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Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law

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Abstract

According to the agency paradigm enshrined by the 2001 ILC Articles on State Responsibility, private conducts are attributed to a state when they are carried out on the state's behalf or under its tight control. On closer look, this legal framework proves to be unable to deal with state involvement in human-rights violations perpetrated by powerful non-state actors, such as terrorist groups or transnational corporations. These wrongs, indeed, are often put in place with the fundamental contribution of – but not on behalf of (or under the control of) – a state, with the consequence that, under the traditional paradigm, they could not be attributed to the latter. Against this backdrop, the present paper argues that a new secondary norm has been developing that provides that private wrongs are to be imputed to a state if the latter knowingly facilitated (or otherwise co-operated in) their commission. Although international practice will be duly taken into account, the analysis will be focused mainly on US case law concerning corporate liability for international human-rights violations.

Key words

Alien Tort Statute; attribution; complicity; human rights; ILC Articles on State Responsibility

1. Introduction

As a matter of principle, states are internationally responsible only for the acts of their organs, while they cannot be called upon to answer for private misconducts.[1] Under certain circumstances, however, private wrongs may be attributed to states, thereby triggering the latter's international responsibility. It is well known that 'secondary' norms on attribution of conducts have been codified by the International Law Commission (ILC) in Part One, Chapter II of the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts ('the Articles').[2] The criteria envisaged by the ILC do not need to be enumerated: with an acceptable degree of approximation,

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1 As noted, this principle has been unquestioned 'from Grotius to Ago', A. Christenson, 'The Doctrine of Attribution in State Responsibility', in R. B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983), 321, at 327.

2 The Articles are published in YILC, 2001, Vol. II (Part Two).

it can be said that private conducts are regarded as acts of state when they are carried out on the state's behalf or under its tight control (the so-called 'agency paradigm').[3]

At a closer look, this legal framework appears unable to deal with state involvement in human-rights (or environmental) abuses perpetrated by powerful non-state actors, such as terrorist groups or transnational corporations (TNCs). Such wrongs, indeed, are often put in place with the fundamental contribution of – though not on behalf of (or under the control of) – a state, with the consequence that they cannot be attributed to the latter.

Against this backdrop, the present paper argues that there has been developing a new secondary norm, according to which private wrongs are to be imputed to a state if the latter knowingly facilitated (or otherwise co-operated in) their commission. In other words, it is here contended that, besides the traditional criteria enshrined in the Articles, another criterion of attribution *of conduct* has been forming: complicity.[4] Since, as we will see, such an emerging rule has been applied only in some fields of international law (human-rights and environment protection, fight against terrorism), it should prevail over the Articles as *lex specialis* in accordance with Draft Article 55.[5]

Of course, state complicity in private wrongs can be (and has actually been) conceptualized in other ways. First, it can be reframed as an infringement of the so-called 'due-diligence' rule. Second, it may be contended that state complicity is forbidden by an autonomous primary norm. Third, complicity in private facts can be read as a criterion of attribution *of responsibility*, in the same way as Draft Article 16 does with reference to inter-state complicity.[6] It is my stance, however, that such approaches are legally flawed and/or normatively undesirable. Furthermore, I contend that they do not match the recent practice on the issue.

In my analysis, although I will also linger on international practice, particular attention will be paid to the US case law concerning corporate liability for international human-rights violations. For reasons that I will explain more clearly below, US courts have, in fact, been called upon to rule on the attribution to states of international wrongs perpetrated by TNCs, and have fulfilled this task by resorting to criteria that clearly recall the notion of complicity.

The choice to focus on this case law is due to several reasons. First, until now, authors dealing with issues of complicity have mainly considered international practice, while overlooking the fundamental role that can be played in this regard

3 T. Becker, *Terrorism and the State* (2006), 43ff. For an overview of the Articles, see J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), 91ff. For an analysis of issues of attribution prior to the adoption of the Articles, see L. Condorelli, 'L'imputation à l'état d'un fait internationalement illicite: Solutions classiques et nouvelles tendences', (1984/VI) 189 RCADI 9.

4 Indeed, such a view has already been propounded by other authors. Hitherto, the most comprehensive (and groundbreaking) analysis of the issue has been by E. Savarese, 'Issues of Attribution to States of Private Facts: Between the Concept of *De Facto* Organs and Complicity', (2006) 15 ItYIL 111. For further bibliographical references, see subsection 2.2, *infra*.

5 Draft Art. 55 (*lex specialis*): 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.'

6 On the distinction between attribution *of responsibility* and attribution *of conduct*, see notes 16–18, *infra* and accompanying text.

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by the domestic case law. Second, the same scholarship has mainly taken into account practice concerning state involvement in paramilitary and terrorist activities and not that concerning TNCs' abuses. Third, and last, although US jurisprudence on corporate human-rights violations has been studied in great depth, no author has yet assessed its impact on secondary norms on attribution.

On these premises, this paper will be divided into two parts. In the first part (section 2), I will develop some general remarks on the issue. In particular, in subsection 2.2, I will explain why the other possible ways to conceptualize state complicity in private wrongs are unsuitable. In subsection 2.3, I will provide a quick framework of the international practice from which the emergence of complicity as a criterion of attribution of conduct can be inferred. Section 3, on the other hand, will be devoted to US case law. After some introductory observations (subsection 3.1), in subsections 3.2 and 3.3, I will clarify why US courts are called upon to rule on attribution to states of TNCs' misconducts. Subsequently, having described the criteria of attribution applied by American judges (subsection 3.4), I will focus on the so-called 'joint-action' test, which closely resembles the notion of complicity (subsection 3.5). In the conclusion (section 4), I will tackle some possible objections that might be raised against my reasoning.

2. General remarks

2.1. Three (unsuitable) ways to conceptualize state complicity in private facts

As mentioned in the introduction, although I will deem state complicity in private facts as a criterion of attribution of conduct, there are other ways to conceptualize it. In particular, it can be read (i) as a violation of the due-diligence rule, (ii) as a violation of an autonomous primary norm, and (iii) as a criterion of attribution of responsibility. In this paragraph, I will explain why these ways to frame state complicity in private wrongs are unsuitable.

According to the due-diligence rule, a state incurs international responsibility when it fails to take all reasonable measures to prevent or to punish unlawful conducts by non-state actors.[7] While it has developed in the context of the treatment of aliens and foreign diplomats,[8] over the years this principle has conspicuously widened its scope and nowadays finds application in all main branches of international law.[9]

It is, therefore, unsurprising that scholarly works on state responsibility usually deal with this rule after listing the criteria of attribution of conduct envisaged by

7 For a general appraisal of this subject, see R. Pisillo Mazzeschi, *'Due diligence' e responsabilità internazionale degli stati* (1989); R. Pisillo Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', (1993) 35 GYIL 9.

