PART C

CIVIL ACCOUNTABILITY FOR GROSS HUMAN RIGHTS VIOLATIONS UNDER INTERNATIONAL AND DOMESTIC LAW

INTRODUCTION AND OVERVIEW

The Charter- and treaty- based systems for the protection of human rights suffer from the general absence of strong inter- and intra-state accountability mechanisms. The existing human rights protection regimes are "weak" in terms of available sanctions and remedies against the violating state and even weaker in respect to the later enforcement of such sanctions.[1] This weakness of the existing human rights systems appears to be especially inherent in the UN charter and treaty-based procedures.[2] One of the probable reasons for this shortcoming is the fact that the existing human rights protection regimes mainly address states as the bearers of human rights obligations and not the individual or corporate violator.[3]

The alternative method of human rights protection through criminal prosecution[4] is still developing and only a partial answer to the problem. The following shortcomings and obstacles can be listed in summary form: the doctrine of *functional* immunity for serving heads of state and other state officials limits the exercise of the principle of universal criminal jurisdiction;[5] the chronic lack of resources and means necessary for effective prosecution; the difficult and sometimes non-existent judicial cooperation in criminal matters; the often apparent reluctance of individual states to assist in the prosecution of perpetrators of international crimes (as highlighted by the difficulties encountered by the two *ad hoc* tribunals); the inherent question whether they resemble forums of selective justice and the limitation of the ICC's *ratione materiae* to effectively three crimes and the supplementary nature of its jurisdiction.

These difficulties hinder the creation of a universal system of individual criminal accountability with the result that the necessary deterrence does not exist. In addition to criminal accountability, the supplementary or isolated use of alternative accountability means,

---

[1] See Part A.

[2] As highlighted by the recent criticism of the UN Secretary General's of the work of the UN Commission on Human Rights, see *Report of the Secretary- General's High Level Panel on Threats, Challenges and Change,* UN Doc A/59/565 of 2 December 2004 par 283 and the later UN SG's report *In Larger Freedom: towards development, security and human rights for all,* UN Doc. A/59/2005 of 21 March 2005, para 182.

[3] Corporate accountability for human rights atrocities has become an established feature of US civil litigation. See below chapter 2, 2.4.4 for a detailed account of corporate liability under US law.

[4] See *supra* part B.

[5] See the *Case Concerning The Arrest Warrant Of 11 April 2000 (Democratic Republic Of The Congo v. Belgium)* 2002, 14 February, General List, No. 121, in *ICJ Reports* (2002), retrievable at http://icj-cij.org, for an example of how the international community limited the scope of prosecuting *jus cogens* crimes.

such as the establishment of investigatory and reconciliation commissions and/or the use of immigration measures as e.g. repatriation are equally questionable from a deterrence point of view.

The establishment of an international regime of strict individual civil liability for the commission of international core crimes and other acts of gross human rights violations[6] in addition to the existing ways and means of human rights protection might well prove to be a solution to existing shortcomings.

This part[7] introduces and outlines the present concepts and existing mechanisms of civil liability for human rights atrocities which are presently available in international and domestic law. The different approaches are evaluated within their historical and country-specific context. This part concludes with the notion that the establishment of an international regime of individual civil liability for gross human rights violations is an essential feature for the future protection of human rights on a global scale.

[6] Human rights atrocities hereafter. The term "human rights atrocities" combines serious international crimes such as the "four core crimes" with other serious human rights violations, such as torture and terrorism. See part B chapter 1.

[7] The topic of this chapter and subsequent parts hereof were the subject of the author's study project *Individual Civil Liability As An Alternative To Criminal Prosecution Of Human Rights Violations* presented in partial fulfilment of the requirements for the degree of Master of Law at the University of Stellenbosch in 2002. Elements of this part were already published in Strydom and Bachmann "Civil liability of gross human rights violations" in 3 *TSAR* (2005) 448-469.

CHAPTER 1

CIVIL RESPONSIBILITY OF STATES FOR HUMAN RIGHTS ATROCITIES UNDER INTERNATIONAL LAW

1. The concept of state responsibility

The starting point of this discourse lies in the tracing and understanding of the historic legal roots of civil accountability[8] of states as a precursor to individual civil liability. Following the century-old concept, whereby states and not individuals were the only bearers of rights and obligations under international law, the relations of states towards each other led to the development of the present existing concept of state responsibility as resembling primarily a system of state liability for inter-state wrongs.

Historically, the practice of holding states civilly accountable for their acts towards other states has been developed in the context of war with the inherent motive of compensating the winning side for its war efforts and to punish, *vae victis*, the defeated. At so-called "peace conferences" the victors dictated their conditions for peace to the defeated in exchange for hefty financial compensations and territorial occupations.[9]

A further development of the concept of state accountability saw the evolution of an independent principle of international law on state civil responsibility:[10] the Permanent Court of Justice established with its *Chorzow Factory*[11] decision the principle that states are civilly liable for attributable acts of international wrongs and are responsible for financial reparations.[12]

---

[8] The terms "responsibility" and "accountability" are used in this chapter as interchangeable terms.

[9] See Part B chapter 2.

[10] See Shaw, *International Law* (2003) 696, listing the following requirements for establishing state responsibility: intrastate legal obligation, its violation through an action or omission imputable to the state responsible and lastly, loss or damage as a direct consequence thereof.

[11] *Chorzow Factory* (Ger. v. Pol.) Jurisdiction, 9 *PCIJ (Ser. A)* (1927), 21; on the nature of reparations, *Chorzow Factory* (Ger. v. Pol.) Indemnity, 17 *PCIJ (Ser. A)* (1928), 29. The case concerned an incident where Poland had unlawfully seized German property in the disputed region of Upper Silesia and thus breached the German-Polish Convention Concerning Upper Silesia of May 15, 1922.

[12] Indemnity, 17 *PCIJ (Ser. A)* (1928) 47, where the court found that: "The essential principle contained in the actual notion of an illegal act … is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

The ICJ has followed this principle on state responsibility in its jurisprudence since its establishment in 1945.[13] A fairly recent example is the *Nicaragua v. United States of America* case,[14] which confirmed the ICJ's determination[15] to hold states accountable for international wrongs.[16]

The International Law Commission acknowledged these dicta in its *Draft articles on Responsibility of States for internationally wrongful acts*.[17] Its Article 1 stipulates that "every internationally wrongful act of a State entails the international responsibility of that State"[18] and consequently obliges it to make restitution.[19] Today, such state liability can arise from any inter-state actions or omissions (to protect other states from the occurrence of such acts) that are attributable to the state in question and are not justifiable to the point that their wrongfulness is overlooked.[20] Examples of such internationally wrongful acts[21], as found in international jurisprudence and treaty law, are the shooting down of an aircraft, the sinking or damaging of a ship, attacks on diplomatic missions and its personnel or costs arising out of trans-state pollution.[22]

Suitable forums for adjudicating such state liability claims are, besides the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea, international arbitration

[13] See e.g. the *Corfu Channel* case (UK v. Albania) in *ICJ Reports* (1949) 244; *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)* in *ICJ Reports* (1996) 9ff.
[14] *"Case concerning Military and Paramilitary Activities In And Against Nicaragua"*, (Nicaragua v. United States of America); there the ICJ found that the USA under its Reagan Administration was responsible for interfering in Nicaragua's internal affairs by its active support of the insurgency of Contra rebels against the lawful Sandinista regime in Nicaragua in the 1980ies, see *ICJ Reports* (1986), 14ff.
[15] The USA withdrew from the proceedings after the ICJ had ruled that it had jurisdiction over the case despite the US objections hereto. The USA under the Reagan Administration revoked its acceptance of the optional clause to the ICJ of 1946.
[16] In its 2004 decision *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the ICJ found that the construction of Israel's "defensive" wall in the Occupied Palestinian Territory was contrary to international law and created the obligation for Israel to make reparation for all damages caused hereby. Summary No.2004/2 retrievable at http://www.icj-cij.org/docket/decisions/Summary
[17] *Draft articles on Responsibility of States for internationally wrongful acts of 2001* in *Official records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), Ch. IV E.1.*
[18] Article 2 defines the further requirements of such liability. See also Article 3 of the earlier ILC's Draft Articles On State Responsibility of 1975, UN Doc. A/CN.4/SER.A/1975/Add.1
[19] *Id.*, Article 35.
[20] *Id.*, Articles 20-7 list circumstances which preclude the wrongfulness of the state's action.
[21] Civil liability for unlawful state action requires in addition to the existence of a wrongful act the necessary sufficient causal link between action and the damage caused herby.
[22] The ILC provides in its commentary to its Draft (n.17) an overview of the various categories of wrongful acts and their subsequent adjudication. See *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts* in *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), Ch. IV. E. 2,* 248-63.

tribunals and ad-hoc claims tribunals and commissions,[23] with the latter often established through bi-national peace treaties.

In 1991 Iraq was reminded of this state liability principle by the UN Security Council in its Resolution 687, whereby Iraq was held accountable "under international law" for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait".[24] Another example of addressing state accountability in this form is the UN GA's "Resolution on a Definition of Aggression of 1974",[25] which establishes state responsibility for the act of aggression.[26]

2. State responsibility for human rights violations.

State civil responsibility for acts constituting violations of basic human rights is not a new concept of international law. For instance, a general principle of state liability for "grave breaches"[27] of humanitarian law committed by its forces during times of armed conflict can be found in provisions of the four Geneva Conventions of 1949.[28] This concept of state liability was already developed under the "Law of Hague" where Article 3 of Hague Convention IV[29] of 1907 recognizes a general obligation of the perpetrator state to pay compensation for its breaches of the Convention,[30] following the IMT's recognition of the "Law of Hague" as resembling customary law in 1946.[31] The principle that states are financially liable for human rights atrocities committed in war time towards the individual victim of such violations of humanitarian law emerged as a principle under international law. Furthermore, there exists today the general notion[32] that states can be held liable for human

[23] See e.g. the UN Compensation Commission for Iraq, established under UN S.C. resolution 692 (1991) *UN Doc. S/22559* of 2 May 1991; the Iran-United States Claims Tribunal, see Shaw, (n.10) 247 and the most recent Eritrea-Ethiopia Claims Commission (EECC) which was established pursuant Article 5 of the bi-national *Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea* of December 12, 2000; reprinted in 43 *ILM* (2004) 1249ff.
[24] UN SC RES 687 (1991), para 16.
[25] UN GA Res. 3314 (XXIX) of 14 December 1974.
[26] Article 5 para 2 of the Resolution reads "Aggression gives rise to international responsibility".
[27] As defined in Article 147 of the fourth Geneva Convention of 1949, IV. Reference is made to the grave breaches provisions of Article 50 GC I, 51 GC II, 130 GC III and 147 GC IV.
[28] See Article 51 of GC I, Article 52 of GC II, Article 131 of GC III and Article 148 GC IV
[29] Hague Convention (IV) Respecting the Laws and Customs of War on Land, reprinted in 2 *AJIL*. Supp. 90, *entered into force* January 26, 1910, retrievable at http://www1.umn.edu/humanrts/peace/docs/con4.html.
[30] *Id.*, Article 3 reads "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."
[31] See Part B chapter 1.
[32] See Shaw, (n 10) 116 with the respective judicial authorities.

rights atrocities in cases where such acts resemble *jus cogens* violations[33] of an *erga omnes* nature.

The final version of *Draft articles on Responsibility of States for internationally wrongful acts*[34] by the ILC of 2001 reaffirms this form of state liability in principle in its Articles 40 and 41.[35]

One example of acknowledging the protection of human rights as a state obligation under international law is the above-mentioned UN SC's Resolution 687 where Iraq was found responsible for the commission of "inhumane acts" committed during its unlawful occupation of the territory of Kuwait in 1990.[36] Consequently, the UN Compensation Commission (UNCC) compensated the victims of human rights and humanitarian law violations, committed by Iraqi military and security forces during the occupation of Kuwait, as so-called "individual claims".[37] The liability of Iraq was based on the UN SC's Resolution 687 cited above.

The ICJ, as the main judicial forum of the UN, was for the first time faced with the question of state liability for gross human rights violations[38] in the case of *Bosnia and Herzegovina v. Yugo*[39] in which it was found that Yugoslavia (Serbia and Montenegro) had an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for its citizens, reparations for damages to persons caused by these violations of international law in a sum to be determined by the Court.[40]

---

[33] See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, *ICJ Reports* (1970), 3 as an exemplary judicial example on state responsibility for *jus cogens* violations.
[34] (n 17).
[35] The duty to provide reparations for *jus cogens* violations derives from the particular consequences of serious breaches of international obligations as defined in chapter III, Articles 40 and 41 para 3, establishing state responsibility for violations of peremptory norms with the duty to make reparations under Articles 34-39 as a consequence. See *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, (n 22) 283-84 and 291.
[36] See UN SC RES 687 (1991), para 16, where Iraq was held accountable "under international law" for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait".
[37] See Article 1 para 12 of the Commission's Provisional Rules for Claims Procedure, UN Doc. S/AC.26/1992/10.
[38] In that case the Convention on the Prevention and Punishment of the Crime of Genocide was applied for the first time before the ICJ as a legal ground for establishing state liability for acts of genocide.
[39] *Bosnia and Hercegovina v. Yugo*., in *ICJ Reports* (1993), 3 *et seq.*
[40] See Judgement of the ICJ in the *Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia-Herzegovina v. Yugoslavia)* paras 13 (r) and 14 (7) of the Judgment. The judgment is retrievable at http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyjudgment/ibhy_ijudgment_19960711_frame.htm

At the regional level, the Inter-American Court of Human Rights established the *dictum* in the well-known *Velasquez Rodriguez v. Honduras*[41] case that states are explicitly obliged to protect human rights not only under regional (human rights) treaty law but also under customary international law.[42]

3. The individual as claims holder in cases of state responsibility for human rights violations

The idea of the individual as being the victim and the claims holder in *persona* is at present a legal concept which is developing under some of the existing international and regional human rights instruments. As a concept or even principle of general international law it remains the exception and as such lacks universal recognition *per se*: international law still follows the principle of the classical law of aliens where the individual as such provides only the *casu* for subsequent interstate responsibility but does not hold a right on his own.[43] The individual's state will then act on his behalf through the means of diplomatic protection.[44] The evolving idea that the individual victim of human rights atrocities should have an individual and enforceable right to financial redress with the necessary *jus standi* constitutes a *novum* under international law.

