGrand (F.R.G. v. U.S.), 1999 I.C.J. 9, 16 (Mar. 3) (order of provisional measures).

errand. But a government official who, as a police officer, arrests and incarcerates an alien out of personal animus can be controlled by the state. The state can screen out unreliable or malicious people rather than hire them, and it can provide employees who have access to dangerous weapons with suitable training and supervision.

An interesting illustration is the case of Francisco Mallén.⁴⁷ An American deputy constable in Texas twice assaulted an official of the Mexican consulate. The first incident occurred when Mallén approached the consul on the street and attacked him. In the second incident, Mallén cornered the consul on a street car, assaulted him, and then arrested him and brought him to jail. A tribunal held that the United States bore direct responsibility for the second act but not the first act. The first act was a private act; the second act, when the arrest occurred, was an official act.⁴⁸ Both acts were motivated by the same private quarrel. The difference is that arrests are public acts that can be monitored and controlled more easily than ordinary assaults. Arrests are recorded and monitored, and require the participation of other officials who book and detain the suspect.

In another case, two Mexican soldiers murdered an American in their barracks after the victim refused to pay them a bribe. A tribunal imputed liability to the state even though the soldiers were not acting under orders because “they acted under cover of their status as officers and used means placed at their disposal on account of their status.”⁴⁹ Both cases reflect the idea that international law should discourage states from placing resources in the hands of people likely to cause harm to aliens. They parallel domestic law, which similarly holds that an employer can be held liable for acts of employees who are on duty but not employees who are off duty.

In yet another interesting case, the U.S. brought a claim against Mexican authorities for failing to prosecute a private citizen who murdered an American.⁵⁰ The American was the superintendent of a mine and was murdered by a former employee in front of many witnesses. The police took more than an hour to put together a posse,

⁴⁷ 4 R.I.A.A. 173 (1927).

⁴⁸ *Id.* at 175-77.

⁴⁹ *Caire (Fr. v. Mex.)*, 5 R.I.A.A. 516, 519 (1929), discussed in the ILC Commentary, *supra* note ___, at 101.

⁵⁰ *Janes (U.S.) v. United Mexican States*, 4 R.I.A.A. 82 (1925).

which did not catch the murderer even though the latter was on foot and the posse was mounted. The fugitive continued to live nearby and the police did not respond to requests to capture him, or did so in a desultory manner. A tribunal recognized a claim against Mexico for failing to prosecute. Was this correct? We think that the answer is yes. If a likelihood of non-prosecution was known to the prospective murderer (or to other prospective murderers), the deterrence of murder will be undermined. Mexican liability is justified to encourage local authorities to undertake valuable measures to protect aliens.

As another example, consider the *Zafiro* case, in which the United States was held responsible after crewmembers of a supply ship were permitted to go ashore in the Philippines, where they looted property.⁵¹ Normally, sailors on shore leave who commit crimes do not implicate the responsibility of the state. But here, because the officers knew that there was no security on shore (the local police having evacuated), they should have known that the sailors would commit crimes. State liability gives the officers an incentive to control soldiers and sailors by preventing them from coming ashore when doing so would bring harm to others.⁵² The *Zafiro* case thus establishes a sensible interpretation of the concept of “control,” extending it to settings in which a state can anticipate misconduct by government officials even acting in a personal capacity and prevent it at low cost.

Although states are usually not directly responsible for the actions of private citizens, they are obligated to provide access to an effective domestic tort system to aliens who are victimized by private citizens. This problem preoccupied leaders in the early years of this country. In 1784, the secretary of the French legation was assaulted in Philadelphia by another Frenchman. The weak response by Pennsylvania authorities led to protests by foreign states, but Congress had no power to take action. This caused a national scandal.⁵³ The first Congress enacted the Alien Tort Statute in order to give federal courts jurisdiction over torts in violation of the law of nations. This ensured that

⁵¹ *Zafiro* (U.K. v. U.S.), 6 R.I.A.A. 160 (1925).

⁵² See also *Lehigh Valley Railroad Company (U.S.) v. Germany* (Sabotage Cases): “Black Tom” and “Kingsland” incidents, 8 R.I.A.A. 84 (1930); and 8 R.I.A.A. 225 (1939). This complicated case turned on whether workers who caused sabotage in the United States were acting at the direction of German agents or not; if they were, then Germany was responsible for violating American neutrality prior to American entry into World War I.

⁵³ See William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 3 Conn. L. Rev. 467, 489-92 (1986).

unbiased federal protection of the rights of aliens would be available lest state remedies fail.

At first blush, state responsibility for providing an effective tort system might seem puzzling. Private individuals commit torts, and holding the state responsible for failing to provide an effective tort system seems akin to making the state responsible for private citizens' torts. If states cannot control private citizens, then one might argue that there is no reason for any element of state responsibility in such cases. And if states can control private citizens, why not make them directly responsible for torts against aliens?

The most plausible answer is related to the underlying rule of liability. States are generally responsible for harms that they can prevent at reasonable cost; they can almost always prevent the harms caused by officials at reasonable cost because states control officials. States cannot prevent the harms caused by citizens at reasonable cost because states have relatively little control over private citizens. But states can reduce the frequency of these harms through an effective tort system; so international law requires states to grant aliens access to the tort system. The question, then, is why international law requires only *access* to a tort system (which might be lousy) for private citizens rather than an actual remedy.⁵⁴ The answer is that the optimal tort system varies from state to state, and depends on the particular monitoring technologies of each state, so that it would be impossible for international law to specify the type of tort rules that must be due under international law. When international law compels states to provide equal access to the tort system, it is, in effect, recognizing that the optimal system varies across nations. This principle is analogous to the nondiscrimination rule in international trade law.

⁵⁴ There has long been a conflict over whether international law also requires that domestic tort (and criminal) legal systems meet a "standard generally recognized as essential by the community of nations." 5 Green Haywood Hackworth, *Digest of International Law* 472 (1943). This controversy was of great importance in the middle of the twentieth century, when communist and many developing states refused to acknowledge that international law required remedies for state expropriation of the property of nationals, and the developed countries argued otherwise. Today, nearly all countries agree that such expropriations should be compensated, so whether or not there is a minimum standard for national legal systems, the question is no longer of importance with respect to the issue of expropriation. See Damrosch et al., *supra* note __, at 745-50. For a discussion of the history, see Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in *International Law of State Responsibility for Injuries to Aliens* 1, 3-7 (Richard B. Lillich ed., 1983). Today, many scholars believe that all states are obligated to protect the human rights of foreign nationals (as well as those of their own citizens), and thus that there remains a minimum standard. See *Restatement (Third) of Foreign Relations*, § 711(a) & cmt. b; see also *id.*, § 702 (listing human rights).