8 See Pisillo Mazzeschi, 'The Due Diligence Rule', *supra* note 7, at 25.

9 See, e.g., E. Klein (ed.), *The Duty to Protect and to Ensure Human Rights: Colloquium, Potsdam, 1–3 July 1999* (2000); R. Pisillo Mazzeschi, 'Forms of International Responsibility for Environmental Harm', in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (1991), 15; R. P. Barnidge, *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (2008).

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the Articles.[10] Yet, it would be a mistake to consider it as a rule of closure, covering every hypothesis of state involvement in private facts left out by the ILC's criteria. In fact, the due-diligence principle turns to be inadequate when the state's behaviour shifts from culpable inaction to more intense forms of co-operation.

On the one hand, indeed, since the due-diligence principle imposes upon states an obligation of conduct,[11] its infringement may only consist of an omissive demeanour. Accordingly, complicit conducts, which are often commissive (e.g., material or financial support), largely fall outside its scope of application.[12] On the other hand, this principle cannot provide an adequate legal answer to cases in which state inaction amounts to connivance with private wrongdoers, namely when the state *repeatedly* and *knowingly* fails to prevent and to punish the unlawful conducts carried out by private entities under its jurisdiction.[13]

In other words, notwithstanding its wide scope of application, the due-diligence rule is unable to govern state complicity in private conducts. To fill this normative gap, two routes can be followed. It may be argued (i) that state complicity in private abuses is forbidden by an autonomous primary norm, or (ii) that state complicity in private wrongs determines the imputation of the latter to the state, in accordance with a secondary norm of attribution.

Both legal reasonings are equally acceptable on a theoretical plane,[14] but they lead to fairly different results in terms of degree of state responsibility. The infringement of a primary norm prohibiting state complicity in private wrongs, in fact, entails a lesser degree of responsibility than that arising when such wrongs are directly carried out by the state.[15] On the contrary, conceptualizing complicity as a criterion of attribution implies that the accomplice state is held responsible in the same way as if it had committed the unlawful act through its own organs.

It goes from the foregoing that the choice between the two options is to be grounded on reasons of legal policy rather than on theoretical arguments. In this connection, it can be argued that the need to guarantee a stronger protection to the

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10 See, e.g., R. Lawson, 'Out of Control: State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century?', in M. Castermans-Holleman, F. van Hoof, and J. Smith (eds.), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations, and Foreign Policy: Essays in Honour of Peter Baehr* (1998), 91, at 105; M. Sassóli, 'State Responsibility for Violations of International Humanitarian Law', (2002) 84 IRRC 401; J. A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', (2004) 36 NYUJILP 265.

11 See Pisillo Mazzeschi, 'The Due Diligence Rule', *supra* note 7, *passim*.

12 Ibid., at 32ff.

13 It is worth stressing that it is not here contended that every state inaction with respect to private wrongs amounts to complicity and legitimates treating the state as the main perpetrator (this argument sometimes appears in the works by feminist legal scholars; see, e.g., C. Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', (1993) 6 HHRJ 87, at 88). I only refer to a *qualified* state inaction, which is characterized, on the objective plane, by the repetition in time of the omissive conducts and, on the subjective one, by the knowledge of helping the private wrongdoer. For a similar view, see Becker, *supra* note 3, *passim*.

14 As has been noted, every primary norm can be legitimately reframed as a secondary norm and vice versa; A. Nollkaemper, 'Attribution of Forcible Acts to States: Connections between the Law on the Use of Force and the Law of State Responsibility', in N. Blokker and N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality: A Need for Change?* (2005), 133, at 148.

15 See, e.g., A. Cassese, 'Terrorism Is Also Disrupting some Crucial Legal Categories of International Law', (2001) 12 EJIL 993, at 999.

fundamental values of the international community (peace, environment, human rights) should lead to hold that, at least when it comes to the infringement of such values, states must be deemed *directly* responsible for private activities that they have knowingly helped to bring about. Indeed, as one author noted with regard to state responsibility for terrorist activities, 'Limiting the State's responsibility to a failure to . . . abstain [from complicit conducts] in cases where its breaches have been essential to the terrorists' success seems to unfairly absolve the State of its full measure of responsibility'.[16]

From a slightly different perspective, it may be added that the 'primary-norm' approach fails to grasp the current reality of the relationships between state and non-state actors. Notably, it overlooks that, nowadays, powerful non-state actors are able to commit the most heinous atrocities, thanks to the support provided by states but without operating under their control. Against this backdrop, it appears overly unjust to consider state complicity in private wrongs as a source of marginal responsibility.[17] This explains why – as we will see in the next paragraph – in recent practice regarding state involvement in terrorism and human-rights abuses, complicity has been regarded more as a criterion of attribution than as an autonomous unlawful act.

Once established that, in some areas of international law, complicity should be conceived as a criterion of attribution, a last clarification is needed. It has to be specified, in fact, whether complicity in private wrongs operates as a criterion of attribution of responsibility or as a criterion of attribution of conduct.

This distinction can be made clear, as follows. The first notion refers to the cases in which a legal subject is held responsible for acts committed by another legal subject and for which also the latter is responsible (so-called *responsabilité derivée*).[18] The second notion, on the other hand, concerns the conditions under which an act of an entity is deemed as the act of a legal subject, regardless of the responsibility (and thus the subjectivity) of such an entity. Although not even mentioned in the *travaux préparatoires*, this distinction is clearly reflected by the structure of the Articles that deal with the two hypotheses in different chapters of Part One. In particular, criteria of attribution of conduct are listed in Chapter II ('Attribution of Conduct to a State'), while criteria of attribution of responsibility are set forth in Chapter IV ('Responsibility of a State in Connection with the Act of Another State').

Some scholars seem to suggest that state complicity in private conducts should operate as a criterion of attribution of responsibility. I refer to those authors that contend that Draft Article 16 ('Aid or Assistance in the Commission of an Internationally Wrongful Act') could be applied by analogy to the relations between state

16 Becker, *supra* note 3, at 258.
17 Ibid.
18 In this regard, see also, for further references, J. D'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents', (2009) 58 ICLQ 427, at 433.

and non-state actors.[19] For the sake of clarity, it is well to recall that, according to this provision:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if *a)* that State does so with knowledge of the circumstances of the internationally wrongful act; and *b)* the act would be internationally wrongful if committed by that State.