3.1 Situation under international law

Under the emerging human rights treaty regimes, the notion that the individual (victim) is entitled to hold enforceable rights on his own was developed: Article 8 of the Universal Declaration of Human Rights[45] grants "everyone the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

The ICCPR's Human Rights Committee utilizes the wording of Article 2 (3) of the ICCPR, in terms of which "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" for the granting of financial reparation to victims of human rights

[41] "Inter-American Court of Human Rights: Judgement in Velasquez Rodriguez Case", 28 *ILM* (1989) 291.
[42] *Id.* paras 164-165.
[43] Article 3 of the above mentioned fourth Hague Convention of 1907 is sometimes seen as conferring a direct right to financial compensation to the individual victim. See Tomuschat, *Human Rights-Between Idealism and Realism* (2003), 295, with reference to Karlshoven who supports this opinion in his article "State Responsibility for Warlike Acts of the Armed Forces" in 40 *ICLQ* (1991), 827, 830-32.
[44] See the *Mavrommatis Palestine Concessions* case on state responsibility for international wrongs and the enforcement of these claims through diplomatic protection. *Greece v. UK* in 2 *PCIJ Reports*, (Series A) (1924), 12.
[45] G. A. Res. 217 A, UN Doc. A/RES/271 A (III) (1948)

violations.[46] What remains open to question, however, is whether this right constitutes only a procedural right or the right to an effective financial remedy as well.[47]

Following the wording of Article 9 (5) of the ICCPR, which specifically stipulates that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation", the nature of the remedy could resemble a financial one as well. Tomuschat,[48] on the contrary, uses the fact that compensation for acts of miscarriage of justice under Article 14 (6) should take place in the domestic context (of the violating state) as an indicator that the term "effective remedy" in Article 2 (3) has a procedural nature only. The HRC has, however, decided to read Article 2 (3) as a right to financial remedy[49] for the victim of state infringements of the ICCPR[50] and based its view mainly on customary international law governing the consequences of internationally wrongful acts and the duty to pay compensation.[51] This view is supported by other legal opinions, which reason that the rationale behind Article 2 (3) (a) ICCPR requires that a substantive claim indeed arises from the violation as a mandatory consequence.[52]

Article 14 of the UN Torture Convention of 1984[53] stipulates that the individual victim of acts of torture (or his dependants in the case of his death) shall have a direct right to financial compensation for his suffering besides[54] existing domestic remedies. This important, additional remedy for the victims of torture has yet to be utilized by the CAT.

---

[46] *Ann Maria Garcia Lanza de Netto v. Uruguay*, Communication No. 8/1977, U.N. Doc. CCPR/C/OP/1 p 45 (1984) decided on 3 April 1980, also known as the *Weissmann* communication.

[47] Tomuschat, (n 43) 298 characterizes redress as being solely procedural in its nature. He refers to the French and Spanish versions of the text, which imply, by using the terms "recours" and "recurso", that only a procedural remedy was intended by the ICCPR.

[48] (n 43)

[49] Tomuschat, "Reparations for Victims of Grave Human Rights Violations" in 10 *Tulane Journal of International And Comparative Law* (2001) 157, 167.

[50] Tomuschat, (n 43) 298-99 commenting on the HRC's findings on financial remedies in the last 25 years.

[51] *Id.*, 299.

[52] See Klein, "Individual Reparation Claims under the International Covenant on Civil and Political Rights: The Practice of the Human Rights Committee" in Randelzhofer and Tomuschat (eds.), *State Responsibility and the Individual-Reparation in Instances of Grave Violations of Human Rights* (1999) 32-34; Klein argues further that in theory Article 2(3) could be used to develop a financial claim against the individual perpetrator as part of his own state's general liability.

[53] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984.

[54] Article 14 (1) of the Torture Convention provides that "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation…"

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[55] acknowledges the general principle of financial compensation for the victims of particular "state crimes" such as unlawful detention and acts of police brutality.

The UN GA widened this limited scope of compensable human rights violations in 1998 by including human rights and fundamental freedoms as such redressable violations. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms[56] stipulates that "in the exercise of human rights and fundamental freedoms […] everyone has the right […] to benefit from an effective remedy […] including any compensation due […]."[57]

These declarations document the UN's growing determination to find an international principle on, and formula for, state responsibility for human rights violations with the further consequence of financial redress.

Examples of this determination can be seen in the recent efforts of the ECOSOC to develop and implement the (so-called) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*.[58]

These principles and guidelines are the result of a drafting process which has lasted for more than a decade: of particular relevance is the "study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms" of 1993,[59] which was undertaken by the CHR's Special Rapporteur, the Dutch Professor van Boven. The findings of the study were used for two subsequent drafts of later codifications in 1996 and 1997.[60]

In 1998, Professor M Cherif Bassiouni was appointed by the UN CHR as the next Special Rapporteur to carry out the task of finalising the draft codification.[61]

---

[55] GA Res. 40/43 of 29 November 1985.
[56] GA Res. 53/144 of 8 March 1999.
[57] *Id.*, Article 9 (1).
[58] E/CN.4/2000/62 of 18 January 2000.
[59] E/CN.4/Sub.2/1193/8 of 2 July section IX 1993.
[60] E/CN.4/1996/17 of 24 May 1996 and E/CN.4/1997/104 of 16 January 1997.
[61] E/CN.4/RES/1998/43.

A finalized draft entitled "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" was adopted by the Commission on Human Rights on 20 April 2005[62] and recommended for later adoption by the ECOSOC and the General Assembly.

This draft, which was eventually adopted by the UN General Assembly on 16 December 2005,[63] contains key elements relating to the victim's rights to reparation which shall be "adequate, effective and prompt" and "proportional to the gravity of the violations and the harm suffered".[64]

3.2 Situation under regional treaty law

On the regional human rights level, the position of the individual victim and claim-holder appears to be promising: all three discussed regional human rights systems[65] provide –at least in theory – financial compensation:

Article 13 of the ECHR[66] (Protocol No. 11) grants the right to an effective remedy to "everyone whose rights and freedoms as set forth in this Convention are violated" and authorizes the European Court of Human Rights in Article 41 to grant partial financial compensation in cases where the domestic legislation of the affected member state allows it.

In addition to the ECHR system, the treaty law of the European Communities can be utilized to provide individual remedies for violations of EC law: the new Charter of Fundamental Rights[67] protects basic human and fundamental rights related to dignity, liberty, equality, solidarity, citizenship and justice. Awaiting later incorporation into the EC Treaty, human rights protection still takes place under the existing EC Treaty with the Court of Justice of the European Communities as the principal judicial organ. The Court already granted financial remedies to individual citizens of the EC for actions and/ or omissions of the respective

[62] E/CN.4/RES/2005/35.
[63] A/RES/60/147.
[64] *Id.*, Ch. IX , para 15 of the adopted basic principles.
[65] See Part A.
[66] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 33 *ILM* (1994) 960, 963.
[67] Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, as entered into force Dec. 7, 2000.

member states to comply with EC standards[68] or to safeguard their timely implementation in domestic law.[69]

Recourse to financial compensation as redress for the violation of human rights is available under the Inter-American Human Rights Regime, where Article 63 (1) of the American Convention on Human Rights of 1969 authorizes the Inter-American Court of Human Rights to rule that "fair compensation shall be paid to the injured party."[70] This authorization to grant financial remedies is a further development of the original "right to judicial protection" as set out under Article 25 of the American Convention.

The Inter-American Court of Human Rights explicitly regards as one of the objectives of international (human rights law) "not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."[71]

The African human rights system seems to acknowledge in principle the possibility of redressing human rights atrocities in Article 27 s. 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, "whereas the Court shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.[72]

3.3 Shortcomings

The possibilities of pursuing civil remedies for human rights atrocities already suffer from apparent shortcomings.

Firstly, the above-mentioned international provisions, which acknowledge in general the possibility of granting financial remedies to the individual victim, provide neither a direct

---

[68] See the case *Van Gend & Loos* where the court found that the EC and its member states were obliged to respect the law determining the individual Community citizens legal position, *N. V. Algemene Transport- en Expeditie Onderneming van Gend & Loos/Nederlandse administratie der belastingen (Netherlands Inland Revenue Administration)*, Case 26/62, reprinted in *ECR* (1963), 1.

[69] In *Francovich* Germany was held liable for its omission to implement in time a EC directive in time and to compensate for damages arising out of this omission, *Andrea Francovich and Others v Italian Republic, Joined Cases C-6/90 and C-9/90*, reprinted in *ECR* (1991), 5357.

[70] American Convention on Human Rights, Article 63. 1144 *UNTS* 123

[71] See the 1988 *Velasquez Rodriguez* decision, Ser. C, No. 4, in 9 *HRLJ* (1988) 212, para 134 and in 28 *ILM* (1989) 291.

[72] See Article 27 s. 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The Protocol can be retrieved from http://www.africa-union.org/home/welcome.htm under [treaties].

procedure for the individual victim to proceed with his financial claim nor the necessary judicial forum, which could be directly accessible for the individual claimant. The ICCPR's HRC, which constitutes the only international treaty body with a proven relevance with respect to the granting of individual remedies in the international field, has the right to grant financial remedies only in the context of already processed individual complaint procedures. The HRC does therefore not resemble an explicit forum for the adjudication of financial claims of the individual victim. Financial claims in this context can only be made during an already ongoing complaint/communication procedure. As a consequence, the ICCPR with its HRC constitute only an indirect and weak procedure that lacks the power to force the perpetrator state to process financial claims of the individual human rights victim in general.

Given the difficulties documented in Part A concerning compliance with the HRC's findings, combined with the length of the individual communication procedures, the few findings of the HRC failed to establish the necessary *consuetudo*[73] in international human rights law.

The situation under the regional human rights regimes is only slightly better.[74] The European Court of Human Rights, for example, "does not acknowledge a [independent and general] right to financial compensation in all instances of violations … irrespective of the gravity of the breach". The dictum in the case *McCann v. United Kingdom*[75] confirms this view when the Court held that while there had been a violation of Article 2[76] of the ECHR by the UK through the actions of her security organs, a further claim for financial damages under Article 41 ECHR had to be dismissed as being inappropriate considering the fact that the killed terrorists had without further doubt intended to carry out a terrorist bombing in Gibraltar.[77]

The ECHR found in three recent judgments, *Al-Adsani v United Kingdom,*[78] *Fogarty v United Kingdom*[79] and *McElhinney v Ireland*,[80] that the conferring of civil immunity on foreign states for the adjudication of claims arising out of human rights-related violations under the

[73] Tomuschat, (n 43) 167.
[74] Tomuschat, (n 43) 162 *et sequ* for a comprehensive evaluation of the present practice.
[75] App. No. 18984/91, 21 *EHRR*. (1996) 97-187.
[76] *Id*. para 214. In contrast hereto stands the prior decision of the then European Commission on Human Rights which found the acts of the UK as not resembling a violation of Article 2 ECHR on the grounds that the use of lethal force had been a justifiable exception as having been absolutely necessary for the purpose of "defending other persons from unlawful violence", (n 75), paras 250, 251.
[77] *Id*. paras 8 and 219.
[78] App. No. 35763/97 Judgment 1 Nov. 2001 in 34 *EHRR* (2002) 273 *et seq*.
[79] App. No. 37112/97 Judgment 21 Nov. 2001 in 34 *EHRR* (2002) 302 *et seq*.
[80] App. No. 31253/96 Judgment 21 Nov. 2001 in 34 *EHRR* (2002) 322 *et seq*., all three decisions can be retrieved from the court's homepage at http://www.hudoc.echr.coe.int

provisions of UK legislation[81] was lawful and thus did not violate the victim's/plaintiff's right to a fair trial under article 6 (1) ECHR.[82] The *dicta* of the court was even more surprising given that the court acknowledged in the *Al-Adsani* case that the alleged human rights violations suffered by the victim were acts of torture and as such *jus cogens* violations, punishable as an international[83] and domestic[84] crime and constituting a violation of Article 3 of the ECHR as well. In *Al Adsani*, the court effectively restored the traditional, absolute concept of state immunity, refusing to extend the findings of the Law Lords in *Pinochet*[85] to civil proceedings[86] and to acknowledge the changes with regard to civil immunity for certain international crimes such as torture and terrorism in the jurisdictions of other states.[87] It remains an open question whether the *Pinochet* decision of the Law Lords has influenced the opinion of the British judiciary in general.[88]

A victim's right to financial redress under the ECHR remains therefore subject to his (home) state's internal domestic law with only very few exceptions permissible under the ECHR.[89]

In contrast hereto, the difficulties of the Inter-American regime of human rights protection in establishing a strong human rights civil adjudication are different: the lack of necessary means to enforce compliance with these findings, jeopardize the creation of an strong Inter-American human rights adjudication.

As early as 1988, with its decision in *Velasquez Rodriguez v. Honduras,*[90] the Inter-American Court set a precedent of holding states financially liable for human rights atrocities. The Court

---

[81] Here under s. 1 (1)UK State Immunity Act,1978, c.33, reprinted in 17 *ILM* (1978) 1123 , whereas " a state is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act".