The doctrinal structure reflects this theory. Private citizens do not violate international law by causing ordinary torts that harm aliens. State officials—legislators, judges—violate international law by failing to provide aliens with adequate, unbiased access to the tort system.⁵⁵ These actors, unlike private citizens, are within the control of the state, and that is why the state can be made responsible for their actions.⁵⁶

2. Exceptional Cases of Responsibility for Acts of Private Citizens

Acts of private citizens normally do not implicate state responsibility, as noted, but there is an important exception. ILC Article 8 provides:

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.

Article 8 ensures that states cannot avoid responsibility by contracting out functions.⁵⁷ A traditional example is the hiring of mercenaries. Today, states contract out many other functions, as we noted in the Introduction.

Several cases illustrate the scope of this rule. We start by comparing two ICJ cases, the Tehran Hostages case⁵⁸ and the Nicaragua case.⁵⁹ In the Tehran Hostages case, student militants in Tehran seized the American embassy and held its staff hostage for more than a year. The ICJ held that although Iran was not responsible for the initial breach of diplomatic immunity, it became responsible when the Iranian government announced its approval of the action and took no steps to expel the militants. In the Nicaragua case, the United States trained, funded, and supported insurgents—the Contras—in their conflict against the Nicaraguan government. The ICJ held that the U.S. was not responsible for internationally wrongful acts committed by the Contras.

⁵⁵ Or other components of the legal system. In the *Van Bokkelen* case, 2 John B. Moore, *A Digest of International Law* 1807 (1888) [hereinafter *Moore's Digest*], Haiti was held responsible for failing to provide relief from imprisonment for debt to an American citizen under a law that provided that only Haitians were entitled to the relief.

⁵⁶ This is why the first Congress passed the Alien Tort Statute (1789).

⁵⁷ The rule apparently strengthens the traditional law, which required a greater degree of control by the state. See Townsend, *supra* note __.

⁵⁸ 1980 I.C.J. 3.

⁵⁹ 1986 I.C.J. 14.

What accounts for the different outcomes? The most plausible explanation, albeit open to some question, is that the U.S. had less control over the Contras than Iran had over the militants. The U.S. could not have prevented the Contras from committing war crimes, while the Iranian government could have expelled the militants from the embassy. Indeed, the evidence suggested that the Iranian government could have persuaded the militants to leave merely by asking or ordering them to leave.

One might argue that the U.S. could have prevented the Contras from committing war crimes by cutting off aid to them, or threatening to do so unless the Contras stopped committing war crimes. The problem with this argument is that the U.S. had legitimate reasons to support the Contras, and international law does not forbid states to provide aid to insurgencies or, for that matter, states that abuse their own citizens. The existence of a legitimate purpose distinguishes the U.S. case from the Iran case; the Iranian government had no argument that the militants were engaged in activities considered legitimate under international law.

Cases decided by the Iran-U.S. Claims Tribunals provide some additional variations.⁶⁰ Prior to the Iran hostage crisis, Ayatollah Khomeini's verbal attacks on the U.S. were accompanied by physical coercion (including expulsion from Iran) by people who identified themselves as Revolutionary Guards. Were these expulsions acts of state? The tribunal generally did not agree that they were acts of state because there was insufficient evidence that the government controlled the Guards.⁶¹ But in *Kenneth P. Yeager v. Iran*, the tribunal found in favor of the claimant because the individuals who claimed to be Revolutionary Guards had insignia, because they brought the claimant to a hotel that was being used by the Revolutionary Guards, and because the Revolutionary Guards were subsequently given official status. Cases involving expropriations have also tended to result in awards if the claimant can establish that the people who took the property wore uniforms or had some clear official status, but not when they were private individuals who may have been inspired or influenced by government pronouncements.⁶²

⁶⁰ See the lucid discussion in Townsend, *supra* note ____.

⁶¹ E.g., Jack Rankin, Alfred Short; Jimmie Leach.

⁶² Townsend, *supra* note ____, at 654-59.

The tribunals' approach in these cases is open to some criticism. In large part, the tribunals seem to be searching for evidence that the actors *were* state actors, such as their use of official insignia and their eventual inclusion in the government. To be sure, if the actors are agents of the state, or part of an insurgency that later takes over the state, the imposition of state responsibility is unremarkable under ILC Articles 4, 5, and 7 or Article 10 (the subject of the next section). But in the Yeager case, the Tribunal seemed unwilling to press very hard on the possibility that the actors were private citizens acting at the behest of or with the blessing of the revolutionary government. If a government has especially great influence over citizens because it enjoys a great deal of prestige—as newly established revolutionary governments may—then holding the state responsible for encouraging citizens to cause harm could well be the proper course of action whether or not the actors display badges of officialdom or subsequently become integrated into the government.

Today, the U.S. frequently pays private contractors to provide security, supply logistical support, and construct facilities in occupied countries such as Iraq.⁶³ When these agents commit torts against people, the U.S. is responsible to the extent that it exerts control over them; otherwise, it can be responsible only if it fails to provide victims access to a tort system. As noted in the Introduction, employees of private contractors engaged in interrogations at Abu Ghraib. The extent to which the U.S. is liable for this behavior depends on the degree of American control. An army report suggests strongly that the U.S. army did have a great deal of control over the contractors but failed to exercise it properly. The army failed to insist that the contractors' employees have adequate training; it failed to monitor them; it failed to provide adequate guidance to them; and it failed to maintain clear lines of authority, so that the contractor employees would know where to go with questions.⁶⁴ If the army failed to maintain adequate control where doing so would not have been too costly or cumbersome, then there is a case for holding the United States responsible for the actions of the contractors.

A final set of cases involves mob behavior. When a mob attacks and injures aliens, state responsibility is more likely as (i) the size of the mob increases, and (ii) the

⁶³ See Townsend, *supra* note __.

⁶⁴ Fay Report, *supra* note __, at 47-52.

degree to which it targets aliens rather than acts indiscriminately increases.⁶⁵ The larger the mob, the less likely that local remedies will be adequate, because it will be difficult to determine liability and perhaps to obtain a fair judgment. If the mob targets aliens, then “popular feeling against a given nationality is presumed to have pre-existed.”⁶⁶ It is cheaper for a state to protect aliens known to be from an unpopular country than to protect aliens from the type of general mob violence that can break out for any reason independent of foreign relations. In short, imposing state responsibility is more likely to lead to greater deterrence of harm by mobs, the more likely that local remedies are inadequate and the type of mob violence is predictable.