On closer inspection, an analogy to Draft Article 16 so as to allow for a state's direct responsibility in cases of assistance to private entities appears to be legally unsound. Indeed, the possibility of widening the scope of such a provision is more asserted than demonstrated. Notably, scholars propounding this view fail to consider, on the one side, that the ILC adopted a strict attitude towards the issue of attribution of private conducts and, on the other side, that Article 16, by its own terms, is expressly limited to co-operation between states.[20]

Furthermore, this approach is likely to lead to unsatisfactory outcomes. As Draft Article 16 makes clear, in fact, in order to hold the accomplice state responsible for the act carried out by the main perpetrator, it is required that the latter (i) is considered an international legal subject, and (ii) is addressed by the same international norm allegedly breached by the accomplice state. Indeed, it cannot be taken for granted that both requirements are always met. It suffices to recall, in this regard, that the international subjectivity of private corporations has been recently questioned in both domestic[21] and international[22] case law. Accordingly, if we frame complicity in private conducts as a criterion of attribution of responsibility, there is a serious risk of making this criterion largely unworkable.

In light of the foregoing, it can be assumed that state complicity in private wrongs threatening the fundamental values of the international community should be conceptualized as a criterion of attribution of conduct. Now, all that remains is to verify whether such a view finds support in international practice.

2.2. Moving towards complicity as a criterion of attribution of private conducts: an overview

By way of premise, it should be stressed that, as a matter of principle, the ILC was not contrary to the inclusion of complicity as a criterion of attribution of private conducts. In his Fourth Report, Special Rapporteur Ago admitted – at least

19 See, with regard to state complicity in corporate abuses, A. Clapham, 'State Responsibility, Corporate Responsibility, and Complicity in Human Rights Violations Responsibility', in L. Bomann-Larsen and O. Wiggen (eds.), *World Business: Managing Harmful Side-Effects of Corporate Activity* (2004), 50, at 66; R. MacCorquodale and P. Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', (2007) 70 MLR 598, at 611. See also, with reference to terrorist activities, R. Wolfrum and C. E. Philips, 'The Status of the Taliban: Their Obligations and Rights under International Law', (2002) 6 MPYUNL 559, at 595.

20 In this sense, see Becker, *supra* note 3, at 225.

21 See note 59, *infra* and accompanying text.

22 ECOWAS Court of Justice, *Socio-Economic Rights & Accountability Project v. Nigeria and Others*, 10 December 2010, No. ECW/CCJ/APP/07/10, para. 69: 'the process of codification of international Law has not yet arrived at a point that allows the claim against corporations to be brought before International Courts. Any attempts to do so have been dismissed on the basis that the Companies are not parties to the treaties that the international courts are empowered to enforce.'

theoretically – that states and non-state actors may be accomplices in the commission of internationally wrongful acts, distinguishing this situation from both the violation of due-diligence obligation and the other criteria of attribution.[23] Although Ago ultimately set aside this criterion, assuming it had never been applied in practice,[24] the concept of complicity has occasionally emerged in the ILC's subsequent debates on the notion of de facto organ.[25] Moreover, even if the ILC eventually adopted the restrictive approach propounded by Special Rapporteur Crawford, it has been suggested that the criterion of attribution referred to in Draft Article 11 ('Conduct Acknowledged and Adopted by a State as Its Own') can be read as envisaging a sort of *ex post facto* complicity.[26]

Before embarking on the analysis of recent practice, it is worth noting that, despite the ILC's contention, the resort to complicity as a criterion of attribution of conduct can be found in two old arbitral decisions, both taken into account by Ago in his Fourth Report: the *Poggioli* award delivered by the Italian–Venezuelan Commissions in 1903[27] and the *Janes* award rendered by the Mexico–United States General Claims Commission in 1926.[28]

In *Poggioli*, one of the claims concerned the failure by the Venezuelan authorities to apprehend and punish the four men who had attempted to kill an Italian citizen, Silvio Poggioli. According to the complainants, this was due to the connivance of the local authorities with the culprits (evidenced inter alia by the fact that the former notified the latter when they were in danger of being arrested). Dealing with Venezuela's responsibility for these events, Umpire Ralston expressly resorted to complicity as a criterion of attribution of conduct:

> when the authorities of the State of Los Andes have acted *in apparent conjunction with criminals*, and have with them and under the circumstances heretofore detailed joined in the commission of offences against private individuals, and no one has been punished therefore and no attempt made to insure punishment, *the act has become in a legal sense the act of the government itself.*[29]

The *Janes* case is less clear in this regard, but it is nonetheless noteworthy. On that occasion, the Mexican state had been accused of not having taken proper steps to apprehend the man who had murdered an American citizen. In particular, the United States contended that Mexico's inaction amounted to complicity in such a crime. The Commission did not endorse this view, holding Mexico responsible only for the infringement of the due-diligence rule. However, it deemed it necessary to underline that '[a] reasoning based on presumed complicity may have some sound foundation in cases of non-prevention where a Government knows of an *intended*

23 R. Ago, 'Fourth Report on State Responsibility', 1972 YILC, Vol. II, para. 64, at 96ff.
24 Ibid., paras. 80ff., 102ff.
25 See Savarese, *supra* note 4, at 115–16.
26 E. Savarese, 'Fatti di privati e responsabilità dello Stato tra organo di fatto e "complicità" alla luce di recenti tendenze della prassi internazionale', in M. Spinedi, A. Gianelli, and M. L. Alaimo (eds.), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti: Problemi e spunti di riflessione* (2006), 53, at 55.
27 *Poggioli* case, UNRIAA, Vol. X (Sales No. 60.V.4), 669.
28 *Janes* case, UNRIAA, Vol. IV (Sales No. 1951.V.I), 82.
29 *Poggioli, supra* note 27, at 689 (emphasis added).

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injurious crime, might have averted it, but for some reason constituting its liability did not'.[30] In this way, it is evident, that the Commission, while considering the notion of complicity to the case as not applicable, somehow left the door open for other cases where this notion could be relevant.

In recent times, the emergence of complicity as a criterion of attribution of conduct has found support in international case law on human rights as well as in the practice of states and international organizations concerning the fight against terrorism. Since this issue has been already dealt with by other authors,[31] I will limit myself to sketching some brief remarks.

With regard to international case law, some interesting points emerge from the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Inter-American Court on Human Rights (IACHR), the European Court on Human Rights (ECtHR), and the African Commission on Human Rights (AfCHR), as well as – although with some reservations – the International Court of Justice (ICJ).