[82] See Strydom and Bachmann (n 7) for a detailed evaluation of the three cases; also Voyiakis "Access to Court v State Immunity" in 52.2 *ICLQ* (2003) 297-332. Note the further discussion of the topic of civil immunity for state human rights violations in chapter 2, 2.3.

[83] As stipulated under Article 4 CAT.

[84] Torture is a crime in the UK under s 134 Criminal Justice Act of 1988.

[85] *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (No. 3) (HL) (E) [2000] in 1 AC 147; see part B.

[86] Judgment (n.78) para 61.

[87] The US FSIA e.g. was amended in 1996 by the AEDPA in order to preclude state immunity in cases of extrajudicial killings, terrorism and torture, see for a detailed account below under chapter 2, 2.3.1.

[88] See e.g . the Crown's Court of Appeal's 2004 decision in *Ronald Grant Jones v The Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia) & Anor*. in [2004] EWCA Civil 1394 et seq. where the court limited the applicability of sovereign immunity protection in cases of *jus cogens* violations by individual state agents.

[89] Tomuschat, (n 43) 164, discussing other recent decisions of the European Court of Human Rights, identifying a change in case law towards a more applicant –"friendly" jurisprudence.

[90] "Inter-American Court of Human Rights: Judgement in Velasquez Rodriguez Case", reprinted in 28 *ILM* (1989) 291.

has so far delivered more than 41 judgments on state responsibility for human rights violations and ordered the respective states to pay reparations.[91]

However, as just mentioned, the Court's lack of power to execute its judgments[92] has prevented the Inter-American system from creating a strong legacy of establishing state accountability for human rights violations in the region.[93]

4. Conclusion

This chapter concludes with two findings: firstly, the concept of state liability for human rights violations has developed into a principle that has received some recognition under international law. In theory, the move away from sole inter-state responsibility for international wrongs towards the idea of intra-state liability was made, especially in respect to human rights violations that constitute *jus cogens* violations. However, international law still follows the "traditional" concept of international state responsibility whereby the claim-holder may only be a state as opposed to the individual victim: the latter, while being nominally the right holder, is left without an actionable claim on his own and still depends on his home state to pursue claims on his behalf as *parens patriae*. Therefore, the prevailing view continues with the traditional notion that only states "have the right and an interest to bring an (civil) action against the offending state"[94] and not the individual victim.[95] The UNCC followed this concept in its rules of procedure whereby only governments and not the individual claimants have the exclusive right to submit claims.[96]

Secondly, the (few) exceptions under international and regional human rights law listed above, which grant the individual victim a limited right to financial redress for his suffering before the respective treaty forums, fail to create a situation in which the establishment of states' civil accountability for human rights becomes automatic.

---

[91] See http://www.corteidh.or.cr/serie_c/index.html, Laplante, "Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, And The Duty Of Prevention" in 22.3 *NQHR* (2004) 351 and Shelton, *Remedies in International Human Rights Law* (2005), 468-477.

[92] See Part A for a description of these difficulties.

[93] Tomuschat, (n 43) 172 provides a more disheartening account of the IACHR's adjudication.

[94] See UN Commission on Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc E/CN.4/Sub.2/1993/8 18 *et seq.*. This opinion follows Article 31 para 2 of the *Draft articles on Responsibility of States for internationally wrongful acts* (n 17) and Commentary, (n 22) 225.

[95] See *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad* of the International Law Association Human Rights Committee (British Branch), Report of the International Law Association Human Rights Committee hereafter, in 2 *EHRLR* (2001) 138, 150.

[96] Art. 5 of the UNCC's Provisional Rules for Claims Procedure, (n 37).

Consequently, one has to conclude that there exists a growing resolve and determination in the international legal community in general, and among the respective human rights organs in particular, to establish more effective means and ways of holding states accountable for human rights atrocities.

However, the drawback of not having established an international regime on civil state accountability, which grants the individual victim an undisputed position as claim-holder with the necessary procedural and enforcing means, remains an unfortunate reality which needs the future attention of the international legal community.

CHAPTER 2

ADJUDICATING HUMAN RIGHTS ATROCITIES IN DOMESTIC JURISDICTIONS

1. INTRODUCTION

Considering the limited options under supranational human rights regimes for obtaining financial redress, which often demand the prior exhaustion of domestic legal remedies, the lack of an independent forum to bring such claims and finally the absence of a guaranteed principle under international law whereby the individual acquires the standing of an individual claim-holder, the existence and use of (corresponding) domestic provisions become increasingly important for the individual victim of human rights atrocities.

With this in mind, the following chapter summarizes the present legal situation for asserting a civil human rights action in some selected domestic jurisdictions.

2. CIVIL LIABILITY FOR HUMAN RIGHTS ATROCITIES BEFORE US COURTS

2.1. Overview

This summary starts with the USA because of the country's reasonably well developed human rights adjudication system for foreign litigants. Human rights litigation before US courts started in 1980 with the landmark decision in *Filartiga v. Pena-Irala*,[97] when the 2nd Circuit Federal Court found that acts of (state) torture, committed outside the territory of the USA and involving only non-US citizens, both as victim and perpetrator, could initiate a successful civil action before US federal courts. The court based the necessary jurisdiction *ratione materiae* of US federal courts on the Alien Torts Claims Act[98] (ATCA), a statute from 1789 which had been lying dormant for nearly 200 years.[99]

Over the last 25 years more than a 100 civil liability cases for alleged gross human rights violations before US federal courts were brought under the ATCA,[100] the supplementary

[97] 630 F.2d 876 (2d Cir. 1980)
[98] 28 U.S.C § 1350. The ATCA is sometimes referred to as Alien Torts Statute (ATS) as well.
[99] The ATCA was only used on a few occasions prior *Filartiga* resulting in less than 30 court findings, See *Symposium* on "Corporate liability for violations of international human rights law" in 114 *HLR* (2001), 2033 *et seq*..
[100] Human Rights Litigation in the USA is based mainly on the ATCA and the TVPA; consequently, the term "ATCA" refers to any action brought before U.S. courts under these statutes.

Torture Victim Protection Act[101] (TVPA) of 1991 and the Antiterrorism and Effective Death Penalty Act[102] (AEDPA).[103] of 1998.

Human rights adjudication under the ATCA has led to the successful suing of individuals as "state" and "non-state" actors of egregious human rights atrocities, some (highly political) suits against states and an increasing number of lawsuits against multi-national corporations (MNCs) for their alleged participation in human rights atrocities committed abroad by repressive regimes.

US human rights litigation is remarkably wide in its scope: individuals have the right to assert legal actions against foreign individuals, judicial persons and even states (on a limited scale), as alleged human rights perpetrators. Through its focus on the individual perpetrator, either as a natural person, or as a corporate, legal person, human rights litigation under the ATCA has the potential to create the necessary deterrence to prevent wide-scale human rights atrocities.

Human rights litigation in the US therefore breaks with the traditional, continental common law view, whereby in cases of state wrongs the claim-holder may only be a state and not an individual victim. It therefore merges the different phases of legal developments under the concept of state accountability discussed above. Consequently, adjudication under the ATCA and its subsequent instruments could develop into a new, potentially powerful way of protecting human rights.

2.2. The Law

2.2.1. The Alien Torts Claims Act (ATCA)

The Alien Torts Claims Act[104] was enacted in 1789 as a domestic law which allows for the adjudication of torts committed by an alien against an alien. The ATCA confers subject matter jurisdiction on a federal court when the following conditions are met: (1) an alien plaintiff

[101] 28 U.S.C § 1331 Pub.L.No 102-256, 106 Stat.73, which extends the scope of civil actions on U.S. citizens as well for torts of torture and extrajudicial killings.
[102] 28 U.S.C. § 1605 (a) (7) (1998). Permitting actions against designed states of state sponsored international terrorism.
[103] *Symposium*, (n 99) 2033 *et sequitur*
[104] The terms ATCA and ATS (Alien Torts Statute) are used interchangeably.

sues, (2) for tort only (3) based on an act that was committed in violation of either the law of nations[105] or a treaty of the US.[106]

The law of nations is defined by customary usage and clearly articulated principles of the international community. However, not all violations of international law are actionable under the ATCA: in general, only human rights violations of a high intensity are actionable. Over the last 25 years, US courts developed from the *Filartiga* judgment[107] certain norms and criteria whose breaches could qualify as violations of the law of nations and therefore as torts actionable under the ATCA.

In *Forti v. Suarez-Mason*[108] the "law of nation" test[109] was developed, requiring a "universal, definable and obligatory"[110] character of the respective international norms. A violation of international human rights and international humanitarian law, as codified in several multilateral treaties and conventions, may qualify as such a violation of the law of nations under these specific criteria and can therefore establish the legal grounds of a civil action against an alien defendant, who has to be present or otherwise represented in the USA when the summons is served.[111] Today, the following human rights violations may establish jurisdiction of US Federal Courts under the ATCA, the TVPA and the AEDPA: torture, summary execution or extrajudicial killing, genocide, war crimes and crimes against humanity, disappearances, arbitrary detention and cruel, inhuman or degrading treatment, terrorism and hostage-taking.[112]

[105] Which was originally regarded as addressing only states with their respective state actors. In *Kadic v. Karadzic,* the 2nd Circuit found that certain international crimes such as genocide resembled exceptions to that rule. 70 F.3d 232 (2d Cir.1995) 239-41.
[106] 28 U.S.C. § 1350 reads: "The district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".
[107] *Filartiga* defined torts actionable under the ATCA as "of mutual, and not merely several, concern, by means of express in international accords, that a wrong generally recognized becomes an international law violation within the meaning of the (ATCA) statute" 630 F.2d at 888.
[108] 672 F Supp (ND Cal 1987) 1531.
[109] Which has become recognized as the so called *Forti* test. The US Supreme Court referred to this test in its *Sosa v. Alvarez Machain* decision of 29 June 2004, 124 S. Ct 2739 (2004). The *Forti* test consists actually of two parts, *Forti I* and *II* with the former outlining the requirements for the *jus cogens* nature of actionable torts and the latter defining the "universality" criteria thereof, see Stephens and Ratner, *International Human Rights Litigation In U.S. Courts* (1996) 51-52.
[110] 672 F Supp (ND Cal 1987) 1539-1540.
[111] The so called personal service requirement of summons etc. as stipulated in Fed.R.Civ.P 4 8(e) (2).
[112] See Stephens and Ratner, (n 109) 63 – 92.

2.2.2. The Torture Victim Protection Act (TVPA)

The Torture Victim Protection Act of 1991 broadened the scope of human rights litigation in the USA by establishing civil liability for acts of torture and/or extra-judicial killings. Section 2 (a) states that "an individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action be liable for damages to that individual; or (2) subjects an individual to extra-judicial killing, shall, in a civil action, be liable for damages to the individual's legal representative, or any person who may be a claimant in an action for wrongful death". The TVPA is important in two ways: first, its scope of applicability includes US plaintiffs as well and, secondly, it also targets state-sponsored human rights violations of only mid-level intensity.

The following four requirements[113] have to be fulfilled in order to establish a successful case:

(1) The defendant must have committed an act of torture or an extra-judicial killing;
(2) The defendant must have acted under actual or apparent authority, or color of law, of a foreign nation;
(3) The plaintiff must be a victim, the victim's legal representative, or a person who may be a claimant in a wrongful death action; and
(4) The plaintiff has to have exhausted legal remedies available in the country where the conduct giving raise to the claim occurred.

The TVPA has, unlike the ATCA, a statute of limitation, which sets the limitations period at ten years. The ATCA "borrows" from the TVPA this statute of limitation. The TVPA can be regarded as a pendant to the ATCA with the explicit focus on adjudicating the international crime of torture before US federal courts. It thus constitutes a legislative response to a particular breach of international law.

2.2.3. The Antiterrorism and Effective Death Penalty Act (AEDPA)[114]

The AEDPA was enacted in 1996 and limits state immunity in cases of state terrorism as a direct response to the growing threat of international terrorism directed against the USA.[115] The AEDPA permits a claim of damages against a state sponsor of international terrorism for

[113] Ratner and Abrams, *Accountability For Human Rights Atrocities In International Law: Beyond The Nuremberg Legacy* (2001), 207.
[114] 28 U.S.C. § 1605 (a)(7) (1998)
[115] See part B above.

personal injury or death caused by acts of torture, extra-judicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources for such an act if the act or provision of support is engaged in by an official agent of the foreign state while acting within the scope of his or her duties. It therefore amends the Foreign Sovereign Immunities Act (FSIA)[116] to permit a civil suit under the following requirements:

(1) The foreign state was designated[117] as a state sponsor of terrorism under section 6 (j) of the Export Administration Act of 1979[118] or section 620 (a) of the Foreign Assistance Act of 1961[119] at the time of the commission of the act;
(2) The act was committed within the designated state and there was a reasonable opportunity for the state to arbitrate the claim; or
(3) The claimant was not a US national.