3. Acts of Insurgencies

Another important class of cases arises when insurgencies gain control over a portion of a state’s territory and commit wrongs on that territory. ILC Article 10 provides:

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.

The insurgency itself can be held responsible for acts that occur on the territory it controls, as though it were a state, even if it is not recognized as one. The legitimate state is not responsible for the acts of the insurgency unless the insurgency eventually obtains control of the state.⁶⁷

⁶⁵ See O’Connell, *supra* note __, at 968-69.

⁶⁶ See O’Connell, *supra* note __, at 969.

⁶⁷ A state can be held responsible for harm caused by insurgents if the state negligently failed to suppress this insurgency, but because states have ample reasons to suppress insurgencies, this claim is

What might be the explanation for this rule? There are two possible cases: the insurgency wins (or obtains permanent control over a region) or the insurgency loses. If the insurgency loses, there is no point in holding the government liable for the insurgency's torts against aliens. The government could not have prevented the insurgency from committing those torts because the government had no control over it. This is why foreign states will demand redress directly from the insurgents (as long as they exist), not from the government. If the insurgency wins, and starts a new government, holding the state liable for acts of the insurgency creates, *ex ante*, an incentive for the insurgency to harm aliens less than it might otherwise. If the insurgents know that foreign governments will demand a remedy from the state after the insurgents prevail, then the insurgents have some incentive not to harm aliens during the course of the conflict.

Another set of issues arises when the insurgency ends with a negotiated settlement, giving the former insurgents some control over the new government. The rule seems to be that the state is responsible for the acts of the former insurgents if they have high positions in the new government—for example, if their party is part of the coalition in a parliamentary system—or if they have positions in the new government that enable them to prevent their former victims from obtaining redress.⁶⁸ This rule follows straightforwardly from our argument above. Individual insurgents may be deterred on the margin from harming aliens if they know that insurgents who harm aliens are likely to be excluded from any future government after a settlement. To appease foreign states, the new government has a strong incentive to exclude such insurgents, and the new government will be supported by former insurgents who have not committed any international crimes, are permitted to join the new government, and will want to ensure that the new government is not liable to foreign states.

This line of thinking suggests that state responsibility will be appropriate when particular members of the insurgency join the government, and therefore will feel the sting of a sanction if the state is held responsible for acts committed by the insurgency.

rarely successful. See Michael Akehurst, *State Responsibility for the Wrongful Acts of Rebels – An Aspect of the Southern Rhodesian Problem*, 43 *Brit. Y.B. Int'l L.* 49, 53-54 (1969).

⁶⁸ Akehurst, *supra*, at 60 (discussing the McCord case, 6 *Moore's Digest*, *supra* note __, at 985-90, and the Baldwin case (*U.S. v. Mex.*), 4 *Moore's International Arbitrations*, *supra* note __, at 2859).

The threshold for state responsibility should relate to the degree of authority that the former insurgents have in the new government. The greater their role, the more appropriate it is to make the state liable for the acts of the insurgency.

An unusual problem arose in a case where the insurgents had official positions in the legitimate government before it was toppled. When an insurgency in Southern Rhodesia declared independence from Britain, the top officials of the colonial government of Rhodesia—including the premier and the legislators—were dismissed, but most other officials, including many with significant executive powers, were retained, even though they sided with the rebels. One question, then, was whether the wrongful acts of these rebellious officials, which occurred prior to independence, were the responsibility of Britain.

As Akehurst points out, the traditional test at that time did not answer the question. The traditional test provided for state responsibility on account of the acts of officials and of private persons controlled by the state, but the test did not govern the acts of officials who are not controlled by the government because they have sided with the rebellion. Akehurst, in our opinion, correctly concludes that control is the key issue.⁶⁹ He bases his conclusion on “fairness,” but we think the better explanation is that vicarious liability serves no purpose when the government cannot control the person in question. What makes this case complicated is that the government could have (presumably) limited the power of the rebellious officials to cause harm by stripping them of their powers, but if it had done so, it would also have lost the means to maintain the ordinary functions of the state, including security. In this sense, one might argue that Britain lacked meaningful control over these officials—the cost of controlling them was simply too high.

4. Acts of Other States

A state can be responsible for the actions of another state. ILC Article 6 provides:

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting

⁶⁹ Akehurst, *supra*, at 62-63.

in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

This article is related to Article 16, which recognizes state responsibility for states that aid or assist other states in the commission of an internationally wrongful act, and Article 17, which recognizes state responsibility for states that direct or control another state in the commission of such an act.⁷⁰ Article 18 recognizes state responsibility for states that coerce other states to commit wrongful acts.⁷¹

These rules make good sense in light of our earlier theoretical discussion. Just as a state may exercise control over its own agents, so too may it direct the behavior of agents of another state. To the degree that the remedy against the latter group of actors is inadequate, the imposition of responsibility on the controlling state is useful to discourage the harmful acts in question. And where two states conspire with each other to commit wrongful acts, the imposition of state responsibility on each of them is justified by the general rationale for imposing joint and several liability on joint tortfeasors.⁷² The rationale is that where multiple agents commit a tort, and one of them turns out to be judgment-proof, joint and several liability (or liability for conspiracy) ensures that the other agent bears the cost of the harmful behavior. That gives the latter agent an incentive, *ex ante*, not to conspire with other agents who may be judgment-proof, or to exert greater control over their behavior where they are.

As an illustration, consider the Corfu Channel case, decided by the International Court of Justice in 1949.⁷³ The Corfu channel passes between Greece and Albania and connects two parts of the high seas. Under international law, the vessels of foreign states have the right to pass through such a channel. In 1946, two British ships traveling through the Corfu Channel struck mines in Albania's territorial waters. The British could not prove that Albania had laid the mines—indeed, Albania did not seem to have the naval capacity to do so. But the evidence strongly suggested that whoever laid the mines (perhaps Yugoslavia) did so with the acquiescence of Albania, which could easily have

⁷⁰ Article 17 was written mainly with colonial relations in mind. See ILC Commentary, *supra* note ____.

⁷¹ See also Restatement (Third) of Foreign Relations, §207.

⁷² See William M. Landes & Richard A. Posner, *The Economic Structure of Tort Law* 190-227 (1987).