In the first place, it has been carefully noted that, in the post-*Tadić* case law, the 'overall-control' test[32] has been applied by the ICTY so as to encompass forms of co-ordination between states and paramilitary groups that lack hierarchical nature.[33] This appears very clearly in the judgement rendered by the ICTY Trial Chamber in the *Lašva Valley* case.[34] On that occasion, in fact, the Court contended that a paramilitary group acts under the 'overall control' of a state when the latter (i) provides it with 'financial and training assistance, military equipment and operational support'; and (ii) participates 'in the organisation, co-ordination or planning of [its] military operations'.[35] It is evident how, in this test, there is no reference to a hierarchical relationship: in this way, the notion of 'control' is expanded well beyond its logical limits, *transmuting* into a form of complicity.

The IACHR followed the same path in some judgments regarding paramilitary activities in Colombia. In these rulings, in fact, the Court, clearly relying on the notion of complicity, held the Colombian government responsible 'for the violations committed by paramilitary groups who have acted with the support, acquiescence, involvement, and cooperation of State security forces'.[36]

The concept of complicity has also been employed by the ECtHR in *Ilascu* v. *Moldova and Russia*.[37] In that case, the applicants were complaining of violations

30 *Janes*, *supra* note 28, at 87 (emphasis in original).

31 Savarese, *supra* note 4. See also J. Cerone, 'Re-Examining International Responsibility: Inter-State Complicity in the Context of Human Rights Violations', (2008) 14 *International Law Student Association Journal of International & Comparative Law* 525.

32 As known, the 'overall-control' test provides that, as far as well-organized private groups are concerned, for the purposes of attribution, it is not necessary that the state controlled every single act of the group, it being enough that the private entity acted under the state's general direction (ITCY, Appeals Chamber, *Prosecutor v. Duško Tadić*, Case IT-94–1-A (1999), ILM, Vol. 38, No. 6 (November 1999), 1518, at 1541, para. 117).

33 Ibid., at 117ff.

34 ITCY, Trial Chamber, *Prosecutor v. Kordić and Cerkez*, Judgement of 26 February 2001, IT-95-14/2.

35 Ibid., para. 115.

36 IACHR, *Case of the Rochela Massacre*, Judgment of 11 May 2007, Series C No. 163, para. 78; *Case of the Ituango Massacres*, Judgment of 1 July 2006, Series C No. 148, paras. 125.1, 125.25, 133; *Case of the Mapiripán Massacre*, Judgment of 15 September 2005. Series C No. 134, paras. 121–123; *Case of the 19 Tradesmen*, Judgment of 5 July 2004, Series C No. 109, paras. 84(b), 115, 134, 135, 137, 138.

37 ECtHR, 8 July 2004, *Ilascu and Others v. Moldova and Russia*, 48787/99.

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that had been mainly perpetrated by the authorities of the breakaway government of Transdniestria – an entity that controls part of the Moldovan territory with the military support of the Russian Federation and whose international subjectivity is generally denied. The Court attributed such abuses to Russia in light of the following reasoning:

> the events which gave rise to the responsibility of the Russian Federation must be considered to include not only the acts in which the agents of that State participated, like the applicants' arrest and detention, but also their transfer into the hands of the Transdniestrian police and regime, and the subsequent ill-treatment inflicted on them by those police, since in acting in that way the agents of the Russian Federation were fully aware that they were handing them over to an illegal and unconstitutional regime. In addition, regard being had to the acts the applicants were accused of, the agents of the Russian Government knew, or at least should have known, the fate which awaited them.[38]

Thus, even in this case, the human-rights abuses perpetrated by a non-state actor (the Transdniestrian regime) were imputed to a state (the Russian Federation) because the latter knowingly facilitated their commission.[39]

Finally, it is worth mentioning the communication delivered by the AfCHR in *Social and Economic Rights Action Centre (SERAC) and Another* v. *Nigeria* (2001).[40] Discussing Nigerian responsibility for environmental devastations carried out by oil companies, in fact, the African Commission seemingly resorted to complicity as a criterion of attribution of conduct when it noted that:

> the government of Nigeria *facilitated* the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian government *has given the green light to private actors*, and the oil companies in particular, to devastatingly affect the well-being of the Ogonis.[41]

Against this backdrop, the ICJ appears to be somehow the black sheep. In both the *Nicaragua*[42] and the *Bosnian Genocide*[43] cases, indeed, it showed a restrictive attitude towards the issue of attribution.[44] Actually, both these judgments are not bereft of ambiguities. In *Nicaragua*, in fact, while strictly applying the 'effective-control' test in order to rule out direct US responsibility for Contras's activities, the Court seems to have employed a rather different test when dealing with the acts of the Unilaterally Controlled Latino Assets (UCLA). The ICJ, indeed, by resorting to an

38 Ibid., para. 384.
39 In the same vein, Cerone, *supra* note 31, at 530.
40 AHRLR 60 (ACHPR 2001).
41 Ibid., at 71 (emphasis added). Cerone, *supra* note 31, at 530. Admittedly, it is not completely clear whether, in this case, the Commission applied the notion of complicity as set forth above or simply resorted to the due-diligence rule.
42 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, [1986] ICJ Rep. 14.
43 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, [2007] ICJ Rep. 43.
44 In the *Nicaragua* judgment, as is well known, the ICJ developed the (strict) 'effective-control' test (see *Nicaragua*, *supra* note 42, paras. 109, 115). In the second case, on the other hand, the Court confirmed this test, bluntly rejecting the evolutive approach followed by the ICTY in *Tadić* (*Bosnian Genocide*, *supra* note 43, para. 406).

(embryonic) notion of complicity, attributed them to the United States in the light of the fact that 'agents of the United States *participated in* the planning, direction, support and execution of [UCLA's] operations'.[45]

Even more significantly, in the *Bosnian Genocide* case, the ICJ wondered whether the Serbian state could have been condemned for *complicity* with the Army of the Serbian Republic in the commission of the Srebrenica genocide.[46] Admittedly, in that case, the Court was authorized to carry out such inquiry by Article III(e) of the Genocide Convention, which expressly forbids 'complicity in genocide'. Nevertheless, it has been convincingly argued that the ICJ has regarded 'complicity' more as a criterion of attribution than as a wrong envisaged by an autonomous primary norm.[47]

As far as terrorist acts are concerned, it has been noted that, since the end of the Cold War, a principle has been emerging according to which states supporting or harbouring terrorist groups are internationally responsible for terrorist acts, independently of the degree of their involvement in the specific act perpetrated.[48] This principle has been endorsed by UN organs and finds support in state practice as well.[49]