2.3. Limitations of the U.S. human rights litigation and their exceptions

2.3.1. The Foreign Sovereign Immunities Act (FSIA)

The FSIA can limit the extent to which individuals will be able to bring suits under the ATCA. The FSIA was passed in 1976 and lays down certain exceptions to state immunity, which were regarded until then as being absolute. Examples of such exceptions are cases where immunity was waived, cases of litigation involving commercial activity undertaken by the sovereign in the United States and, more relevant with respect to human rights, cases in which the sovereign is alleged to have committed a tort resulting in injury inside the United States.[120]

The FSIA limits the range and scope of ATCA litigation. The Supreme Court ruled in 1989 in *Argentine Republic v. Amerada Hess Shipping Corp*[121] that, in general, save for some exceptions as contained in the FSIA, a foreign state was immune from suit.[122] This exemption

[116] 28 U. S. C. §§ 1602 – 1605
[117] States designated by the US State Department as state sponsors of terrorism in 2004 were Cuba, Iran, Libya, the Democratic Peoples' Republic of Korea, Sudan and Syria. Information is accessible at http://www.state.gov/s/ct/rls/pgtrpt/2004/31644.htm.
[118] 50 U.S.C § 2405 (j)(1994)
[119] 22 U.S.C. § 2371 (1994)
[120] 28 U.S.C. § 1605
[121] 488 U.S. 428 (S. Ct 1989); the court further laid out the requirements under which a foreign states could waive its immunity.
[122] *Id.* 443; the court found that the FSIA was the "sole basis" for jurisdiction in state liability cases. The US SC overruled the Court of Appeals holding of September 1987 because a violation of international law would establish subject matter jurisdiction on the grounds of the ATCA, reprinted in 26 *ILM* (1987) 1374, thus ruling that the ATCA did not remove sovereign immunity. See also Symposium on "Corporate liability for violations of international human rights law", *Symposium* (n 99) 2033, 2035.

from US jurisdiction also applies to cases of gross human rights violations which might qualify as *jus cogens* in international human rights law. The DC Circuit Court therefore found in its 1994 decision *Princz v. Federal Republic of Germany,*[123] concerning claims of a Holocaust survivor against Germany for his suffering in the concentration camps, that "even the most grievous human rights violations do not evince a foreign sovereign's intention to submit to suit in the United States".[124]

The commercial activity exception of the FSIA, 28 U.S.C. § 1605 (a) (2), whereby a commercial activity must have been carried out by the sued state, can allow the commencement of a civil action under strict conditions. In the context of human rights litigation, the third clause of § 1605 (a) (2) applies whereby this activity must have been taken place "elsewhere" – that is, outside US territory. The main difficulty for plaintiffs in any civil litigation against states is therefore to prove that the alleged human rights violation qualifies as a commercial activity. This has to be done with reference to the nature of the conduct.[125] In the case of a civil action this means that the foreign state acts through its organs "in the manner of a private player" in order to apply the commercial activity exception.[126] So far, any attempt to establish jurisdiction against states in human rights litigation cases before US courts by invoking this exception has been unsuccessful.[127]

Besides these exceptions, the only possibility to overcome the bar of the FSIA is on grounds of the 1996 AEDPA[128] in cases of state-sponsored terrorism.

2.3.2. The Head-of-State doctrine

Following this doctrine any action against a foreign head of state would be futile since the head of a foreign nation enjoys the same immunity from the jurisdiction of United States courts as the state itself.

(a) One approach is that head-of-state immunity derives from common law and promotes "comity among nations by ensuring that leaders can perform their duties without being subject

[123] 26 F 3d 1166 1173 (D.C.Cir.1994)
[124] *Id.* 1174.
[125] 28 U.S.C. § 1603 (d).
[126] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, p. 614 (1992).
[127] See e. g. the cases *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir.1994) and *Hwang Geum Joo, et al., v. Japan*, Civil Action 00-02233 (HHK) (D.C. Cir. 2001).
[128] See above under 2.2.3.

to detention, arrest or embarrassment in a country's foreign legal system".[129] This kind of immunity is, however, a limited one since it can be waived. The Fourth Circuit, for instance, rejected the bid of former Philippines president Marco for immunity because the new government of the Philippines had sought to waive his immunity. The granting of immunity to him would therefore have weakened the idea of promoting comity among nations as being detrimental to the interests of both states.

Traditionally, the executive branch has the authority to define who should be entitled to immunity. In the USA, the State Department as part of the executive branch has more recently limited the head-of-state immunity only to acts that are inherently governmental or public in nature.[130]

(b) The second approach is through the FSIA. The courts in the USA, however, differ in their view on whether individuals – including heads of state – are included in the FSIA's scope.

The Ninth Circuit concluded in *Chuidian v. Philippine National Bank*[131] that an individual acting in his or her official capacity on behalf of a foreign sovereign was entitled to immunity under the FSIA. The decision was based on § 1603 (b) of the FSIA, which defines a "foreign state" to include "an agency or instrumentality of a foreign state"[132] which includes "any entity… which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or political subdivision thereof"[133]. The court explained that the terms "organ" and "agent" "do not in their typical legal usage necessarily exclude individuals".[134] The direct application of the FSIA for the purpose of individual immunity therefore eliminated the role of the State Department in determining immunity.

However, this view was challenged in *Lafontant v. Aristide*,[135] where it was stated that "immunity only extends to the person the United States government acknowledges as the official head-of-state".[136] Recognition of a government and its officers is the exclusive

[129] 817 F.2d 1108 (4thCir. 1987).
[130] See George "Head-of-State Immunity In The United States Courts: Still Confused After All These Years", 64 *FLR* (1995), 1055-1056.
[131] 912 F. 2d 1095 (9th Cir.1990)
[132] 28 U.S.C. § 1603 (b)
[133] *Chuidian*, 912 F. 2d 1100.
[134] *Id*. 1101.
[135] 844 F. Supp.128 (E.D.N.Y. 1994)
[136] Concurring in *Kadic v. Karadzic* 70 F.3d 244, whereas the recognition of a state and its organs is a precondition for the enjoyment of head-of-state immunity.

function of the Executive Branch. "[…] the courts must defer to the Executive determination. Presidential decisions to recognize a government are binding on the courts, and the courts must give them legal effect".[137] Consequently, the status of head-of-state immunity still remains uncertain in light of the passage of the FSIA.[138]

In conclusion, it has to be stated that cases brought before US courts under the ATCA before 1996 were only successful in respect of the FSIA when they were directed against an individual who acted outside his or her official authority.

US human rights litigation has therefore departed from the traditional view that state immunity is an absolute bar to any court proceedings with its judicial construction of declaring certain human rights violations such as summary executions and torture as lying outside the scope of official governmental acts.[139] The recent equivocal decisions of UK civil courts on third state liability for *jus cogens* violations of international human rights and humanitarian law indicate an ambivalence in the Crown's courts in addressing this difficult topic.[140]

2.3.3. The "political question" doctrine

This limitation is used as a justification for a motion to dismiss a case of human rights litigation before US courts in cases where one or more factors are present which may compromise the justiciability of a case because of the nature of the suit.[141] In *Baker v. Carr*,[142] citing matters involving foreign affairs and the exercise of executive powers as falling within the political question doctrine, the US Supreme Court cited matters involving foreign affairs and the exercise of executive powers as falling within the political question doctrine The political question doctrine consequently does not abrogate the existence of federal judicial power but merely limits its exercise.[143] It has further justified the "political question" with two considerations: "the appropriateness under our system of government of

[137] *Id*. 132-33
[138] Stephens and Ratner, (n 109) 127ff.
[139] *Id.*, 131 and Fn. 43 with references to US criminal and civil case law supporting this view.
[140] See below under 3.2
[141] The actual relevance of this defence is limited. Until 1996 there hasn't been one dismissal on grounds of this defence, *Id.*, 141.
[142] 369 U.S. 186 (1962).
[143] *Id.* 217.

attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination".[144]

According to experienced human rights litigation lawyers, only the argument that the civil action may question the conduct of the USA can be successful.[145] Such a situation may appear when a "judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests".[146]

2.3.4. The Act-of-State doctrine

This doctrine defines the conditions under with the judicial branch is prohibited from examining the validity of a foreign sovereign's act, regardless of the existence of possible international law infringements.[147] It therefore constitutes a quite powerful obstacle for any successful ATCA litigation.

The act-of-state doctrine has the potential to undermine any ATCA litigation in cases where the human rights violations were authorized or encouraged by the ruling government itself. The doctrine limits the federal court's ability to pass on the validity of a foreign nation's conduct under international law.

In *Republic of the Philippines v. Marcos*[148] the Ninth Circuit refused to apply the act of state doctrine to shield the activities of former Philippines president Marcos. It therefore restricted the scope of applicability in cases where the conduct of a regime which was no longer in power is subjected to a civil action by the current government. It concluded that, "as a practical tool in keeping the judicial branch out of the conduct of foreign affairs, the classification of 'act of state' is not a promise to the ruler of any foreign country that his

[144] *Id*. 210.
[145] Stephens and Ratner, (n 109) 141 with further references.
[146] *Kadic v Karadzic* 70 F. 3d, 249. The so called "Statement of Interest" which is issued by the State Department and sent to the courts in cases where the USA has an interest in a dismissal because of possible interference with state policy has no legal power to force the courts to comply with it. Important recent decisions using this doctrine are the "Holocaust Slave Labor" cases, see *In re: Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D.N.J. 2000). See below 2.4.5.
[147] This doctrine had been identified and elaborated on *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).
[148] 862 F.2d 1355 (9th Cir.1988).

conduct, if challenged by his own country after his fall, may not become the subject of scrutiny in our courts".[149]

2.3.5. The objection of *forum non conveniens*

A court can refuse to hear a case even when all other requirements are met on the grounds that it is not the proper forum. The choice of whether or not to exercise jurisdiction is based on the *forum non conveniens* doctrine which allows a court to dismiss a case on the grounds that another venue under a foreign state's jurisdiction provides a more appropriate forum.[150] US federal courts' dismissals of ATCA-based corporate lawsuits on grounds of this doctrine have not been unusual. However, many appellate courts have overturned these dismissals and restored the balance of the parties' interests in favour of the plaintiff/appellant's choice of the judicial *forum*. The courts hereby gave way to the growing resolve in the US legal community to prevent the commission of severe human rights atrocities on a global scale by adjudicating them before US courts. The enactment of the TVPA[151] is a further illustration. The 2nd Circuit Court of Appeals followed the above considerations in its *Wiwa*[152] decision when it overturned the dismissal on grounds of *forum non conveniens* of the Southern District of New York Court, stating that the plaintiffs would put themselves in grave danger when returning to their home country in order to process their action there in particular, and that, in general, US courts would constitute a more suitable *forum* in actions involving such grave human rights violations. The US Supreme Court denied certiorari, thus allowing the case to become law within the circuit.[153]

2.3.6. Further limitations to US human rights litigation

A future obstacle to any successful human rights litigation based on the US system alone arises out of doubts as to whether one state's judicial *fora* would be appropriate for the adjudication of international torts committed worldwide. Interestingly, this additional "forum non- conveniens" objection is raised by very diverse critics. On the one side there are the US objectors who fear a possible infringement of US economic and political interests worldwide if the USA were to become a global forum for human rights litigation, especially for corporate

[149] *Id*. 1360.
[150] The following reasons may give way for such a dismissal: the proximity of evidence, the availability of an alternative venue, practical considerations such as costs incurred and the interests of the jurisdiction in trying a case, see Stephens and Ratner (n 109) 151-154.
[151] Extending US jurisdiction over foreign nationals for acts of torture committed abroad against US citizens and non-citizens alike.
[152] *Wiwa v. Royal Dutch Petroleum Co. et al.*, 226 F.3d 88 (2d Cir. 2002) reversing the District Court's prior dismissal in *Wiwa v. Royal Dutch Petroleum Co. et al.* No. 96 CIV 8386 (KMW) (S.D.N.Y.2000).
[153] 532 U.S. 941 (2001).

human rights violations. Their motivation seems to indicate an isolationist or even patriotic concern for the protection of such US interests.[154] The other objection to the apparent universality of the US courts comes from outside the USA. Critics fear the emergence of an omnipotent US jurisprudence that could eventually turn out to be inapplicable in civil proceedings worldwide, and that this would reverse the positive development of creating civil accountability for human rights atrocities that has been achieved thus far.[155] They seem to forget, however, that it was former president Jimmy Carter who encouraged and supported the commencement of the *Filartiga* proceedings in 1980 and helped therefore to "jumpstart" the US human rights litigation with its later impact on the adjudication of human rights globally.

The recent decision of *Sosa v. Alvarez-Machain*[156] by the US Supreme Court exemplifies the present legal dispute between the US government and the human rights community in the USA.[157] The petitioner, assisted by the present Administration's Justice Department, opted for a severe limitation of the ATCA's scope by arguing that this statute constituted merely a grant for jurisdiction before US federal courts and did not provide the legal grounds for tort action in the USA.[158] This opinion was vehemently challenged by the human rights community as basically "gutting" the ATCA and denying 24 years of successful human rights litigation (since the 1980 *Filartiga* precedent).[159]

---

[154] The former President Reagan and the present President George Walker Bush II resemble two protagonists of this group. The most recent attempt by politicians to limit the scope of the ATCA was Senator Feinstein's proposed "Alien Tort Statute Reform Act", which she introduced to the Congress on 17 October 2005. It excludes war crimes from ATCA jurisdiction and cases where a foreign state has perpetrated the crimes within its territorial boundaries, see 109th Congress, 1st session, S.1874, Sec. 1350 (a). A further analysis of the impact of these limitations on the ATCA and/or US human rights litigation lies outside the scope of this research at present.

[155] They base their criticism mainly on two particular characteristics of US civil litigation, namely the jury system with their pre juror selection and the awarding of punitive damages at a scale that appears excessive to the European lawyer.

[156] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), 124 S. Ct 2739 (2004) (*Sosa* hereafter).

[157] The facts of the case were in brief: The US Drug Enforcement Agency (DEA) suspected that the Mexican national Alvarez-Machain (Alvarez) had been involved in the 1985 torture and murder of one US DEA agent in Mexico. The DEA with assistance of the Mexican national Sosa kidnapped Alvarez, held him incommunicado for 24 hours and brought him to the USA where he was handed over to US authorities. In 1992, a criminal court cleared Alvarez of all charges. In 1993, Alvarez sued the US for false arrest under the FTCA (§ 1346 (b) (1) U.S.C.) and Sosa among others for a violation of the law of nations under the ATCA. Only the ATCA suit was successful with a summary judgment of $ 25,000 in damages. A later appeal judgement of the Ninth Circuit reversed the FTCA dismissal while confirming the ATCA judgment. See *Sosa*, (n 156) para 1 for a summary of the facts.