⁷³ Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 22 (Apr. 9).

observed mine laying and yet did not warn Britain or any other country of the mines' existence. The ICJ held that Albania was legally responsible for the damage to the British ships. State responsibility then attached because Albanian authorities failed to notify the British of the danger created by the mines. From an *ex ante* perspective, imposing liability on Albania would give Albania an incentive to prevent Yugoslavia from laying the mines in the first place or at least to warn others of the mines, where Yugoslavia might otherwise be undeterrable because of detection and enforcement problems.⁷⁴

B. Remedies

1. General Principles

States that are victims of internationally wrongful acts are entitled to remedies. Article 31 provides:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 34 provides:

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter. Some scholars argue that restitution is the theoretical ideal; others point out that compensation is the norm.⁷⁵

Restitution occurs when the perpetrator state returns what it took, and in doing so makes the victim state whole.⁷⁶ Article 35 provides:

⁷⁴ See also *Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240, ¶¶ 47-48 (June 26). The ICJ permitted Nauru to bring a claim against Australia even though Australia acted in concert with New Zealand and Britain, and the latter two nations did not consent to jurisdiction. The ICJ reserved the question whether it would apply the principle of joint and several liability.

⁷⁵ We should point out that pecuniary remedies have generally been awarded to states on behalf of injured nationals; only in rare and mostly ambiguous cases have states obtained pecuniary remedies on account of an injury to the state itself. See Christine D. Gray, *Judicial Remedies in International Law* 107-08 (1987).

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- (a) Is not materially impossible;
- (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

For example, Spain was required to provide new premises for the British consulate after having been found responsible for the destruction of the old premises.⁷⁷ In many cases, property wrongfully taken is returned, or individuals wrongly detained are released.⁷⁸ However, we might better think of this as a sort of in-kind compensation, somewhat analogous to specific performance. Restitution in private law and in public law as well differs from compensation as it requires the wrongdoer to disgorge the “profits” or benefits that it obtains as a result of its action. Restitution of this type is very rarely awarded in international law, and thus cannot be considered the standard remedy in international law.⁷⁹

2. Compensatory Damages

The normal award is compensation. Article 36 provides:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Compensation does not refer to out-of-pocket costs, or what are often called reliance damages in American law. They are equivalent to expectation damages. If a treaty is breached, then compensation should put the victim in the position it would have been in

⁷⁶ Sometimes restitution is defined in a manner more akin to the expectation principle – to put the victim in the position in which it would have been if the wrong had not occurred. See ILC Commentary, *supra* note __, at 238.

⁷⁷ See Gray, *supra*, at 14, discussing Spanish Zone of Morocco (U.K. v. Spain), 2 R.I.A.A. 615, 722 (1923).

⁷⁸ See ILC Commentary, *supra* note __, at 240.

⁷⁹ *Id.* at 14-16.

if the breach had not occurred. As Article 36(2) notes, this includes profits that individuals or corporations have lost as a result of a breach.

Compensation is the theoretically correct measure of damages. It ensures that the perpetrator state internalizes the costs of its actions. Restitution, by contrast, either requires the wrongdoer to undercompensate (if the benefit is small) or overcompensate (if the benefit is large) the victim. Neither result would be desirable. If the wrongdoer may undercompensate the victim, it is not adequately deterred from imposing harms on others. If the wrongdoer must overcompensate the victim, then the wrongdoer will not engage in actions that increase aggregate welfare—actions that benefit the wrongdoer more than they harm the victim. Thus, international law’s preference for compensation over restitution seems correct.

One interesting question is whether the international law of remedies should make a distinction between the harm to people caused by a violation of international and the harm to a state. Consider, for example, the M/V “Saiga” (No. 2) case,⁸⁰ in which the International Tribunal for the Law of the Sea found that Guinea had violated the law of the sea by detaining a vessel registered with Saint Vincent and the Grenadines. In determining damages under general international law principles, the Tribunal took into account damage to the vessel itself, the detention of the crew, medical costs, and lost profits, but refused to award compensation for violation of the legal rights of Saint Vincent and the Grenadines, concluding instead that the declaration that these rights were violated is adequate “satisfaction.”⁸¹ The Tribunal also refused to award Saint Vincent and the Grenadines lost registration fees. Presumably, Saint Vincent and the Grenadines believed that vessels would be less likely to register with it after the Guinea attack because the flag did not protect the Saiga from aggression.

Why shouldn’t Saint Vincent and the Grenadines receive compensation for the injury to its “interest” apart from the harm to the owners of the Saiga, or for the loss to its honor or dignity? The answer is that the state’s interest is just an abstraction; it is not something that can be injured independently of people or property.

⁸⁰ The M.V. “Saiga” (No. 2) Case (St. Vincent v. Guinea) ITLOS Case No. 2, para. 176 (July 1, 1999), 38 I.L.M. 1323 (1999).

⁸¹ *Id.* at para. 176.

The Tribunal did not reach the argument about lost registration fees because Saint Vincent and the Grenadines did not provide any proof that it lost registration fees; nonetheless, it is worth considering. The argument ought to be rejected. If Saint Vincent and the Grenadines wants to protect vessels against predation by other states, it can simply compensate the victims and apply for compensation from the wrongdoing state. If it receives full compensation, it is made whole, and will not lose registration fees because vessel owners know that they will be compensated for any harm.

In determining compensation, one must keep in mind that the baseline entitlement is determined by international law. Thus, if the official of one state illegally injures the official of another state, the loss is the (say) medical costs of the latter official, and the wrongdoing state must compensate the injured state. But what if the citizen of one state injures the citizen of another state, and the wrongdoing state violates international law by failing to provide nondiscriminatory access to its tort or criminal justice system? An ambiguity arises because even if the state had provided nondiscriminatory access to the legal system, the victim may still have been unable to recover damages. Tort systems fail, and even when they do not fail, they often immunize wrongdoers in order to safeguard some other policy such as the policy of settled expectations embodied in statutes of limitation.

Cases go in both directions. The tribunal in the *Janes* case, discussed above, held that the murder victim's survivors should be compensated for the indignity, grief, and mistrust that resulted from the failure not to apprehend, not for the death itself—that is, loss of income and the like.⁸² The tribunal defined the loss as the failure to pursue and prosecute the suspect, not the death caused by the crime itself. Mexico cannot prevent crime from occurring, but it can prevent victims and their relatives from the emotional distress that presumably occurs when crimes are not prosecuted in good faith (even if prosecutions would result in acquittal or the suspect is not captured despite good faith efforts). Other tribunals in similar circumstances, however, have awarded compensation for the underlying pecuniary or physical loss.