The most important (and dramatic) example is represented by the US reaction after 9/11. As is well known, in fact, the United States regarded the Taliban regime as directly responsible for the terrorist attack on the Twin Towers, notwithstanding such an attack had been actually carried out by al Qaeda – that is, by a private entity clearly distinguishable from the Afghanistan government. Such an imputation, which was not disputed by the greater part of the international community, has been justified by the US government in light of the fact that the Taliban knowingly harboured the agents of al Qaeda, namely because the former were the latter's accomplices.[50]

Therefore, it seems arguable that customary international norms on attribution are developing so as to consider complicity as a criterion to impute private facts to states, at least when it comes to conducts that threaten the fundamental values of the international community (peace, human rights, environment).[51] In the next

45 ICJ, *Nicaragua*, *supra* note 42, para. 86; Savarese, *supra* note 4, at 119 (emphasis added). However, this passage has been interpreted in very different ways (C. Kress, 'L'organe de facto en droit international public: Réflexions sur l'imputation à l'état de l'acte d'un particulier à la lumière des développements récents', (2001) 105 RGDIP 93, at 106). According to the ICTY (*Tadić*, *supra* note 32, para. 109), for instance, in this case, the ICJ applied the 'overall-control' test.

46 ICJ, *Bosnian Genocide*, *supra* note 43, paras. 418ff.

47 See E. Savarese, 'Complicité de l'Etat dans la perpétration d'actes de génocide: Les notions contiguës et la nature de la norme: En marge de la décision', *Application de la convention sur la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, (2007) 53 AFDI 280, at 284–6.

48 See, e.g., S. M. Malzahn, 'State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility', (2002) 26 HICLR 83.

49 See the practice mentioned in Savarese, *supra* note 4, at 123.

50 President George W. Bush, *Address to a Joint Session of Congress and the American People*, Washington, DC, 20 September 2001, available online at www.whitehouse.gov; UN Security Council, *Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc. No. S/2001/946 (2001); 'Bush's Remarks on U.S. Military Strikes in Afghanistan', *NY Times B6*, 8 October 2001. See D. Jinks, 'State Responsibility for the Acts of Private Armed Groups', (2003) 4 Chicago JIL 83; Nollkaemper, *supra* note 14.

51 As one author noted (Savarese, *supra* note 4, at 124), this represents a typical answer provided by legal systems to respond to grave attacks against values of particular importance.

part, I will try to show that such a view also finds support in US case law on corporate liability for human-rights abuses.

3. The attribution to states of corporate misconducts in US case law

3.1. The Alien Tort Statute and its applicability to corporate human-rights violations

The US judicial system is characterized by the most conspicuous case law concerning the liability of private companies for violations of internationally recognized human rights.[52] This feature is due to several factors,[53] the most important of which is the presence in the US legal order of a juridical tool that is, for many reasons, unique: the Alien Tort Statute (ATS).[54]

As is known, the ATS is an ancient US statute (it dates back to 1789) granting jurisdiction of federal courts over civil actions brought by aliens for torts 'committed in violation of the law of nations or a treaty of the United States'.[55] Despite being one of the first statutes adopted by Congress, the ATS was successfully invoked for the first time only in 1980 (*Filàrtiga* case) when the Second Circuit ruled that customary international law on human rights is to be considered 'law of nations' under the ATS and thus its infringement is able to trigger the jurisdiction of federal courts.[56] Since it was generally understood that international law addressed only states, in the years following *Filàrtiga*, the ATS was invoked against former foreign officials with regard to acts perpetrated in the exercise of public functions.[57]

However, in 1995 (*Kadic* case), the Second Circuit went further and affirmed its jurisdiction also over non-state actors (in that case, the leader of a non-recognized state).[58] This evolution opened up the door to lawsuits against private companies. Only two years later, in fact, a Californian District Court, confronted with a civil action concerning the abuses committed by a mining corporation in Myanmar, stated that ATS jurisdiction covers not only natural, but legal persons as well (*Unocal* case).[59] Since *Unocal*, several multinational enterprises have been brought before federal courts to answer for abuses allegedly perpetrated in countries where they carry out their activities.[60]

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52 On this case law, see M. Koebele, *Corporate Responsibility under the Alien Tort Stature: Enforcement of International Law through US Torts Law* (2009); S. Joseph, *Corporations and Transnational Human Rights Litigations* (2004).

53 It has been noted that the US system offers several procedural advantages for novel claims: Joseph, *supra* note 52, at 16ff.

54 28 USC §1350.

55 On the historical reasons that led Congress to adopt this peculiar statute, see A.-M. Slaughter Burley, 'The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor', (1989) 83 AJIL 461.

56 *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

57 See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D.Cal. 1987); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992); *Hilao v. Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

58 *Kadic v. Karadzic*, 70 F.3rd 232 (2nd Cir. 1995).

59 *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

60 So far, companies that have been sued under the ATS include, among others, Coca-Cola, Pfizer, Exxon Mobil, Texaco, Shell, Rio Tinto, Freeport-McMoran, Ford, Banque Paribas, Chevron, Drummond.

The possibility of invoking the ATS against corporations has been recently questioned by the Second Circuit in 2010 (*Kiobel* case).[61] On that occasion, it was held that legal persons are not subjects of international law and cannot infringe customary international law, as evidenced by the fact that no international criminal tribunal has jurisdiction over them. It is not possible here to embark upon a critical analysis of this controversial ruling. For our purposes, it suffices to note that the line of cases that I will take into account is not affected by the *Kiobel* precedent, since they are not grounded on the international legal personality of transnational corporations.

3.2. Holding corporations liable for the violation of state-addressed norms: the 'state-action' requirement

The applicability of the ATS to wrongs committed by private actors has been justified by federal courts on a double basis. In the first place, it has been recognized that international law imposes duties directly on individuals.[62] Yet, since this can be affirmed only with regard to norms forbidding the most egregious violations of human rights (e.g., genocide, forced labour, or war crimes), courts have worked out ways to link private facts to states so as to hold the former responsible for the infringement of norms that typically address the latter.

Generally speaking, two routes have been followed by US judges. Some courts have accepted that private parties may be sued for the violation of state-addressed norms if they aided and abetted a state that directly infringed those norms.[63] Even though the concept of 'aiding and abetting' is clearly contiguous to (if not synonymic with) that of 'complicity',[64] this case law does not serve our purposes and will not be dealt with in this paper. Courts adopting this approach, in fact, do not rule upon the attribution to states of private conducts. On the contrary, they consider *as given* that a state perpetrated a human-rights abuse and limit themselves to considering whether the corporate respondent aided and abetted the state in committing it.