[158] See BRIEF OF PETITIONER, January 23, 2004, No. 03-339 at (i) under questions 1 and 2.

[159] See Hermer and Day "Helping Bush Bushwack Justice" in *Guardian* April 27, 2004, retrievable at http://www.globalpolicy.org/intljustice/atca/2004/0427/whack.html and Sebok "The Supreme Court Confronts the Alien Tort Claims Act: Should the Court Gut the Law, as the Administration suggests?" at http://writ.corporate.findlaw.com/scripts/sebok/20040322.html.

The Court rejected the petitioner's opinion and held that while the ATCA is in its terminology only jurisdictional it can also create a statutory cause for action but only for certain defined acts. It demanded that for the actionability of a breach of an international norm, the latter had to be "specific" or "definable", "obligatory" and "universal"[160], therefore endorsing the *Fortis* test.[161]

The Court consequently denied the applicability of the ATCA as a statutory cause on the grounds that the abduction and subsequent 24-hour detention of Alvarez did not qualify as actionable under the ATCA because this arbitrary arrest could neither qualify as a breach of any US treaty obligation nor as a breach of *jus cogens* of international law and was thus only actionable under domestic laws.[162]

The importance of this judgment for the future of ATCA adjudication lies in the renewed confirmation that the ATCA remains the appropriate forum for action in cases of gross violations of human rights and international humanitarian law, and that it will not become too broad in respect of less serious human rights violations that may be already actionable under other statutes. This judgment keeps the scope of the ATCA focused on redressing the severe suffering of individual victims and does not water down the spectrum of future human rights litigation.[163]

2.4. The development of human rights litigation in the USA

2.4.1. The individual human rights perpetrator: *Filartiga v. Pena-Irala*

As mentioned above, the history of successful human rights suits filed under the ATCA (and the TVPA) began in 1980, with the 2nd Circuit's decision in *Filartiga v. Pena- Irala*,[164] where the relatives of a Paraguayan man, who was tortured and killed while in custody of the Paraguayan police, filed suit against the former Inspector General of Police while he was in the USA. The 2nd Circuit Court found that it had subject matter jurisdiction and that torture was a violation of the law of nations within the scope of the ATCA.[165] The court's decision was important in two ways: firstly, it was the first time that plaintiffs could litigate human

[160] *Sosa* 124 S. Ct 2766 (2004).
[161] (n 108)
[162] See *Sosa*, (n 156).
[163] Sebok regards the judgment as unsatisfying in regard to future human rights litigation. "The Alien Torts Claims Act: How Powerful a Human Rights Weapon Is It? The Supreme Court Gives Some Guidance, But Not Much" at http://writ.corporate.findlaw.com/scripts/sebok/20040712.html
[164] 630 F.2d 876 (2d Cir. 1980)
[165] *Id*. 884.

rights abuses in federal courts despite the absence of a direct connection (other than that of the defendant being present when served with the court summons) to the United States of either the conduct of the tort or its effect and, second, the court's reliance on modern customary international law paved the way for the modern US adjudication of international crimes.

With *Filartiga* the doors of US federal courts were opened for civil litigation in cases where the defendants had acted as individual state actors when committing the human rights atrocities.

2.4.2. The non-state actor: *Kadic v. Karadzic*

This state actor/action requirement was upheld by the US federal courts until 1995 when the Second Circuit of Appeal decided in *Kadic v. Karadzic*[166] that the applicability of the ATCA and the more recent TVPA of 1991 was to be extended to non-state actors for cases of gross human rights offences.

In this highly political case[167], two groups of Bosnian women brought claims under the ATCA and TVPA against the Serb national Karadzic before the District Court of Manhattan because of his alleged participation in gross human rights violations such as genocide, rape, forced prostitution, torture, execution and wrongful death. Karadzic moved for dismissal on four different grounds: (1) insufficient service of process, (2) lack of personal jurisdiction, (3) lack of subject-matter jurisdiction and (4) non-justiciability of the plaintiffs' claims.[168] The District Court held that there was no subject-matter jurisdiction under the ATCA because Karadzic, as a president of an internationally unrecognized state (Respublika Srpska),[169] had acted as a private actor and as such his acts did not constitute violations of international law (or breaches of the law of nations as required by the ATCA), nor did they fulfill the requirement of governmental involvement as stipulated by the TVPA.

---

[166] 70 F. 3d 232, (2nd Cir.1995). The case was a consolidation of two suits brought on behalf of two groups of defendants, namely a group of individuals and two organizations, *Doe v. Karadzic* (No. 93 Civ. 878) and *Kadic v. Karadzic*.

[167] When the cases were brought before the 2nd Circuit Court, the civil war in Bosnia and Herzegovina with its predominantly Serb atrocities against the Muslim ethnicity was on full course and subject to UN scrutiny. Before and during the filing period, Karadzic visited N.Y. on three occasions on UN invitation.

[168] *Id*. 237

[169] In 1992 the Bosnian Serbs had declared part of the then independent former Yugoslavian Republic Bosnia and Herzegovina which was occupied by them as the independent Republic of Srpska. This Republic was, however, never recognized by the UN.

The plaintiffs challenged that verdict by appealing to the Second Circuit of Appeal and argued alternately that Karadzic has acted both as a private individual and as president of the Srpska Republic. The Second Circuit found, however, that the Republic of Srpska met the requirements of statehood[170] under international law[171] and that therefore there was subject-matter jurisdiction under the ATCA and further that certain international crimes, forming part of the *jus cogens* of international criminal law, such as "genocide, war crimes and crimes against humanity", could have been committed by Karadzic "in his private capacity".[172]

With *Kadic v. Karadzic* the subject-matter jurisdiction of the ATCA and TVPA has been extended to include certain acts of non-state actors because of the seriousness of their nature. With the 2nd Circuit's ruling, *jus cogens* violations of international human rights and humanitarian law have become actionable under the ATCA and TVPA.[173] But the Court went further when it found that other "common" crimes such as rape and extrajudicial killings were actionable under the ATCA as long as they were committed in furtherance of other *jus cogens* crimes which do not require "state action".[174]

2.4.3. States as defendants

Lawsuits against states are generally restricted through the bar of state immunity as stipulated in the FSIA. The lawsuits in *Argentine Republic v. Amerada Hess Shipping Corp.*[175] and *Princz v. Federal Republic of Germany*[176] are two examples of suits that were unsuccessful because of state immunity.

Lawsuits against states brought under the ATCA and TVPA are more likely to be successful in the case of state-sponsored terrorism. An important case in this respect is the *Lockerbie* litigation, which was brought in connection with the 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie in Scotland. The explosion killed 259 passengers, crew members and 11 residents of Lockerbie. The Libyan intelligence agent Abdelbaset Ali Mohamed (a.k.a. al

[170] Territory, Population and Political Leadership as the three governing criteria.
[171] 70 F. 3d 232 (2nd Cir.1995), 243.
[172] *Id*. 236.
[173] *Id.*, 239-43.
[174] *Id*., 243-44, "…are actionable […], without regard to state action, to the extent that they were committed *in pursuit of genocide or war crimes"*.
[175] 488 U.S. 428, 429; 109 S. Ct. 683 (1988).
[176] 26 F.3d 1166 (D.C. Cir. 1994).

Megrahi) was convicted in 2001 by the "Lockerbie" court in the Netherlands[177] for the bombing.[178]

The first civil suit[179] by 118 American representatives of victims against the Libyan government in 1993 was rejected on the grounds of state immunity under the FSIA. The plaintiffs argued that this case fell under one of the FSIA's exceptions to foreign state immunity.[180]

The 2nd Circuit Court found, firstly, that Pan Am Flight 103 was not to be regarded as territory of the USA; secondly, the bombing did not fall within the non-commercial tort exception under the FSIA; thirdly, the UN SC's Resolution 748,[181] whereby Libya was obliged to pay compensation to the victims of the bombing, was not a binding treaty obligation under Article 25 of the UN Charter at the time of the enactment of the FSIA and as such could not qualify as a waiver of immunity under the act; and, lastly, the international crime of aviation terrorism did not constitute a "commercial act" within the commercial activity exception of 28 U.S.C. § 1605 (2).[182] Consequently, the court dismissed the civil suits.

As a consequence of the pressure from the families of the victims and the public, the FSIA was amended in 1996 by the AEDPA, and this opened the way for civil suits against foreign governments under the conditions outlined above. Following the passage of the AEDPA many plaintiffs renewed their suits.[183] The 2nd Circuit Court ruled in *Socialist People's Libyan Arab Jamahiriya v. Smith*[184] that families of the Lockerbie victims could proceed with their case seeking damages because of the changes in the law, therefore rejecting the appellant's (Libya's) legal view that the AEDPA resembled an impermissible *ex post facto* law.

---

[177] The court was a Scottish court sitting in Camp Zeist, Netherlands. This was a requirement of the Libyan government for the extradition of the two prime suspects to a Scottish court. Ali Mohamed was sentenced to life in prison on 31.1.2001. His appeal was dismissed.
[178] See for the Lockerbie case 40 *ILM* (2001) 582 *et seq.*
[179] *Smith v. Socialist People's Libyan Arab Jamahiriya* 101 F.3d 239 (2d Cir. 1996).
[180] See for an outlook on these exceptions and their position within the system of legal obstacles for a successful U.S. human rights civil action above under 2.3.
[181] UN Doc. S/RES/748 (1992)
[182] Murphy, "Civil Liability for Commission of International Crimes as an Alternative to Criminal Prosecution" in 12 *HHRJ* (1999); 1-56, 35 with more annotations.
[183] See e. g. the case *Rein v. Socialist People's Libyan Arab Jamahiriya* in 995 F. Supp. 325 (E.D.N.Y.1998)
[184] Case No. 98 – 7467, 1998 U.S. App. (2d Cir. December 15, 1998), retrievable at http://www.findlaw.com/2nd/987467.

The Lockerbie case came to an end, however, through a different course of events. In May 2002 the Libyan government offered the impressive sum of US $ 2.7 billion to compensate each of the 270 victims' families in exchange for the withdrawal of their lawsuits and the end of US and UN sanctions against Libya. By compensating the victims, the Libyan government would meet one of the conditions stipulated by the UN Security Council as a requirement for lifting international sanctions against the country.[185] In August 2003, this settlement was concluded by the legal and diplomatic representatives from the US and Libya.[186]

In *Alejandre v. Cuba*[187] and *Flatlow v. Iran*[188] Cuba and Iran were found liable as states for acts of extra-judicial killings.[189] In the first case Cuba was found liable for the shooting down of two unarmed civilian planes over international waters – an act that was regarded as an instance of extra-judicial killing within the AEDPA's definition. Iran was found liable for its support of the Shaqaqi faction of the Palestine Islamic Jihad, which launched a bombing attack on an Israeli bus, killing and wounding a number of passengers.

In conclusion, one can state that as a consequence to the severely limited state liability adjudication under the provisions of the FSIA, suits against governments have so far resulted only in out of court settlements but no final judgments. This far, very few actions have been successful under the AEDPA exceptions.

2.4.4. The corporate defendant: *Doe v. Unocal, Wiwa v. Royal Dutch Petroleum Company* and other cases

As one of the consequences of the limited success in suing states, more and more human rights lawyers turned instead to suing big multinational corporations (MNCs) for their complicity in gross human rights violations carried out by foreign states.[190] To date, the jurisprudence of US courts has found MNCs to be complicit in the violations of *jus cogens* norms of international criminal and human rights law such as crimes against humanity, war crimes and torture. Besides these violations, MNCs infringe a wide range of rights protected under civil, political, economic, social and cultural rights treaties.[191] The influence of MNCs

[185] *Mail & Guardian* (31st May 2002) "Lockerbie families offered $ 2,7bn" at http://archive.mg.co.za.
[186] See Sebok, "Libya, Lockerbie, and the Long-Delayed Settlement Relating to Pan Am Flight 103", at http://writ.news.findlaw.com/sebok/20020908.html.
[187] 996 F. Supp. 1239 (S.D.Fla.1997).
[188] 999 F. Supp. 1 (D.D.C.1998).
[189] See Murphy, (n 182) 40.
[190] See *Symposium*, (n 99) 2025- 2049 for a comprehensive summary of this important topic.
[191] *Id.*, 2027.

in transnational business operations has grown rapidly over the last fifty years to the extent that today whole governments of, mostly, third or second world states find themselves and their organs under the de facto control of these business enterprises. It was therefore only a matter of time before gross human rights atrocities committed by state organs of a repressive state would be attributed to the actions of MNCs. In the context of the accountability of MNCs there is the observation that their conduct still falls into a legal "black hole" in international law in the sense that international law has failed to address their liability with respect to rights and obligations under international human rights and international criminal law.[192] The ATCA, however, permits civil liability actions against corporations for their conduct overseas, under the conditions mentioned above. Specific difficulties in corporate liability actions may arise in the context of establishing subject-matter and personal jurisdiction. In respect of the former, the plaintiff has to prove that the alleged acts of the defendant qualify as "non-state actor" exceptions as set forth in the *Kadic v. Karadzic*[193] judgment in cases where the MNC has directly committed a law of nations violation, thus overriding the state action requirement. In cases where the liability of the MNC is based on its complicity in acts committed by a foreign sovereign government, the plaintiff has to prove that the violation was the result of the MNC's exercising of control over the respective government's officials or actors.[194]

The second hurdle to overcome is the successful establishment of personal jurisdiction by US courts through proving substantial links between the defendant and the US. The existence of financial assets is not enough in this regard: a direct connection between the actions of the MNC in the US and the MNC business affairs has to be established. The existence of MNCs' headquarters in the USA will increase the chances of a successful lawsuit.