⁸² See *Janes* (U.S. v. Mex.), 4 R.I.A.A. 82 (1923); *Mecham* (U.S. v. Mex.), 4 R.I.A.A. 440 (1923); discussed in *Gray*, *supra*, at 20-21.

The correct rule is that the wrongdoing state should be held liable for the underlying loss if nondiscriminatory prosecution of the offense or tort access would have likely led to conviction or an award; otherwise, the victim should recover only for the grief and indignity that results from being denied access to the law. From an ex ante perspective, this rule would deter states from denying justice when justice is feasible, and this in turn would give the state an incentive to maintain a justice system that deters harms to aliens in a cost-justified fashion. When even a nondiscriminatory legal system would not have led to conviction or a tort award, state responsibility for the underlying loss would have no deterrence value, and thus serves no social purpose.

3. Punitive Damages

The only economic justification for supracompensatory (or punitive) damages is a detection problem: if an agent can cause an injury with a low probability of detection, it will be underdeterred unless the damages are set at the loss divided by the probability of detection. The detection problem is rarely serious for states; most violations of international law are easy to detect. So we should not expect supracompensatory damages in international law, and indeed they do not exist.⁸³ Heavy reparations against France after the Franco-Prussian War and Germany after World War I and World War II were justified on compensatory grounds.

4. Satisfaction

Victim states are also entitled to satisfaction. Article 37 provides:

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

⁸³ In a handful of cases, there is arguably punitive damages, but these are extremely rare. See Gray, *supra* note __, at 26-27. For the contrary view, see Restatement (Third) of Foreign Relations, § 901, Reporter's Note 5, which, however, cites only one case (*The I'm Alone* (Can. v. U.S.), 3 R.I.A.A. 1616, 1618 (1949)).

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

The usual cases involve offense to the state's "honor" such as insulting its flag or harassing its diplomats; trespassing on the premises of embassies; and violating territorial integrity.⁸⁴ As noted in the discussion of the *Saiga* case, above, there is no reason that states should be compensated for such injuries independently of the actual harm to property or the well being of citizens. Thus, when no such injury occurs, satisfaction ensures that the perpetrator acknowledges the wrongdoing. This is analogous to nominal damages in domestic law, but satisfaction plays a more important role in international law than nominal damages plays in domestic law. In international law, where violation of the law is one method for changing it, apology or other form of satisfaction makes clear that the perpetrator state does not seek to change the law but instead acknowledges that existing law remains in force.

5. Apportionment

Another pair of rules concerns apportionment of liability. Article 39 provides:

In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

Article 47 provides:

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(a) Does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(b) Is without prejudice to any right of recourse against the other responsible.

The notion that an injured state can recover from jointly wrongful states is familiar from domestic tort law, which similarly provides for joint and several liability plus a right of contribution to ensure that no defendant pays more than its share. Although sometimes

⁸⁴ See ILC Commentary, *supra* note ___, at 264-65.

criticized in the literature,⁸⁵ these rules straightforwardly ensure that wrongdoers do not pay more than the harm that they cause, which would result in overdeterrence. At present, these rules must be described as conjectural; we are aware of no examples where they were implemented.⁸⁶

6. Countermeasures

Lastly, we turn to countermeasures. Article 49 provides:

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 51 provides:

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

The domestic analogy is self-help, and the articles track domestic law. Contract law conditions a party's performance on performance of the other party. For example, if a seller violates its contractual obligation to deliver goods, the buyer is not required to pay the price and then sue for damages; instead, the buyer may withhold the price and sue for any additional loss. The simple explanation is that the structure of the transaction may give the victim leverage over the wrongdoer, so that a legal remedy is not necessary. In the international setting, formal legal remedies are rare, and so self-help is routine, and recognized as such in international law.

Article 51 reflects the domestic rule that a person engaged in self-help cannot be overcompensated. For example, a bank which is owed \$100 by a defaulting debtor may

⁸⁵ Landes & Posner, *supra* note __, at 219-22.

⁸⁶ There are a few examples in treaties; e.g., Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389. 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).

take \$100 from that debtor's bank account, but not some larger amount. The domestic rules, and their international counterparts, correctly enable parties to use self-help when doing so is cheaper than resorting to the law, while preventing them from using self-help remedies that would result in overcompensation.

International self-help is much more common and widely accepted than self-help in domestic legal systems. A powerful state like the U.S. can enforce its rights by freezing the assets of foreign states that are in American control, and the U.S. does so regardless of whether there is a connection between the assets and the wrongdoing.⁸⁷ By contrast, a bank could not freeze the account of a customer who committed a tort against the bank by assaulting an employee. The explanation for this difference is that because international law enforcement is weak, states tolerate self-help remedies despite the many drawbacks, including the opportunistic use of self-help remedies to seize value or obtain bargaining leverage. Because domestic law enforcement is generally adequate, self-help remedies are tolerated only in limited circumstances, where the danger of prejudice is minimal.

C. Serious Breaches

The International Law Commission's 1996 draft articles on state responsibility provided for criminal liability of states. Article 19 provided that a wrongful act is a crime if the international obligation that is violated is "so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime."⁸⁸ International obligations that rise to this level include the prohibitions on aggression and genocide.⁸⁹ However, the United States and many other states denied that such international crimes existed and opposed the language in the draft.⁹⁰

The most recent ILC draft articles on state responsibility avoid the reference to criminal responsibility but do continue to advance the idea of heightened levels of liability:

⁸⁷ For example, in response to the Tehran hostages incident.

⁸⁸ ILC 1996 draft, art. 19(2).

⁸⁹ ILC 1996 draft, art. 19(3).

⁹⁰ See Damrosch et al., *supra* note ___, at 698.

Article 40: Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation.

Article 41: Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.⁹¹

These two articles provide that a heightened level of international responsibility occurs when a state commits a *serious* breach of a *peremptory* or *jus cogens* norm. A peremptory norm is a norm that binds states regardless of consent; the norms against aggression and genocide are often cited as examples. Unlike the case of a regular violation of international law, where only the victim state may invoke the responsibility of the perpetrator, all states have an obligation to take action against the perpetrator.

The ILC's approach does not have much support in state practice. The UN Charter arguably obliges states to respond collectively to breaches of the peace, and it authorizes the Security Council to order such a response, but states have not acted as if they felt themselves obliged to respond to breaches of the peace, and the Security Council has never ordered them to.⁹² The Genocide Convention and some other human rights treaties appear to oblige states to take steps to prevent genocide and other serious abuses of human rights, but again there is little evidence that states take these obligations seriously. From time to time, states collectively respond to aggression and other violations of international law, but these collective efforts do not appear to be based on a sense of legal obligation. A few other cases discussed in the literature—such as an unsuccessful effort

⁹¹ ILC, arts. 40-41.