Other courts, on the other hand, have maintained that private actors may be deemed liable for the violation of state-addressed norms when their conduct can be regarded as state conduct (the so-called 'state-action' requirement).[65] In order to assess compliance with this requirement, US courts have looked at the jurisprudence relating to a domestic provision: 42 USC 1983. This section was introduced by the

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61 *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). See also *Doe v. Nestlé*, 2010 U.S. Dist. LEXIS 98991 (C.D. Cal. 2010); *Flomo v. Firestone*, 2010 U.S. Dist. LEXIS 112249 (S.D. Ind., 2010).

62 *Kadic*, *supra* note 58, at 240.

63 See, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932, 932 (9th Cir. 2002); *In Re South Africa Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009). On this case law, see D. Cassel, 'Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts', (2008) 6 *Northwestern University Journal of International Human Rights* 304; S. Coliver, J. Green, and P. Hoffman, 'Holding Human Rights Violators Accountable by Using International Law in US Courts: Advocacy Efforts and Complementary Strategies', (2005) 19 EILR 169. On corporate complicity in human-rights violations, see, in general, A. Clapham, 'On Complicity', in M. Henzelin and R. Roth (eds.), *Le droit pénal à l'épreuve de l'internationalisation* (2002), 241. Also, this case law is threatened by the *Kiobel* precedent.

64 Indeed, the analysis concerning the 'aiding and abetting' test is sometimes (erroneously) conflated with that regarding the 'state-action' requirement. See, e.g., *In Re Agent Orange Products Liability Litigation*, 373 F. Supp. 2d 7, 58–9 (E.D.N.Y. 2005); *Beanal v. FreeportMcMoRan, Inc.*, 969 F. Supp. 362, 375 (E.D. La. 1997).

65 *Kadic*, *supra* note 58, at 246. See, for further references, Koebele, *supra* note 52, at 212; Joseph, *supra* note 52, at 33.

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Civil Rights Act of 1871 and provides redress for constitutional (or federal) violations perpetrated under the colour of law – that is, committed by actors clothed with state or federal authority.[66] Although section 1983 was originally deemed to be applicable only against state officials, US courts have subsequently recognized that there are circumstances in which private entities also may be regarded as acting under the colour of law.[67]

The same principle has been applied, *by analogy*, in ATS cases in order to hold private entities responsible for the infringement of international norms that only address states.[68] This approach is of striking interest for our purposes. Indeed, as I will try to demonstrate, when dealing with the 'state-action' requirement, US courts are confronted with the attribution to states of private conducts.

3.3. 'State-action' jurisprudence and international norms on attribution

International norms on attribution are based on the premise that states, like every legal person, necessarily act (and may do wrongs) through individuals. Accordingly, they identify the cases in which the wrongful conduct of an individual can be referred to a state, so determining the latter's international responsibility.[69]

The US 'state-action' jurisprudence performs a function that is, from certain aspects, very similar. As I have recalled, section 1983 provides whoever has suffered the violation of a civil right with a cause of action against the wrongdoer. Under US constitutional law, however, civil rights may not be infringed by private parties, but only by federal and state authorities. Section 1983, therefore, requires that the wrong committed by the defendant is regarded as an act of a state, namely that his (or her) conduct is 'fairly *attributable* to the State'.[70] Against this backdrop, the 'state-action' canons – like international norms on attribution – indicate when and under which conditions such an imputation is possible.

Thus, it seems at least arguable that the 'state-action' jurisprudence constitutes the US domestic counterpart of the international norms on attribution.[71] Accordingly, when US courts resort to such case law in order to link TNCs' international wrongs to states, they are actually attributing the former to the latter under international law.[72] While the familiarity between these two sets of norms has never been admitted by

66 In particular, section 1983 provides that 'Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress'.

67 The leading case, in this regard, is *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). On this issue, see, in general, B. Kritchevsky, 'Civil Rights Liabilities of Private Entities', (2004) 26 *Cardozo Law Review* 35.

68 This analogy was first affirmed by the District Court for the Northern District of California in *Forti*, *supra* note 57, at 1546.

69 J. Crawford and S. Olleson, 'The Nature and Forms of International Responsibility', in M. D. Evans (ed.), *International Law* (2006), 452, at 460.

70 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, at 935 (emphasis added).

71 This analogy has already been underlined by other authors. See, e.g., J. Priselac, 'The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?', (2007) 21 EILR 789, who suggests substituting the 'state-action' canons with the criteria envisaged by the Articles on State Responsibility.

72 It is worth noticing, however, that, in these cases, the perspective is reversed, since courts link conducts of private entities to states in order to hold the former somehow responsible and not vice versa.

US courts, a clear indication in this sense is provided by the judgment rendered by the Eastern District Court of the Louisiana in *Beanal* v. *Freeport-McMoran*.[73] In its ruling, in fact, the court made reference both to domestic jurisprudence and to international-law principles in order to assess whether the 'state-action' requirement had been met.[74]

One might wonder, at this juncture, why US courts rely on section 1983 case law instead of referring exclusively to international principles on state responsibility. Arguably, this choice stems from the fact that US courts consider such principles inadequate to deal with ATS corporate cases. As we have seen above, in fact, traditional international norms on attribution require that states wield a tight control on private actions, while, in most of the ATS cases, plaintiffs contend that TNCs and government officials co-operated *at an equal level* in the perpetration of the alleged human-rights violations. As we will see, 'state-action' canons have proved much more useful, since they provide courts with criteria of attribution that are definitely more comprehensive.[75]

3.4. The 'state-action' tests

US courts employ three basic tests to determine 'state action': the 'public-function' test, the 'state-compulsion' test, and the 'joint-action' test.[76]

According to the 'public-function' test, 'a private party who performs a function that has traditionally been the exclusive prerogative of the State may be deemed a state actor'.[77] The 'state-compulsion' test, on the other hand, requires that 'the State creates, coerces, or significantly encourages the challenged activity to the extent that the decision is deemed to be the State's'.[78] Under 'joint action', finally, state action is present 'where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights'.[79]

The first two tests find clear matches in the Articles. The 'public-function' test, in fact, presents more than one analogy with the criterion of attribution envisaged by Draft Article 5 ('Conduct of Persons or Entities Exercising Elements of Governmental Authority'), while the 'state compulsion' test, despite some differences in the formula employed, closely recalls the 'effective-control' test under Draft Article 8.[80] The

73 *Beanal*, *supra* note 64.