Besides the above-mentioned *Wiwa* case with the important US Court of Appeals decision on jurisdiction of US courts over foreign corporate human rights atrocities,[195] the *Unocal*[196] case is of importance as the first case which brought a US corporation before US courts for its alleged human rights violations in the context of business activities overseas. In 1996, 15

[192] *Id.*, 2030 to 2033.
[193] 70 F.3d 232 (2d Cir. 1995).
[194] *Symposium*, (n 99) 2039 with reference to the *Doe v. Unocal Corp.* case.
[195] *Wiwa v. Royal Dutch Petroleum Co. et al.*, 226 F.3d 88 (2d Cir. 2000) reversing the District Court's prior dismissal in *Wiwa v. Royal Dutch Petroleum Co. et al.* No. 96 CIV 8386 (KMW) (S.D.N.Y.2002).
[196] The *Unocal* case comprises of two actions brought before the District Court of Central California: *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329,334 (C.D. Cal. 1997) brought by four villagers, the Federation of Trade Unions of Burma and the National Coalition Government of the Union of Burma and *Doe I v. Unocal Corp.*, 963 F.Supp.880,883 (C.D. Cal. 1997) brought by 14 villagers.

plaintiffs from Myanmar[197] brought an ATCA lawsuit against the California-based corporation alleging the corporation's complicity in widespread human rights abuses such as murder, rape and forced labour committed by Myanmar's security organs during the construction of a $1.2 billion oil pipeline. The *Unocal* saw a defence that utilized all above discussed defences. The case became significantly politicized within the human rights community on the one side and the political establishment on the other side. The latter argued that such corporate liability cases would impair US global economic interests. The initial motion to dismiss the case on the ground that the alleged violations were official acts of the state of Myanmar, and as such subject to the act of state and/or state immunity jurisdictional bar, was refused by the Ninth Circuit Court.[198] Next the defendant argued that US courts lacked subject-matter jurisdiction over the case on the grounds that the plaintiff had failed to establish that the defendant had committed a law of nations violation. Following the distinction between violations requiring state action outlined above, such as torture and forced relocation, and those without this requirement, which is the case of *jus cogens* violations, the same court later found that the plaintiffs had failed to prove that there had been a law of nations violation actionable under the ATCA and dismissed the case.[199] It ruled that the plaintiff could not establish that the defendant had caused the violations of the first category by exercising (direct) control over Myanmar's security organs or that it had participated in the commission of violations of the second category through sole knowledge or even approval of the methods applied by Myanmar's security organs.[200] This temporary setback for progressive human rights litigation lasted only until September 2002, when a three-judge panel of the Court of Appeals for the Ninth Circuit found the case actionable under the ATCA and TVPA and reversed the Circuit Court's granting of summary judgment in favour of Unocal on claims for forced labour, murder and rape.[201] The Court of Appeals found that Unocal's corporate liability for participation in the crime of forced labour could be established through the "knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetuation of the crime",[202] qualifying as aiding and abetting of the crime in question. It further found that the alleged acts of murder, rape, and torture occurred in

[197] Formerly known as Burma.
[198] See *Doe v. Unocal Corp.*, 963 F.Supp 880, 885-88 (C.D. Cal 1997).
[199] *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D. Cal. 2000).
[200] *Id.* 1307-1310.
[201] *Doe I v. Unocal Corp*, CV-96-0659-RSWL and CV-96-06112-RSWL Opinion 14187 (9th Cir. 2002) at 14243. The 2nd Circuit had consolidated four appeals brought on behalf of the plaintiffs (Nos. 00-56603, 00-56628, 00-57195 & 00-57197).
[202] *Id.*, 14207,14213.

furtherance of forced labour and were thus actionable under the ATCA without requiring fulfillment of the state action condition.[203]

This decision sent "shockwaves"[204] through the corporate world, giving new impetus to similar lawsuits based on corporate human rights violations, such as the *Apartheid* class action.[205] The Court consequently agreed to rehear the case before an 11-judge *en banc* panel at a later stage. This long-awaited hearing, however, never took place: the parties decided in December to settle the lawsuit out of court.[206] The unfortunate aspect of this eventuality is the fact that important legal questions concerning corporate liability for human rights atrocities remain unanswered.

Considering the absence of an acknowledgment of corporate criminal responsibility under international criminal law and the additional fact that the existing domestic provisions for the criminal prosecution of business entities[207] are only existing in few jurisdictions, civil actions against corporate defendants serve as an important deterrent to future corporate human rights violators.[208]

2.4.5. Mass torts and class actions

Closely related to the legal trend of suing corporations as a substitute for state accountability is the evolution of mass tort procedures (better known as class actions) in ATCA and TVPA actions in the 1990s. Prominent examples are the two Holocaust lawsuits against Swiss banks[209] and German corporations,[210] the Brooklyn Slave Labour action and the most recent Apartheid[211] class action.[212] Common to these lawsuits is their nature, where a limited

---

[203] *Id.,* 14223.
[204] Sebok describes the effect of the rulings in "Unocal Announces It Will Settle A Human Rights Suit: What Is the Real Story Behind Its Decision?" at http://writ.findlaw.com/sebok/20050110.html
[205] *In re South African Apartheid Litigation; Ntsebeza et al. v. Citigroup et al.* (November 29, 2004) (EDNY), 346 F. Supp. 2d 538, retrievable from Lexis-Nexis as 2004 U.S. Dist. Lexis 23944.
[206] *Id.*, Sebok gives in his column a well balanced view over the probable causes for this settlement.
[207] See above Part B Chapter 2.
[208] *Symposium* (n 98) 2041-2042 lists possible deterrents of human rights litigation for MNCs which may result in a change of their business conduct overseas.
[209] *In re Holocaust Victim Assets Litig.,* 105 F. Supp.2d (E.D.N.Y. 2000) 139.
[210] *In re Nazi Era Cases Against German Defendants Litigation.,* 198 F.R.D. (D.N.J. 2000) 429.
[211] *In re South African Apartheid Litigation;* (n 205). The U.S. District Court for the Southern District of New York ("the Court") dismissed the plaintiffs' claims against several multinational corporations that had engaged in business in apartheid South Africa in November 2004 because of lack of subject matter jurisdiction under the ATCA (and other related laws). The judgment is presently on appeal and hearings set for as early as early 2006. The decision of the SA government to join the defendants by filing an "Amicus Curiae", declaring that the cases would interfere with the ongoing Truth And Reconciliation process and further damage present and future business investment in South Africa (seen before the background that the amount of remedies sought, totals

number of plaintiffs, acting on behalf of a far bigger group of victims, sue a multitude of corporate defendants for their or their legal predecessors' involvement in gross human rights violations of the past.

Mass tort action in ATCA litigation follows the strict requirements of Federal Rule 23 of the Federal Rules of Civil Procedure, as revised and substantially adopted in 1966. Federal Rule 23 (a) sets forth four prerequisites to asserting a class action: firstly, the sheer number of parties makes a joinder of plaintiffs impracticable; secondly, common issues of law and fact are in question; thirdly, the claims and defences brought by the respective parties are typical; and, finally, the adequacy of representation has to be guaranteed. After these threshold requirements are met the court has to determine whether the class action resembles a "mandatory" class action which requires no further notice under Federal Rule 23 (b) (1) & (2)[213] or whether the class action resembles the more common notice and opt out of the class action as defined under Federal Rule 23(b) (3).

The availability and scope of class actions before state courts for corporate misconduct involving multimillion-dollar claims of plaintiffs representing thousands of affected consumers was limited in 2005 by the new Class Action Fairness Act of 2005.[214] This limitation had become necessary because of the fact that in an increasing number of lawsuits against companies, the respective class counsel chose states for filing the actions which were known for granting often exaggerated amounts of damages. The new Act limits in principle the availability of state courts as a forum in lawsuits seeking more than $5 million or more in damages and refers these suits with few exceptions to the jurisdiction of federal courts. Consequently, the use of class actions before federal courts in ATCA and TVPA litigation is (at least for now) not affected or even limited by this Act.

400,000,000,000 US $), has already sparked a controversy in South Africa, see "It's state v. apartheid victims" in Mail & Guardian, October 21 to 27, 2005, p.5.

[212] Prior to these cases, *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir.1995) and *Doe I v. Unocal Corp*., 963 F.Supp.880 (C.D. Cal. 1997) were cases brought as class actions before U.S. federal courts. See Boyd, "Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level" in *BYULR* (1999) 1153-57, for a conclusive summary of examples of class action litigation. These three cases included class representation of up to 10,000 victims (*Marcos)* unlike the *Holocaust* cases which involved nearly one million victims or relatives of victims.

[213] The mandatory class action requires the existence of one or more of the following conditions: the potential of a risk of inconsistent or incompatible standards of conduct, the potential for adjudications that would be contrary to the interests of the class, or a suggestion of injunctive relief or declaratory. See Boyd, (n 212) 1183-89.

[214] See 109th Congress, 1st Session, S. 5, retrievable at http://thomas.loc.gov.

Of the above-mentioned examples of such human rights class actions, the two Holocaust class actions deserve further evaluation because of their implications for international affairs. The first "*Holocaust I*" class action concerned the abusive corporate behaviour of Swiss banks towards their Jewish clients and other victims of Nazi persecution during and after WW II and raised questions concerning their business ethics. *In re Holocaust Victim Assets Litigation*[215] nearly 900,000 victims[216] and relatives filed a class action suit against the three largest Swiss banks in 1996, alleging that Swiss banks had breached international and national law by "knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labour".[217] The "Swiss Nazi Bank" case came to an end through a then "historic" $ 1.25 billion settlement[218] in August 2000, with a subsequent termination of any further litigation.

The second, "Holocaust II" case, is the "Nazi Slave Labour" case, a mass class action against a better part of "DAX"[219]-listed German corporations for the alleged use of forced "slave" labour during WW II by the defendant corporations and/or their legal predecessors.[220] This highly politicized case ended with a settlement in 1999 when the defendant corporations and the German government agreed to establish a $5 billion foundation for compensating the surviving victims of Nazi slave labour. The Foundation "Remembrance, Responsibility and the Future" was established in August 2000 by a German parliamentary law and has been compensating the survivors ever since. In exchange for this compensation, the surviving victims agreed to provide German industry with legal peace.[221] Apart from the initial suspicion that US courts would not honour this part of the settlement, recent court opinions seem to prove that the legal peace is kept by US Federal Courts.[222]

---

[215] (n 209) 141.
[216] Boyd, (n 212) 1155.
[217] *In re Holocaust Victim Assets Litig.* (n 209) See Memorandum and Order of Korman, CJ (E.D.N.Y 2004) 3ff for a summary of the alleged torts of the Swiss banks.
[218] *Id.*,1. The official negotiations found an end in August 1998, this settlement was confirmed by the U.S. Court for the Eastern District of New York in August 2000 and the settlement became final through the confirmation by the Second Circuit in July 2001, *In re Holocaust Victim Assets Litig., 14 Fed. Appx. 132 (2d Cir. 2001).*
[219] DAX is the "Deutsche Aktien Index", where the major German (public) corporations are listed.
[220] See *In re Nazi Era Cases Against German Defendants Litigation*, (n 210), 429.
[221] *Id.*, for a full factual overview see opinion of December 5th of the U.S. District Court for the District of New Jersey.
[222] See *In re: Nazi Era Cases Against German Defendants Litigation*, MDL No. 1337 D.N.J Lead Civ.No. 98-4104 (WGB), a decision of the U.S. District Court for the District of New Jersey to dismiss with prejudice the last of more than fifty consolidated cases brought by individuals after the 2000 settlement on the grounds that the "Plaintiff's claims present non-juridical political questions and that the court should decline to exercise jurisdiction in the interest of international comity", and subsequently closed the case *id.*, 2.

Evaluating these two important cases is not an easy task. Massive suffering was acknowledged and financially compensated, some of the perpetrating firms brought to accountability through harsh damages and another chapter of human suffering probably closed. In addition, numerous people gained a personal victory in coping with their personal or their relatives' sufferings through their active role in becoming plaintiffs in two of the largest class actions of US jurisprudence ever.

Besides the intense media coverage and subsequent public attention this generated, not one of these class actions has resulted in a court judgment. The two former cases were settled in out-of-court settlements; the latter two were thrown out of court. This record sheet does not impress from a human rights law perspective, even less when considering that these settlements were at least partly coerced through immense diplomatic pressure and even the threat of indirect sanctions.[223] The sole fact that two such important mass litigation cases were settled out of court[224] meant that the ATCA was not effectively tested in court, with the consequence that important legal questions for future human rights mass litigation cases could not be decided – like, for example, subject-matter jurisdiction over corporate conduct[225] or the political question issue. As a direct consequence of this, the notion emerged that every mass litigation action for mass human rights violations would be successful before US courts as long as the "human rights violation" lever could be used. The "Apartheid Class Action"[226] is one such example of hysteria among human rights litigants, who follow the credo of "everything goes", as long as the alleged violations of human rights law and international criminal law appear to be severe enough.[227] The courts' decision to throw out the *Khulumani* case at the first hearing left thousands of victims of Apartheid's aggression suddenly hopeless after years of positive indoctrination by the "wizards" of human rights litigation of the likes of

[223] See for a critical description and evaluation of the proceedings and the accompanying politics of the "Holocaust" litigation, Finkelstein *Die Holocaust Industrie,* (2000).
[224] Sebok even doubts whether U.S. citizens would have had *locus standi* in such civil suits as the US governments excluded individual reparation claims against private corporations in the Potsdam Agreements of 1945 and the 1953 London Debt Agreement. See "UN-SETTLING THE HOLOCAUST" (Parts I&II) at http://writ.news.findlaw.com/sebok/20000828.html & http://writ.news.findlaw.com/sebok/200008289.html However, the silence of the 1990 "2+4" Peace Treaty on the German reunification and sovereignty did not address the topic of additional reparation claims, and thus encouraged the subsequent actions of slave labourers.
[225] See the findings on corporate human rights liability, above 2.4.4.
[226] In *re South African Apartheid Litigation*, (n 205); the case is also known as the "Khulumani" case, which refers to the South African based "Khulumani Support Group" aka the Khulumani plaintiffs, who resemble the biggest group of plaintiffs.
[227] For a rather unusual lawsuit against IBM for alleged abetting the Holocaust, see Sebok "IBM AND THE HOLOCAUST: THE BOOK, THE SUIT, AND WHERE WE GO FROM HERE" at http://writ.findlaw.com/sebok20010312.html.