⁹² See Michael Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (2001).

by two African countries to enforce the Namibia mandate in the International Court of Justice⁹³—provide little evidence to the contrary.⁹⁴

The evidence is weak; what about the theory? A starting point is the observation that in domestic law, compensatory remedies are not considered appropriate for a range of activities. One is where bargaining is available: thus, a thief cannot escape liability by showing that she values the stolen goods more than the owner does. The reason is most likely that the opposite rule would cause owners to invest in excessive precautions against theft, and the existing rule forces the thief to prove that she values the goods more in the most effective way—by purchasing them. Another type of activity for which compensatory remedies are considered inadequate is the clearly socially harmful activity, where the wrongdoer's claim that she benefited more than the victim lost is not accepted—for example, murder.

However, the ILC does not adopt the approach that would seem to follow from these observations, namely, that the state that commits genocide should pay punitive damages. Instead, it requires other states to intervene. But there is no reason to believe it better for third party states to intervene in the case of “serious” breaches than for ordinary breaches. Ideally, states would intervene in all cases. If they will not because of free riding or similar cooperation problems, then there is no reason to think that third party states—which are not injured by the conduct in question—will intervene only in serious cases. If they will, then the rule should be punitive damages.

One thought is that the rules are supposed to deal with the special case where the injured state is weak and the wrongdoer is powerful, so there is no realistic opportunity for self-help. But this is a pervasive problem, not one that arises only or mainly in cases of serious breach.

In sum, we do not see any theoretical explanation for making a distinction between serious (or criminal) and normal (or civil) breaches of international law by

⁹³ South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319 (Dec. 21); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (S. Afr. v. Namib.), 1971 I.C.J. 16 (June 21); South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.) (Second Phase) 1966 I.C.J. 6 (July 18).

⁹⁴ See Jonathan I. Charney, Third State Remedies in International Law, 10 Mich. J. Int'l L. 57 (1989).

states, nor any evidence that such a distinction is recognized in state practice. Breaches by individuals provide different issues, and we turn to them in the next section.

D. Individual Criminal Responsibility

As noted above, individuals are generally not liable for violating international law; states are. For example, an individual who commits a tort against an alien is not subject to international liability; the tortfeasor is subject to domestic civil liability, and international law comes into play only if the state in question fails to provide effective tort law that does not discriminate against aliens.

In certain circumstances, however, individuals may be liable for violating international law. Most important, individual criminal liability attaches when an individual commits an international crime.⁹⁵ The historical paradigm is the crime of piracy. We will discuss why piracy was an international crime, and then discuss more modern crimes.

During the formative era of modern international law, no state had exclusive jurisdiction over the high seas. If a conflict arose—for example, if a crime occurred on a vessel—the state whose flag was flown by the vessel would have jurisdiction. If vessels flying different flags collided, the states whose flags were flown would have concurrent jurisdiction.⁹⁶ Thus, domestic law, including admiralty law, would be brought to bear on the conflict. If sailors aboard a British ship observed a crime occurring on a French ship, the British would have no jurisdiction over the crime, and thus no right to board, make arrests, hold trials, and so forth, even if British subjects were perpetrators or victims.

These rules did not apply in the case of piracy. Pirates did not have the protection of the flags that they flew. If the French ship in question was a pirate ship, the British could—without violating international law—board the French vessel, arrest the pirates, and try and punish them, regardless of whether any British subjects were involved. The pirate is “treated as an outlaw, as the enemy of all mankind ... whom any nation may in

⁹⁵ Civil liability is unusual.

⁹⁶ See Restatement (Third) of Foreign Relations, § 502; *The S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). Other states may also have overlapping jurisdiction; for example, if the collision occurs in the territorial waters of a third state, the latter may have jurisdiction.

the interest of all capture and punish.”⁹⁷ Piracy—defined roughly as “robbery on the high seas”—was the single international crime.⁹⁸

Why was piracy an international crime? The answer is that no state could control what happened on the high seas. All states asserted jurisdiction over criminal activity on their own territory and yielded jurisdiction over criminal activity on foreign territory, even when their own citizens were involved. So long as procedural protections were in place (and, today, they are governed by various treaties), this system made good sense. American authorities had more control over activities on American soil, and German authorities had more control on German soil.

But because no nation has effective control over acts by pirates on the high seas, there would be little point to making states responsible for acts of piracy committed by their citizens or subjects. Because of their minimal control over the high seas, states cannot effectively deter their own citizens from engaging in piracy, at least not alone. Further, the flag on a pirate vessel is unlikely to be a reliable indicator of the pirates’ citizenship in any event. If states were liable for acts of piracy by their putative citizens, therefore, little effective policing of the piracy problem would result. Instead, international law encourages states to fight piracy by giving all states the right to interdict and punish pirates, regardless of their nationality and the flag of their ship.

Two further observations about this argument are necessary. First, the fact that states could agree that piracy was undesirable—and could agree on the substantive elements of piracy—was a necessary but not a sufficient condition for making piracy an international crime. States agree that murder is undesirable, but there is no international crime against murder. What distinguishes piracy and murder is that states can enforce laws against murder on their territory; they cannot as easily enforce laws against piracy.

Second, recognition of an international crime carries with it costs as well as benefits. A court will not necessarily extend standard criminal law procedural protections to foreign citizens. If British territorial courts are biased against French people, then the French can protect themselves by exiting British territory. But if British sailors decide that a French citizen they capture on the high seas is a pirate, the French cannot protect

⁹⁷ Lotus, *supra*, at 70.

⁹⁸ O’Connell, *supra* note ___, at 657.

themselves without yielding the high seas to the British. Normally, states insist that their citizens receive the benefit of domestic norms, traditions, and institutions—that is why states, not individuals, are generally responsible for violating international law. But insistence on this principle would be inconsistent with effective prosecution of pirates because pirates operated outside local control. Thus, states compromised and consented to universal jurisdiction.