74 Ibid., at 374. See also *Forti*, *supra* note 57, at 1545. For the sake of precision, it has to be noted that US courts did not refer to the ILC's Articles, but to the Restatement (Third) of the Foreign Relations Law of the United States.

75 In this sense, see also Koebele, *supra* note 52, at 219. Another (obvious) factor that has to be taken into account is the greater familiarity US judges have with domestic-law principles.

76 For a general appraisal of 'state-action' tests, see E. Chemerinsky, 'Dialogue on State Action', (2000) 16 *Touro Law Review* 775. Indeed, US courts employed two other tests, namely the 'close-nexus' and the 'symbiotic-relationship' tests. Yet, it has to be noted that US courts tend to conflate them in the 'joint-action' test (see, e.g., *Lugar*, *supra* note 70, at 941; *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, at 1453–5. For a similar approach, see I. P. Robbins, 'Privatisation of Corrections: A Violation of US Domestic Law, International Human Rights, and Good Sense', in K. De Feyter and F. Gómez Isa (eds.), *Privatisation and Human Rights in the Age of Globalisation* (2005), 57, at 64).

77 *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, at 353 (1974).

78 *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, at 170 (1970).

79 *Collins v. Womancare*, 878 F.2d 1145, at 1154 (9th Cir. 1989).

80 Similarly, Priselac, *supra* note 71, at 811.

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application of these tests in order to impute private facts to states, therefore, does not innovate traditional standards on attribution.

The same cannot be said with reference to the 'joint-action' test. The formula 'substantial degree of cooperative action', indeed, expresses the idea, almost unknown to the Articles, according to which it is possible to attribute to states acts committed by private entities not placed under state control. For this reason, I will linger only on this test.

3.5. The 'joint-action' test and the notion of 'complicity'

Like the whole jurisprudence relating to Section 1983, the 'joint-action' case law is not 'a model of consistency'[81] and its formula has been used to encompass very different forms of co-operation. Nevertheless, at least as far as ATS corporate cases are concerned, some general remarks could be made.[82]

A first observation is that US courts did not consider the 'joint-action' requirement to be met when the host state failed to prevent (or to punish) the unlawful acts committed by private actors.[83] In *Aldana* v. *Del Monte*,[84] for instance, the Eleventh Circuit held that police inaction in response to crimes committed by private security forces hired by Del Monte was not enough to find state action. In the court's view, it was crucial that such an omissive behaviour, though culpable (as the crimes occurred very near to the police station), was not intentionally aimed to assist the private wrongdoers.[85] This approach is perfectly in line with the remarks we put forward in subsection 2.1, since it confirms that the mere lack of due diligence does not determine the attribution to states of private wrongs but, at the same time, clarifies that things stand quite differently when state officials omit to intervene with the purpose of facilitating abuses by non-state actors.

In the second place, it is worth highlighting that the state's failure to counter harmful corporate activities abroad has never been taken into account by US courts in order to establish 'state action'. In this hypothesis, indeed, state involvement in corporate abuses is too loose to justify attribution, even on the ground of complicity. This is not to say, however, that the home state cannot be held responsible on other bases. As some authors argue, under certain circumstances, international law imposes on states an extraterritorial duty to monitor and govern their corporate nationals.[86] This duty particularly arises whenever the home state is unable or

81 *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (Judge O'Connor, Dissenting Opinion).

82 At this juncture, a quick clarification is needed. All the rulings I will consider have been handed down in response to a motion to dismiss lodged by the corporate defendant. According to US case law, at this procedural stage, courts must accept as true all of the factual allegations set forth in the plaintiff's complaint; see, e.g., *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986). In no case, therefore, has state involvement in human-rights abuses been judicially ascertained. This circumstance, however, does not weaken our arguments but, on the contrary, makes it easier to identify the relevant points of law, since the courts' findings are cleansed of any evidentiary problem.

83 The possibility of invoking the lack of due diligence on the part of the host state in order to establish 'state action' was suggested by Joseph, *supra* note 52, at 39.

84 416 F.3d 1242 (11th Cir. 2005).

85 Ibid., at 1249.

86 The existence of such an obligation has been inferred from the general duty of a state not to act in such a way as to cause harm outside its territory (see MacCorquodale and Simons, *supra* note 19, at 617). See

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unwilling to exercise effective control on corporate activities (e.g., because it is a failed state or is governed by a repressive regime).[87]

Turning to the cases in which state action was held to be present, a distinction should be drawn. In a line of cases, state action has been found under the 'joint-action' test because state agents *directly* committed the alleged violations. This happens, for instance, when corporations have paid public authorities to obtain protection and the latter have committed abuses. In *Mujica* v. *Occidental Petroleum*,[88] the court deemed the state action requirement to be met because the wrongs that Occidental Petroleum was accused of had in fact been carried out by state agents (the Colombian Air Force), who were on the defendant's payroll.[89] Since, in these cases, the unlawful acts are directly carried out by state agents, their attribution to states is unproblematic and the same outcome would have been reached by resorting to the Articles.

In other cases, courts held 'state action' to be present even though state agents *did not take part directly* in the alleged violations. So far, this has happened in two circumstances.

On the one hand, private human-rights violations have been regarded as state actions when a state knowingly facilitated their commission. In *Abdullahi* v. *Pfizer*,[90] for instance, a well-known pharmaceutical company was accused of having tested an experimental drug on Nigerian children without seeking their parents' informed consent, so causing their death or serious diseases. The Second Circuit attributed these abuses to the Nigerian state, arguing that the Nigerian government (i) provided a letter of request to the US Food and Drug Administration (FDA) to authorize the export of the drugs incriminated, (ii) granted the exclusive use of two hospital wards to Pfizer as well as the use of the hospital's staff and facilities to conduct the tests, (iii) silenced Nigerian physicians critical of the test, and (iv) back-dated an 'approval letter' that the FDA and international protocol required to be provided prior to conducting the medical experiment.[91]

Similarly, in *Arias* v. *Dyncorp*,[92] the Columbia District Court accepted that the spraying of fumigants by Dyncorp onto cocaine and heroin poppy plantations in Colombia that caused unlawful damages also to Ecuadorian plantations could be attributed to both the United States and Colombia, since (i) the corporation was contracted with the US State Department to engage in aerial spraying of cocaine and heroin fields in Colombia, (ii) the compensation for this task was to come from funds

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also O. De Schutter, 'Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations', background report to the seminar organized with the Office of the High Commissioner for Human Rights, Brussels, 3–4 November 2006, available online at www.business-humanrights.org/Links/Repository/775593.

87 See MacCorquodale and Simons, *supra* note 19, at 620. This qualification is needed in order to preserve the sovereignty of the home state.