Ed Fagan[228] and Michael Hausfeld. It is my opinion that the two successful "Holocaust" mass litigation cases were more of a "Pyrrhic" victory for the evolution of effective human rights litigation considering their particular nature and the highly politicized circumstances of their conclusion.

2.5. Conclusion

Human rights litigation in the USA has produced encouraging examples of adjudication[229] and has contributed to a further legal development that might serve as the legal basis for a new international instrument on individual civil liability for human rights atrocities. The US human rights adjudication breaks away from the traditional (however, challenged) view that claims based on violations of international humanitarian and human rights law can only be made at the interstate level[230] and do not provide the individual victim with enforceable financial remedies.[231]

However, the successes are dampened by the fact that the larger part of these judgments went un-enforced, with the exception of some settlements in corporate actions such as in the Holocaust case and, more recently, the *Unocal* case.[232] This reality of poor enforcement has to be addressed soon in order for US human rights litigation to become a powerful deterrence to human rights violations.

Time will eventually tell whether the ATCA will maintain its influence or whether its critics and political opponents will be successful in their attempts to limit the scope of US human rights litigation in order to silence a crucial legal tool for the achieving of international compliance with human rights and international humanitarian law. Considering the post 9/11 foreign and security policy of the present Bush Administration, with its ongoing war against terror which has led to direct US violations of international, international human rights and

---

[228] Ed Fagan is known more for his "excellence" in securing huge attorney fees than for his judicial brilliance and honesty; he is at the moment accused of having committed breaches of fiduciary duty against his clients and faces disbarment, see "Schwere Vorwürfe gegen Star-Awalt Fagan, *Der Spiegel Online* of 18 September 2005 at http://www.spiegel.de/panorama/0,1518,342396,00.html.

[229] Stephens and Ratner, (n 109) 239-245.

[230] See BGH – III ZR 245/98 (OLG Köln) concerning claims of relatives of Greek citizens whose relatives were murdered by German security forces in 1944. The German BGH as the highest German court for civil and criminal matters, ruled in its 2003 *Distomo* judgment that claims for human rights violations committed in WW II as violations of international humanitarian law could only be raised at interstate level. For a more detailed summary of the German legal situation, see below under 3.3.

[231] See above under chapter 1 for an account of the international legal situation.

[232] Report of the International Law Association Human Rights Committee, (n 95) 130 Fn.5.

humanitarian law, and the utilization of the services of allies with often doubtful human rights records, the prospect of limiting the scope of US human rights adjudication seems realistic.[233]

3. CIVIL LIABILITY FOR HUMAN RIGHTS ATROCITIES IN OTHER DOMESTIC LEGAL SYSTEMS

3.1. South Africa and the Truth and Reconciliation Commission[234]

The new democratic, post-apartheid South Africa of 1994 committed itself as early as 1995 to redress the injustice and suffering of the victims of apartheid and the victims of the anti-apartheid struggle without establishing a *quasi* state liability for the new state.

Therefore the Truth and Reconciliation Commission (TRC) was established in 1995 to investigate the nature, causes and extent of the violations committed by all parties involved in the conflict.[235] Reparations for gross human rights violations committed in South Africa during the apartheid-era conflict were originally intended to be the result of an intense reconciliation and nation-healing process, which combined the elements of confession (of the perpetrators) and absolution (of the victims and their relatives).

The TRC followed the legal view that apartheid was a crime against humanity[236] and recognized that the liberation movements conducted a legitimate armed struggle against the former South African government. With reference to the Geneva Conventions and Protocols the Commission distinguished between a 'just war' and the question of 'just means' and concluded that, in the course of the conflict, the ANC contravened humanitarian law principles and was also responsible for gross human rights violations for which it was morally and politically accountable.[237]

---

[233] Sebok does not exclude future claims against the U.S. government because of the torture incidents in Abu Ghraib; see "Could Suits Against the U.S. Government By Iraqis Subject to Abuse In Abu Ghraib Prison Succeed?" retrievable at http://writ.findlaw.com/sebok/20050221.html. The U.S. academic and columnist Fletcher found already as early as 2002, that there could be a realistic possibility of holding President Bush civilly liable for the attack on Iraq, see "IF THE PRESIDENT ORDERS AN ATTACK OF IRAQ WITHOUT SECURITY COUNCIL APPROVAL, CAN INJURED IRAQIS SUE THE PRESIDENT IN U.S. COURTS?", retrievable at http://writ.corporate.findlaw.com/commentary/20020925_fletcher.html

[234] I want to thank Professor Strydom for his insightful help on the topic of the TRC matter, which enabled me to reflect on the South African situation.

[235] See post-amble of the *Constitution of the Republic of South Africa* Act 200 of 1993 and the *Promotion of National Unity and Reconciliation Act* 34 of 1993.

[236] Interestingly is in this context the finding of US Judge Sprizzo in *re South African Apartheid Litigation*, (n 205), whereas the Apartheid Convention of 1973 (1015 *UNTS* 243,245) did not resemble binding international law at that time due to the fact that the major states as the USA, UK, Germany, France, Canada and Japan had not ratified this Convention at that time. These findings led eventually to the dismissal of the lawsuit on the grounds of a lack of ATCA based jurisdiction of U.S. federal courts.

[237] *Truth and Reconciliation Commission of South Africa Report*, vol 6 (2003) 642 - 643.

The TRC's second objective was to secure the payment of reparations to individual victims or their relatives. This reparation procedure deliberately avoided a "victors' justice" approach by establishing a state-run reparation scheme for the compensation of as many as 22,000 victims of the apartheid atrocities. The TRC recommended in 1998 the setting aside of R2,8 billion for the payment of final reparations to the acknowledged victims of apartheid.[238] This contribution to justice and humanity by redressing the suffering financially has been severely hampered by the South African government's inability and even unwillingness to pay out the promised reparation payments. Besides initial disbursements made by the Nelson Mandela's President's Fund to the value of R48.37 million, which had been paid out by November 2001 in grants of R3000 each to the 17,100 applicants, further payments and a finalization of reparations still await the government's implementation. This unfortunate situation has already raised international concern, as the following statement[239] of Human Rights Watch and Amnesty International illustrates:

> Human Rights Watch and Amnesty International are concerned that there has been no systematic effort to ensure that the TRC's recommendations are implemented. In particular, the government has failed to ensure that the modest reparations proposed by the TRC for victims are paid. The participation in the TRC process of victims of human rights abuses was critical for the integrity and credibility of this experiment in addressing past human rights violations. In addition to the moral obligation to victims implicitly arising from the agreement to grant amnesty to perpetrators that arose from the political transition, there are clear international obligations for states to provide reparations, including restitution, compensation and rehabilitation, for victims of gross violations of human rights. Human Rights Watch and Amnesty International urge the South African government to live up to the standards which are embodied in these human rights treaties which it has ratified.

This unfortunate situation needs the urgent attention of the SA government, especially given that President Mbeki uses the TRC and its (intended) reparation policy as justification for his support of the corporate defendants in the ongoing in *re South African Apartheid*

[238] Using the benchmark of R21,700 - the median annual household in South Africa at the time.
[239] See joint statement by Amnesty International and Human Rights Watch *Truth and justice: unfinished business in South Africa* (February 2003), 7 retrievable at www.hrw.org/backgrounder/africa/truthandjustice.pdf.

Litigation,[240] thus creating irritation and disillusionment among the domestic human rights community.

3.2. United Kingdom

The jurisprudence of the UK provides international law with important precedents in respect of the principle of state immunity and exceptions thereto. In the *Pinochet No. 3*[241] decision, the House of Lords denied Pinochet, as then former head of state, immunity *rationae materiae* on the grounds that torture had become a *jus cogens* crime of international law.[242]

Interesting is, however the fact that other English courts had thwarted prior civil actions against states or state officials by using the State Immunity Act of 1978.[243]

In *Al-Adsani v Government of Kuwait*[244], the court had initially allowed leave to serve summons out of the jurisdiction to the Government of Kuwait and three individual defendants for alleged claims of psychological damage of a British-Kuwaiti plaintiff who allegedly suffered torture in a security prison in Kuwait. On appeal, the Court of Appeal set aside the decision to serve and ruled that Kuwait was entitled to state immunity under s. 1(1) of the State Immunity Act of 1978. This decision was appealed to the ECHR on the grounds that the Court of Appeal's decision infringed his right to a fair trial as stipulated under Article 6 of the European Convention on Human Rights. The ECHR found with a majority of 9 to 8 that there had not been such an infringement by the Court's granting Kuwait state immunity[245] because it had "pursued a legitimate aim and was proportionate".[246]

Considering the implications of the *Al-Adsani* case for human rights litigation, it appeared as if the door for such measures of human rights protection had been closed before English courts.

However, in 2004, the Court of Appeal issued a decision with *Jones v. Saudi Arabia*,[247] which partially overturned the prior *Al-Adsani* decision in respect of individual defendants sued for

---

[240] (n 205); see for the present stance of the SA government, (n 210).
[241] *R v Bow Street Magistrate, ex parte Pinochet (No.3)* 2000 1 AC 147. See Part B, chapter 2, 1.2.1.
[242] *Id.*, 205, 248.
[243] See Report of the International Law Association Human Rights Committee, (n 95) 150-158.
[244] 100 *ILR* (1995) 465
[245] *Al-Adsani v UK* in 34 EHRR (2002) 11, paras 46 to 49.
[246] *Id*., para 50.
[247] *Ronald Grant Jones v The Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia) & Anor.* in [2004] EWCA Civil 1394, *Jones v Saudi Arabia* hereafter.

acts of state torture.[248] The plaintiff appealed a prior court's decision to strike out his claims[249] against the Kingdom of Saudi Arabia as first defendant and a Lieutenant Colonel Aziz as a servant or agent of the Kingdom as second defendant on the grounds of s.1 of the State Immunity Act 1978. The Court of Appeals upheld the appeal against Aziz as an individual defendant on the grounds that he was not protected by a blanket application of sovereign immunity and remitted the application for further consideration.[250] The Court hereby focused in its judgment on the recent jurisprudence on the matter of criminal and civil immunity for individual perpetrators of international crimes and found no grounds for the latter in respect of the individual defendant.[251]

With this ruling, access to English courts for actions of human rights litigation against individual defendants may be possible in principle. The Court's judgment is remarkable because it breaks with prior jurisprudence of the Crown's courts in their upholding of the principle of foreign states' absolute immunity from suit.[252] It is, however, too early and probably even unrealistic to speak of the start of a future US-style human rights litigation before English courts.[253] Other prerequisites for a successful action before English courts include the establishment of the presence of the defendant, alternatively the limited permission of a service out of jurisdiction and the non-existence of grounds for a stay of proceedings because of *forum non conveniens*.

3.3. The Federal Republic of Germany

The (West) German Republic accepted its responsibility for the legacy of mass human rights violations committed by its legal predecessor, the Third Reich, and has since 1949 paid the sum of nearly €50 billion either as direct financial compensation to victims (and their relatives) of the Holocaust and for other related Nazi crimes, or in the form of direct financial aid to the state of Israel.[254] This compensation took place either under special domestic laws

[248] In *Jones v Saudi Arabia*, the plaintiff Jones was allegedly tortured and falsely imprisoned by the Saudi Ministry of Interior and its agents in 2001.
[249] Claim No. HQ020X01805. The Court combined Jones' claim with claim No. HQ04X00431 brought by three other claimants against four Saudi individuals for similar allegations of torture committed by Saudi officials.
[250] *Jones v. Saudi Arabia*, (n 247), paras 98 and 99.
[251] *Id.*, paras 54 – 68.
[252] See Voyiakis "Access To Court v State Immunity" in 52 *ICLQ* (2003) 297-332 for an overview of the recent practice in UK's courts and the subsequent confirmation of this jurisprudence by the ECtHR.
[253] *Id.*, para 97, where Mance LJ predicts, that English courts won't become the forum of prime choice for future torture civil litigation because the specific requirements to start proceedings under English common law.
[254] The total sum is expected to reach approximately 60 billion €. Source: German Federal Government, retrievable at http://www.germany-info.org/relaunch/info/archives/backgrounds/ns_crimes.html.

such as the Bundesentschädigungsgesetz (BEG)[255] of 1953 or bi-national treaties such as the 1952 Luxembourg Agreement between Germany, the State of Israel and the Jewish Claims Conference – the so-called "Israel Treaty".[256] The original aim of this compensation was to compensate the "main" victims of Nazi prosecution for their suffering in the concentration and/or extermination camps which they endured on grounds of their (Jewish) race. The financial compensation of other victims of the Nazi regime such as the "slave workers",[257] however, was initially not intended. The BEG explicitly exempted this group from any compensation. In the "Londoner Schuldenabkommen"[258] of 1953 the question concerning compensation of slave workers was postponed until the later signing of a peace treaty.[259] The responsibility of the German state for war crimes and other breaches of humanitarian law was acknowledged by the German government in various multinational peace treaties. The 1999 Holocaust Slave Labour settlement[260] between the German Federal government, the US government and victims' organizations over the establishment of a 10 billion Deutschmark compensation trust, is the latest acknowledgment of German responsibility for its Nazi past. This state responsibility does not, however, establish an individual's right to redress against the German state but only of his home state.