Today, there are some other international crimes, including war crimes and genocide. Like pirates, war criminals can be tried and punished by foreign states even if they commit their crimes outside the states' territory (such as on the battlefield in the war criminal's home state). The first condition for recognizing international crimes is clearly satisfied for both war crimes and genocide. War crimes are embodied in treaty instruments that reflect the consent of virtually every state;⁹⁹ genocide is recognized as an international crime in the genocide convention.¹⁰⁰ States agree that their soldiers should not be permitted to attack hospitals (for example), and that genocide is an evil.¹⁰¹

The applicability of the second condition is a more complicated question. One could imagine a system under which states agree that a soldier accused of war crimes would be subject to the jurisdiction of a national court only, and not to the jurisdiction of the enemy's courts or an international court. Armies would have an obligation to try and punish their own soldiers for war crimes; if a suspected war criminal is captured by the enemy, the enemy could hold him for the duration of hostilities, and then return him to his home state for trial after hostilities end. The enemy could not try and punish the foreign soldiers using its own courts.

The problem with this system is that frequently the foreign army that captures an enemy soldier will have the best evidence that the soldier committed a war crime, and

⁹⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

¹⁰⁰ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 10, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

¹⁰¹ On the function of war crimes from an economic perspective, see Eric A. Posner, A Theory of the Laws of War, 70 U. Chi. L. Rev. 297 (2003); Eric A. Posner, Terrorism and the Laws of War, 5 Chi. J. Int'l L. 423 (2005).

that punishment deferred will most likely be no punishment at all. Thus, under such a system it is unlikely that war criminals would ever be punished. The current system, however, has the problem of bias: what prevents a state from executing POWs on the pretext that they are war criminals when they are not really? The answer may have to do with the effectiveness of reciprocity in the war setting. If one state executes POWs for pretextual reasons, then the other state can retaliate by executing the POWs it holds. By contrast, under the hypothetical system, if one state fails to prosecute its own soldiers for war crimes after the war is ended, it may be that a similar failure by the other state not to prosecute *its* own soldiers for war crimes would not have a deterrent effect. The likely reason that universal jurisdiction for war crimes is recognized is thus that states very rarely prosecute their own soldiers for war crimes—perhaps, it is politically difficult, or undermines morale—so if war crimes are to be punished and deterred, this will happen only if states are permitted to prosecute enemy soldiers.

Universal jurisdiction for genocide and other serious crimes against humanity may follow a similar logic. Again, we might ask why states would agree to universal jurisdiction for genocide and mass murder when they do not allow universal jurisdiction for ordinary murder. The answer may be that in any country in which genocide occurs, it most likely occurs with the complicity of the government or powerful interests, and therefore it is quite unlikely that the perpetrators will be prosecuted in domestic courts.¹⁰² States agree that foreign courts have jurisdiction because this enhances the probability of punishment (at a minimum, the perpetrators will be afraid to travel), while the problem of bias may again seem worth tolerating because of the seriousness of the crimes in question.

The Nuremberg defendants were tried for ordinary war crimes, crimes against humanity, and aggressive war. Of these, the war crimes charges were least controversial; war crimes were already recognized as such and had been prosecuted in the past. Crimes against humanity—which encompassed crimes against one's own citizens (unlike war crimes) and crimes committed during peacetime (unlike war crimes, again)—and the crime of aggression were innovations. Crimes against humanity were later recognized in

¹⁰² This is not always true; the Rwandan government has prosecuted thousands of genocide perpetrators, but only because the earlier government complicit in genocide was overthrown. Even the current government, which is run by victims of the genocide, is tiring of prosecution.

treaty instruments, and have provided the basis for subsequent trials, including those stemming from the atrocities in the former Yugoslavia and Rwanda. The crime of aggression appears to have been stillborn; there have been no subsequent prosecutions for commission of this crime.¹⁰³ Why might states agree that enemy soldiers and leaders can be held guilty for (say) bombing hospitals or killing POWs, or massacring their own co-nationals, but not that leaders can be held guilty for launching an aggressive war?

The most likely reason is that states can agree on what the war crimes are, and to a lesser extent what crimes against humanity are, but they cannot agree about what a crime of aggression is. So although the problem of judgment proofness is the same in all three cases, only in the first two cases can the states agree on the underlying substantive rules.

Instead of individual criminal responsibility for aggression, international law makes states responsible for illegal wars under the United Nations convention. Perhaps the bottom line is that if world opinion, and the threat of state-to-state retaliation, is insufficient to deter states from engaging in improper warfare (however that is defined), the marginal deterrence benefit from holding leaders criminally responsible for aggressive war is likely to be extremely low, while the risk of bias—when leaders and former leaders travel to foreign country and become subject to their courts—is high and likely to interfere with normal diplomatic relations.

Of special importance, a person cannot avoid criminal liability by showing that he acted in official capacity. Under the doctrine of command responsibility, a commander may be responsible for failing to prevent soldiers under his command from committing international crimes. Further, soldiers and other agents may not avoid liability by pleading superior orders unless they can show that were legally obliged to obey the orders, they did not know that the orders were unlawful, and the orders were not manifestly unlawful.¹⁰⁴

¹⁰³ The Rome Statute for the international criminal court grants the court jurisdiction over aggressive war but defers the definition of this crime for future negotiations. In any event, the U.S. and other countries with major military operations did not ratify the Rome Statute.

¹⁰⁴ Rome Statute of the International Criminal Court, arts. 29, 31, 33, July 17, 1998, 2187 U.N.T.S. 90. We rely on the Rome Statute because of its recent vintage; it does not, of course, bind nonsignatories. Most of international criminal law is customary international law, deriving from sources such as the Nuremberg Charter, treaties such as the Genocide Convention, and the jurisprudence of various tribunals.

Command responsibility is a species of vicarious liability: the commander is held responsible for the crimes of subordinates. The ordinary rationale for this rule is that the commander has a great deal of control over subordinates, who will usually follow orders; by holding the commander responsible for the crimes of soldiers, the law gives the commander an incentive not to order soldiers to commit war crimes. More difficult questions arise when the subordinates did not follow orders but engaged in criminal behavior that the commander knew of or should have known. Consider the important case of General Yamashita of the Japanese Army, who had responsibility for defending the Philippines against American invasion near the end of World War II. During this invasion, Japanese troops committed atrocities on a large scale against American soldiers and Philippine citizens. Yamashita claimed that he did not know about these atrocities because of a breakdown in Japanese communications caused by war conditions, but a military commission found that “the crimes were so extensive and widespread, both as to time and area, that they must have been willfully permitted by the Accused, or secretly ordered by the Accused.”¹⁰⁵ Yamashita was found guilty and executed because he failed to exercise “effective control” over his troops.¹⁰⁶

Command responsibility has recently been extended to civilian officials. Jean-Paul Akayesu was the mayor of Taba, Rwanda, during the massacres that occurred in 1994.¹⁰⁷ The evidence showed that, as mayor, he was responsible for enforcing order in the town, and had authority over the police; that he did not try to stop the massacres; that he ordered the police to kill Tutsi; that he was present during acts of violence; and that he encouraged violence against Tutsi. If all of this was true, then Akayesu was correctly found guilty of genocide and related crimes.¹⁰⁸

Commanders are held responsible for the crimes of soldiers if the commanders ordered the soldiers to commit crimes or, as in the Yamashita and Akayesu cases, the crimes of subordinates occurred on a large scale. They are not responsible for isolated

¹⁰⁵ Leon Friedman, *The Law of War: A Documentary History 1596* (1972) (quoting Yamashita Commission).