88 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

89 Ibid., at 1175. In the same vein, *Presbyterian Church of Sudan et al. v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 328 (S.D.N.Y. 2003).

90 562 F.3d 163 (2nd Cir. 2009).

91 Ibid., at 188. See also *Abdullahi and Others v. Pfizer*, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. 2002), at 18.

92 517 F. Supp. 2d 221, (D.D.C. 2007).

approved by Congress under Plan Colombia, and (iii) Dyncorp acted in co-ordination with the Colombian and US governments.[93]

It is clear that none of these conducts can be deemed as a direct participation by the states in the abuses committed, nor do they constitute evidence that the respondent corporations acted as state organs. The basis of such an attribution, instead, has been found in the practical (in the case of Nigeria and Colombia) or financial (in the case of the United States) assistance provided by the states to the perpetrators – in other words, in their 'complicity'.[94]

On the other hand, private abuses have been imputed to states when they were part and parcel of a more general plan set up by the private entity together with state officials. In *Wiwa* v. *Royal Dutch Petroleum*,[95] for instance, the claimants alleged that Royal Dutch met with Nigerian officials in England and the Netherlands to organize a joint action to suppress the Ogoni rebels. In pursuing this plan, both Royal Dutch and Nigerian agents perpetrated several human-rights abuses. During the trial, the corporate defendant argued that state action could not have been found with regard to the violations, which were not committed under state control. The District Court for the Southern District of New York rejected this argument, maintaining that, for the purposes of attribution, it was enough that state and non-state actors conspired to commit those violations, while it was not required that they 'acted in concert to commit each specific act that violates plaintiffs' rights'.[96]

Therefore, private facts have been regarded as state actions, since they have been carried out in furtherance of a plan arranged along with state officials, regardless of whether each act had been put in place under state agents' direction or control, namely because of the complicit conspiracy between state and non-state actors.

4. Conclusions

Traditional norms on attribution are currently questioned by the convergence of two factors. First, the hierarchical paradigm enshrined by classical criteria of attribution of conduct is made obsolete by the fact that well-organized private actors are able to co-operate with states in the commission of international wrongs without being absorbed in their structure. Second, the growing attention paid by the international community to the protection of fundamental values like peace, environment, and human rights calls for the expansion of the number of cases in which states may be held liable for private activities threatening such values.[97]

In this connection, it has been suggested that a customary norm is developing according to which states are *directly* responsible for complicity in private wrongs

93 Ibid., at 18. Colombian allegedly wrongful conduct is also the object of controversy pending before the International Court of Justice (*Ecuador v. Colombia, Case Concerning Aerial Herbicide Spraying*, General List, No. 138).

94 In the same vein, *Doe and Others v. Unocal and Others*, 963 F. Supp. 880, at 889 (C.D. Cal. 1997); *The Estate of Rodriquez and Others v. Drummond and Others*, 256 F. Supp. 2d 1250, at 1265 (N.D.Al. 2003).

95 *Wiwa and Others v. Royal Dutch Petroleum*, 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. 2002).

96 Ibid., at 42–6.

97 In this sense, see Condorelli, *supra* note 3, *passim.*

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when the latter affect the fundamental values of the international community. As we have seen, however, authors advancing such a thesis have mainly looked at international practice concerning state involvement in paramilitary and terrorist activities.

In the present paper, I have tried to demonstrate that the emergence of a customary norm envisaging complicity as a criterion of attribution of conduct finds support also in US case law on corporate human-rights abuses. In particular, in the case law considered above, this criterion assumes two declinations. According to the first one, a private abuse is attributed to a state when the latter knowingly facilitated its commission (complicity *stricto sensu*). Under the second one, private facts are to be regarded as state actions when they have been carried out in furtherance of a plan arranged along with state officials, regardless of whether each act had been put in place under state agents' direction or control (complicit conspiracy).

Against the line of reasoning I have developed so far, (at least) two objections might be raised. First, it may be said that US case law is unlikely to be followed by other courts (either domestic or international), which, of course, cannot make reference, in their judgments, to a US domestic provision such as Section 1983. Second, one could claim that the ATS corporate cases have nothing to do with the attribution to states of wrongful acts, since they concern only the liability of private corporations and not that of states (which, in any case, would benefit from state immunity).

As to the first objection, it is worth premising that the judicial application of the Section 1983 jurisprudence to the ATS cases does not derive from confusion between domestic and international norms. Rather, US courts apply domestic-law principles *by analogy* in order to fill a perceived gap in the international norms on attribution. Granted, the use of a domestic provision does not encourage the adoption of the same approach by other courts.[98] However, it is worth noticing, on the one hand, that some courts dealt with the 'state-action' requirement without resorting to 'Section 1983' jurisprudence. This happened, for instance, in *Iwanowa* v. *Ford*, in which a New Jersey district court analysed the relationship between the corporate defendant and the Nazi regime by adopting autonomous criteria of attribution.[99] On the other hand, also courts applying 'Section 1983' case law are becoming aware of the need to contextualize such an approach in a more appropriate international-law framework. In *Sinaltrainal* v. *Coca-Cola*, for instance, the Florida Southern District Court invoked the intervention of the Eleventh Circuit in order to clarify 'the extent to which section 1983 jurisprudence constitutes an established norm of international law'.[100]

As to the second point, it suffices to note that it is not the first time that the development of international norms on attribution has been propelled by judgments not strictly related to state responsibility. In *Tadić*, as is known, the ICTY questioned the 'effective-control' test worked out by the ICJ.[101] Yet, the ICTY did not reach this

98 A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts', (2007) 101 AJIL 760, at note 151.
99 *Iwanowa v. Ford Motor Company and Others*, 67 F. Supp. 2d 424, at 445 (D.N.J. 1999).
100 *In Re Sinaltrainal Litigation*, 474 F. Supp. 2d 1273, at 1302 (S.D. Fla. 2006).
101 See *supra* note 32.

legal finding in order to assess the international responsibility of a state. On the contrary, the legal question was whether the Bosnian war was, for the purposes of the application of the Geneva Conventions, an international conflict. To this end, the court assessed whether the army of the Serbian Republic in Bosnia, a non-state actor, could have been considered as a de facto organ of the Federal Republic of Yugoslavia.[102] Similarly, in the cases analysed above, US courts had to find whether the alleged human-rights violations were attributable to a state for the purposes of the application of the ATS. The fact that such judgments do not end up with a finding of state responsibility does not exclude that US courts are actually dealing with issues of attribution.

102 See, e.g., A. Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18 EJIL 649.