Three recent court decisions support this opinion. The 1996 *Arbeitsentgelt für NS-Zwangsarbeiter* decision[261] of the German "Bundesverfassungsgericht"[262] on the individual enforceability of claims[263] for the remuneration for Nazi Slave Labourers outlines the present view on the situation in respect of individual claims and state responsibility. The Court found that, firstly, the individual is not the holder of an individual claim towards other states and, secondly, that claims based on war acts are subject to international state peace treaties that do not exclude parallel individual claims of victims against a victim's own state. This opinion of

[255] Federal Law for the Compensation of the Victims of National Socialist Persecution of 1956.
[256] Israel Vertrag.
[257] This term refers to the millions of people who were forced to work in the German armament industry during the war. It was estimated in 2001, that there were still around 1,5 million of these former slave workers alive. Source: Stiftung (Trust) "Erinnerung, Verantwortung und Zukunft", cit. in *Aktuell 2003***,** 203.
[258] The London Dept Agreement, wherein questions concerning the German war dept were settled. This term must not be confused with the 1943 London Agreement establishing the UN War Crimes Commission. See Jørgenson, *The Responsibility of States for International Crimes* (2003) 17.
[259] It took nearly 40 more years before this peace treaty was signed. The two German states and the four former allied victors signed in 1990 the so called "2 plus 4" treaty which paved the way for the German reunification and resembles a *de facto* peace treaty.
[260] This settlement which does not resemble a settlement in legal terms was meant to end all pending lawsuits brought against German corporations before US Federal Courts. See above under 2.4.5 and Sebok, "Unsettling the Holocaust" (n 224).
[261] BVerfG, Beschl. v. 13.5.1996-2 BvL 33/93 in *NJW* (1996) 2717-2720.
[262] The German Constitutional Court (BVerfG).
[263] The claim was based on the fact that in WW II the German industry had used Jewish and other nationalities as slave workers in her factories.

the Court finds support in the above-mentioned US *Princz*[264] decision of 1992, which found that Germany's state sovereignty barred any direct legal action against it. The issue of compensating the victims of Nazi slave labour found a different end, when in 1999 in the Holocaust Slave Labour[265] settlement between the German Federal Government,[266] the U.S. Administration and victims' organizations[267] the establishment of a compensation trust was decided upon. The agreed amount was to reach 10 billion Deutschmark and was to be equally funded by the German Federal government and a German corporate consortium.

The 2003 *Distomo* decision[268] of the German "Bundesgerichtshof"[269] rejected financial claims directed against the Federal Republic of Germany and brought by relatives of Greek victims of the 1944 war crimes. The court found that the claims lacked any legal basis in international and domestic German law and further that the recognition of prior Greek judgments,[270] which had granted financial relief to the plaintiffs against the German state as defendant were contrary to the international principle of state immunity from foreign civil judgments. The official liability of the German state as the legal successor of the Third Reich for these war crimes was refused on the grounds that breaches of humanitarian law did not fall under the provisions on state liability and as such could only be subject to individual accountability and responsibility under international law provisions, which on the other hand would rule out individual claims against the responsible state.

This view, according to which, direct individual claims for breaches of humanitarian law against states are non-justiciable under international law,[271] was the basis of the 2003 *Varvarin* ruling[272] of the "Landgericht" Bonn[273] concerning claims by victims of the 1999

[264] *Princz v. Federal Republic of Germany*, (n 176).
[265] This settlement, which does not resemble a legal settlement in *strictu sensu*, was meant to end all pending lawsuits brought against German corporations before U.S. Federal Courts. For a summary of the "Holocaust" case with an evaluation of its legal and political background, Sebok, "Un-settling the Holocaust" (n 224).
[266] Acting on behalf of German and –to a smaller extent- U.S. corporations.
[267] As e. g. the Jewish Claims Conference.
[268] BGH, Urt.v.26.6.2003-III ZR 245/98 (OLG Köln) in NJW (2003), 3488-3493.
[269] The German Supreme Court for Criminal and Civil Matters, (n 230).
[270] District Court of Livadeia, *Prefecture of Voiotia v. Federal Republic of Germany*, case No. 137/1997, Judgment of 30 October 1997 and the subsequent confirmation of the judgment by the Greek Areopag (Areios Pagos, the Greek Supreme Court) in it decision of 4 May 2000, case No. 11/2000, reprinted in 95 *AJIL* (2001), 198 ff. Compare in this context the Italian Court of Cassation ruling of 11 March 2004 in the case *Ferrini v. Germany*, (Cass. Sez. Un.5044/04), discussed in 99 *AJIL* (2005) 242-248. The Italian Court of Cassation (Court of Appeal)found that Germany was not immune from civil law suits for damages from deportation and forced labour during World War II as *jus cogens* violations.
[271] The Court explicitly recognizes the recent developments in international law whereas individual claims are actionable under various international human rights instruments as e.g. under Article 2 (5) ECHR.
[272] LG Bonn, Urt. v. 10.12.2003- 1 O 361/02 (nicht rechtskräftig) in NJW (2004), 525-526.
[273] Regional High Court of Bonn (LG Bonn).

NATO bombing campaign against the Republic of Serbia and Montenegro. The court further denied the applicability of the principle of official liability for Germany's participation in the war on the ground that acts of war are excluded because they constitute a state of emergency in international law.

The outcome of these cases documents to what extent domestic jurisprudence differs: on the one hand the view that *jus cogens* violations of international law can overcome jurisdictional immunities and on the other hand the still prevailing view whereas states are still immune from civil suits of individual plaintiffs, victims respectively.

CHAPTER 3

HUMAN RIGHTS LITIGATION AS A DETERRENT TO THE PERPETRATOR OF HUMAN RIGHTS ATROCITIES – THE BALANCE SHEET

Above a short overview of the developments in human rights civil litigation as an additional means of human rights protection was given. It can be argued that only the ATCA adjudication in the USA is worthy of recognition as a probable alternative means of human rights protection.

On a global scale we find that inadequate provision is made in international human rights and humanitarian law for civil liability. None of the existing provisions allows for an actionable claim by the individual rights bearer before an independent civil claims forum. Consequently, this chapter summarizes some of the arguments favouring the development of civil responsibility for human rights atrocities and their adjudication before civil courts.

1. *JUS COGENS* VIOLATIONS AS PART OF THE DOMESTIC TORTS LAW

The nature of breaches of customary international humanitarian and human rights law, which resembles torts in common law and civil law jurisdictions alike, leads to the conclusion that domestic jurisdictions may eventually recognize such violations as actionable torts under their respective domestic laws applying the principles of the law of conflict, also referred to under Private International Law.[274]

However, with the exception of the USA with its ATCA adjudication, no other domestic jurisdiction recognizes such an explicit possibility for human rights violations.[275] Assuming a future general understanding of the justiciability of such civil actions in accordance with tort principles under Private International Law, the following pages will outline the advantages of such an additional and supplementary legal instrument.

[274] Stipulating that the law of the forum state applies unless foreign law was chosen by one of the parties. The Private International Law (Miscellaneous Provisions) Act of 1995 applies in s 11 (1) the general rule for tort actions before English courts whereas the applicable law is the law of the country where the tort occurred.

[275] See Report of the International Law Association Human Rights Committee, "Section V – The Applicable Law of Tort", (n 95) 158 ff with a theoretical evaluation of possible tortious human rights actions.

2. THE ADVANTAGE OF CIVIL REMEDIES IN THE QUEST FOR THE PROTECTION OF HUMAN RIGHTS

There are two particular aspects of civil liability coupled with financial remedies for human rights atrocities which make this form of accountability especially rewarding. Civil remedies serve "the purpose of relieving the suffering of and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts. […] Reparation should respond to the needs and the wishes of the victim".[276] Financial redress acknowledges the victim's suffering and may help to assist in rehabilitation of the victim and the closure of a traumatic chapter in the life of the victim.[277]

Secondly, civil remedies can, especially when of a high amount, deter possible future offenders simply because of personal financial implications. The granting of punitive damages[278] in US ATCA actions punishes and deters at the same time. Because the verdict directly affects the private assets of the offenders, civil liability will hurt most of today's human rights offenders, whose private fortune are usually spread all over the world. As a consequence, civil liability could possibly become a deterrent more powerful than criminal prosecution will ever be.

3. THE BENEFITSS OF HUMAN RIGHTS LITIGATION

Criminal proceedings under domestic or international jurisdictions always require that there exists the actual will to prosecute. It is seldom up to the actual victim alone to get such proceedings started[279] and to initiate events that will lead to a court hearing. Political reasons such as diplomatic restraints, amnesty laws or the plain unwillingness and/ or inability of the respective judicial forums to prosecute limit the victims' role in their pursuit of finding justice. In a civil human rights litigation action, the victim has a more active role in establishing the accountability of his tormentors.[280] The victim does not have to wait for justice to take its slow course through the means of lengthy criminal procedures before the ICC or a similar forum. The position of the victim in his quest to find justice is improved through his more active participation. A further consequence of such private actions will be that the existence of gross human rights violations and the involvement of the individual

[276] Fernandez, "Reparations Policy in South Africa for the Victims of Apartheid in Law" in 2 *DD* (1999), 210.
[277] *Jones v. Saudi Arabia*, (n 247), para 80.
[278] Punitive damages in U.S. civil law are damages, which are granted in addition to the individual damages granted to the victim for his loss or harm caused by the defendant which punish the defendant for his actions.
[279] See Part B Chapter 3 above on such obstacles for criminal prosecution.
[280] *Jones v. Saudi Arabia*, (n 247), para 80.

perpetrator will be brought to wider international attention with the result that a more accurate account of atrocities will be established. These consequences are of great importance in cases involving MNCs, since they depend on a good "corporate image" and therefore fear "bad publicity" more than individuals do.[281]

There is the further notion[282] that civil suits may be more effective than criminal prosecution in establishing the full factual context of the crimes committed. Higher standards of proof and difficulties in respect of gathering evidence apply in criminal proceedings, which is not the case in civil law actions.[283]

Another advantage of civil proceedings is the fact that the actual presence of the defendant/accused in court is obsolete in civil proceedings[284] with the further possibility of obtaining a default judgment.[285]

One should also not forget the advantage of a civil liability action with regard to transitional justice: the financial compensation of the victim recognizes his/her suffering and by doing so restores the honour and the dignity of the victim. Such acknowledgment enables a new democratic governments of a state with a past of human rights violations to grant amnesty and therefore to pacify its torn community.[286] Civil liability can be a tool of reconciliation when public policy and the national interest demand amnesty[287] but without denying the victims' rights. [288]

Civil liability can overcome some of the main obstacles and barriers to an effective criminal prosecution. In the case of immunity for acts committed by individuals in official capacity[289], this protection may be pierced. The practice of civil courts on the domestic level is, however,

---

[281] See chapter 2 on corporate lawsuits.
[282] Jose E. Alvarez, "Lessons of the Tadic Judgement" in 96 *MLR* (1998) 203.
[283] *Jones v. Saudi Arabia*, (n 247), para 80.
[284] *Id.*, para 81
[285] See Stephens and Ratner, (n 109) 174-178 about the use of default judgments in US human rights litigation under the ATCA.
[286] Such as the Republic of Congo, Burundi, Sierra Leone and Rwanda.
[287] Such amnesty, however, can in respect to the ICC only be granted in cases which do not resemble core crimes in the sense of Article 5 (1) lit. a-d
[288] Another example of using the means of civil liability as a corrective for the endured suffering can be found in the Islamic Law of Sharia where in the case of the murder of a person, the head of his family clan has got the right to accept a sum of money for his dead kin and by doing so he can spare the offender from prosecution and eventual execution.
[289] *Jones v. Saudi Arabia*, (n 247), para 98, where the Court rejected the Kingdom of Saudi Arabia's blanket claim to state immunity for the individual defendants.

not coherent and far from resembling a *consuetudo*.[290] Considering the fact that the recent *Draft United Nations Convention on Jurisdictional Immunities of States and Their Property*[291] practically exempts the property of a state from the jurisdiction of any other state's court,[292] the resort to civil remedies against individual perpetrators could resemble the only feasible way to claim financial damages for human rights atrocities.

CONCLUSION PART C

This part offered an introduction to and overview of the existing means of establishing the accountability of individuals and corporations for their participation in human rights atrocities. In conclusion, it must be said that, at present, only the U.S. human rights litigation, however limited, is able to establish some sort of civil accountability on a universal level.

The impressive record of, to date, nearly 100 human rights litigation cases before U.S. federal courts finds hardly any reflection in other domestic law systems. So far there is not one case outside the USA that is comparable to the *Filartiga* legacy. This lack of a uniform state practice prevents present human rights litigation becoming part of customary international law and thus impedes the further development of a universal civil jurisdiction of domestic courts.[293] However, the civil actions of the US human rights litigation have already contributed to the development of international law before domestic courts of other states. One example of this is the quoting of ATCA adjudication as legal precedents by English courts.[294]

All other systems and means available under international and domestic law which were suitable to establish civil liability for human rights atrocities remain in an underdeveloped state, or go unapplied and/or un-enforced. But even the advanced US system has its shortcomings and limitations which hamper its use as a universal deterrent. These findings document the need for an international approach on civil liability of individuals and corporations for human rights atrocities as a supplement to the existing means under international criminal and human rights law.

---

[290] See Dugard, "Immunity, human rights and international crimes" in 3 *TSAR* (2005) 482 on the present restrictive court practice in civil proceedings.
[291] UN Doc. A/59/22.
[292] Article 5 stipulates that "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."
[293] See Rau, "Domestic Adjudication of International Human Rights Abuses and the Doctrine of Forum Non Conveniens" in *ZaöRV* 177, 194.
[294] *Jones v. Saudi Arabia*, (n 247), paras 61-68.