¹⁰⁶ *Id.* For a discussion of command responsibility in the Yamashita case and subsequent cases, see Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 *Mil. L. Rev.* 155 (2000).

¹⁰⁷ Genocide Convention, art. 2, *supra* note __.

¹⁰⁸ *Prosecutor v. Akayesu*, Case No. ICTR-96-4 (Tribunal, 1998; Appeal, 2001).

murders. The reason is surely that commanders can, at low cost, prevent soldiers from committing crimes by not ordering them to, or ordering them not to; but small scale crime is hard to detect. But by the same token, one might wonder whether Japanese soldiers would have obeyed if General Yamashita had ordered them not to engage in atrocities. In the chaos of the American invasion, one can plausibly argue that they would not have obeyed, and in fact there was nothing General Yamashita could have done to stop the atrocities. If this was the case, then liability was inappropriate.

A related topic concerns the liability of soldiers who commit war crimes pursuant to an order from a superior officer. Prior to World War II, soldiers could often avoid liability for war crimes if they could show that they were following orders. Nuremberg rejected this defense and now it is settled that soldiers who obey patently illegal orders can be convicted. The question arises, why the qualification for “patently” illegal orders? Why not hold soldiers liable for all war crimes, just as an employee will be held liable for committing domestic crimes, and the fact that the employer ordered him to commit the crimes would be no defense? The answer is probably that states do not want to go give soldiers an excuse for insubordination. The rule balances the desire to deter soldiers from engaging in war crimes, and the need to maintain discipline on the field. There is no analogous concern in the corporate setting.

E. The Relationship between Individual and State Responsibility

In domestic private law, the employer and the employee are usually jointly liable as a result of a tort committed by the employee; the employee alone is liable if the tort occurred outside the scope of employment. In international law, the pattern is more complex. We observe state responsibility with and without individual liability; and individual liability without state responsibility. This difference should not be overstated. If it is optimal for the agent (employee, citizen) to be liable, liability can be created by contract or statute in the international case. If it is optimal for the agent to be immunized, immunity can be created by contract in the employment (or international) case, except when liability is criminal. Still, the default rules are different. What accounts for this pattern?

State responsibility without individual responsibility. International law usually holds the state liable without making the individual liable because individual liability will usually be determined by domestic needs and capacities. Suppose, for example, that a Mexican soldier injures an American in Mexico. Mexico is liable for the violation of international law. In addition, the American victim can sue the Mexican soldier for civil liability under Mexican or American law. The liability of the soldier, then, depends on local tort law and doctrines of official immunity. This leaves the nations the option to immunize officials or not, as they choose—a decision that reflects a tradeoff between providing officials an incentive to comply with international law and insuring them against risks of legal liability. If the soldier has assets in the U.S., he could be subject to American law, but (simplifying greatly) American law is likely to duplicate the outcome under Mexican law. The U.S. has no reason to compel the soldier to pay the victim if Mexico offers compensation.

Individual responsibility without state responsibility. No one seems to think that Rwanda is responsible for the international crimes committed by individual Rwandans, even those committed by officials. Holding Rwanda responsible for these crimes would mean that the state would be required to pay compensation to other states, which would not make much sense. This would both impoverish the Rwandan genocide victims who now control the state and enrich uninvolved nations who did not directly suffer from the genocide. When state officials and citizens commit international crimes against other citizens, there is no reason to hold the state responsible for the crimes. Individual responsibility is justified as the sole possible deterrent when domestic law is inadequate.

Individual responsibility with state responsibility. In other cases, state officials commit international crimes against citizens of foreign states. Nazi officials committed crimes against foreigners in pursuit of German policy aims; the officials were individually responsible. Germany was also widely regarded as responsible, and it paid reparations to victims and their families. One possible explanation for joint liability is that, typically, the state will not have enough resources to compensate victims; ex ante, it effectively anticipates that it will be partially judgment proof if its policies fail and it is defeated. Thus, it is not fully deterred. Criminal liability for individuals adds additional deterrent effect by making the policymakers and policy implementers fearful of being

jailed if their state is defeated. Put differently, policies that lead to international crimes are assumed to have negative social value; therefore, the sanction should be arbitrarily high, and it can be enhanced if it is imposed both against state (and thus all citizens) and against the culpable individuals. By contrast, policies that lead to ordinary tort-like violations, such as the policy of maintaining a police force (whose members may deliberately injure aliens), are assumed to have positive social value; therefore, the sanction should be limited to the harm caused. State responsibility is adequate for this purpose.

The principle of complementarity in the Rome statute. In yet another variation, the Rome statute provides that an individual can be tried for committing an international crime by the International Criminal Court only if the legal system of the national's state does not provide adequate legal process.¹⁰⁹ If a state does not provide adequate legal process and nonetheless does not turn over a defendant to the ICC,¹¹⁰ it would violate the Rome statute, and presumably the defendant would remain liable under international law. This system encourages states to prosecute international crimes while permitting them some leeway so as to take account of local institutional and procedural variations.

Conclusion

The international law of state responsibility resembles the domestic law of vicarious liability because the two bodies of law serve similar functions. They provide third parties who have the ability to monitor individuals incentives to discourage those individuals from causing harm. When such monitoring is excessively difficult or not necessary, the law does not penalize the third parties for harms caused by the wrongdoers in question. In the case of domestic law, victims can recover damages only if the wrongdoer has assets; in extreme cases, criminal penalties are inflicted. In the case of international law, international criminal law provides a supplement when domestic remedies fail.

¹⁰⁹ Rome Statute, supra note ____.

¹¹⁰ Already, we have an example in Sudan, although this arose from a security council referral. See supra note ____.

This description of international law is an interpretation of its broad contours. Tribunals and drafters of treaty instruments do not always follow our prescriptions, and thus our analysis is mainly normative in orientation.

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