PART D

DRAFT STATUTE ON A CONVENTION ON INDIVIDUAL CIVIL LIABILITY FOR HUMAN RIGHTS ATROCITIES

INTRODUCTION AND OVERVIEW

This part outlines and comments on the various elements and aspects of a proposed draft convention on individual civil liability. Each provision is evaluated in the context of already existing legal instruments, jurisprudence and, where applicable, examples of customary usage.

The draft's overall aim is the establishment of a workable system on civil liability of the individual and corporate perpetrator for a specified selection of egregious human rights atrocities. The envisaged regime of civil responsibility foresees the imposition of heavy financial penalties for the convicted perpetrator and in this regard the draft follows the precedents and examples of US human rights litigation under the ATCA and its subsequent human rights litigation legislation.

CHAPTER 1
THE DRAFT[1] – ESTABLISHMENT OF THE COURT

Article 1
The Court

An International Court of Human Rights Litigation ("the Court") is hereby established as a separate chamber to the International Court of Justice. It shall be a permanent institution and shall have the power to exercise its jurisdiction over natural and legal persons for the most serious violations of human rights, as referred to in this Statute, and shall be complementary to national civil jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Commentary

The new court will be established as an additional but separate chamber to the International Court of Justice. Its jurisdiction,[2] organs[3] and procedure follow the working procedures of forums of criminal justice such as the ICC, the ICTY and the SCSL. Breaches of customary international humanitarian and human rights law will constitute "international crimes"[4] and tortious behaviour[5], which may create civil liability under the prescriptions of the law of tort/delict in international and domestic law.[6] Consequently, the link between individual civil liability for serious breaches of international human rights and humanitarian law and individual criminal responsibility[7] for the same type of offences implies a court structure and

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[1] Structure and thematic order of the draft follow the examples set by the ICJ-Statute, the ICC-Statute, ICTY and other relevant international instruments which are already in force. Every chapter begins with a short overview of the elements and aspects dealt with. The order therefore differs from the structure of the thesis.

[2] The court has jurisdiction over international torts arising from serious breaches of international human rights and humanitarian law.

[3] The Office of the Trial Advocate, established under Article 4 (b) of the draft, illustrates the similarity between the proposed court's organs and that of a criminal court. The Trial Advocate's role is part prosecutor and part legal council to the victim-plaintiff. His investigative rights in regard to discovery and fact finding are similar to that of a criminal prosecutor.

[4] See part B.

[5] The draft articles of the ILC on Responsibility of States for internationally wrongful acts do not recognize "any distinction between State "crimes" and "delicts"", see Commentaries to the draft articles on Responsibility of States for internationally wrongful acts, 281 in *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chapter IV. E.2).*

[6] See above part C for the present legal situation on the topic of civil liability for human rights violations. Note that the present situation generally still does not recognize the individual victim, with the exception of the US human rights litigation, as a claim bearer against the perpetrating state.

[7] The law of international delict and international criminal law have interrelated features: since the *Chorzow Factory* case it is an acknowledged principle in international law that breaches of international law and the responsibility of states resemble international delicts with a duty to compensate. See Shelton, "Righting Wrongs: Reparations In The Articles On State Responsibility" in 96 *AJIL* (2002) 833. Bassiouni describes reparations as "a hybrid between criminal penalty and civil damages" and exemplifies herewith the interrelation between

organization that follow the example of criminal adjudication. It would therefore seem logical to establish the new court as an annex to one of the existing criminal forums in order to supplement their remedies with civil liability. However, considering the temporary nature of jurisdiction of the ad hoc tribunals, the only suitable forum for such a supplementing body would then be the ICC as a permanent court. The proposed court, as a separate chamber to the ICC would then be responsible for the adjudication on reparations for victims, which is already foreseen under Article 75 of the ICC Statute.[8]

However, this draft opts for a new approach by establishing a new International Court of Human Rights Litigation that will form as an independent and separate chamber annexed to the ICJ and not to the ICC.[9] This option is mainly based on two considerations.

Firstly, the ICJ[10] as the UN's principal judicial body has for 60 years contributed significantly to the goal of achieving international justice and comity, and of defining international legal standards.[11]

Secondly, choosing the ICJ as the main forum acknowledges the fact that the ICJ has already provided international law with a sufficient corpus of jurisprudence on *jus cogens* and other grave human rights violations and on the civil liability of an offending state in the form of reparations.[12]

The ICC, on the other hand, would be the wrong forum to choose given that its existence as a judicial organ is seriously threatened by the persistent US opposition to the ICC.[13] The fact that the USA is familiar with civil human rights adjudication under the ATCA over the last twenty-five years and that this form of recourse was recently reaffirmed in principle by the

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criminal and delictual law; cit in Laplante "Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, And The Duty Of Prevention" in 22.3 *NQHR* (2004), 382.

[8] Article 75 of the ICC-Statute imposes on the ICC the obligation to develop principles concerning reparations for victims.

[9] Which appears to be the more suitable forum under the above stated considerations.

[10] And to a lesser extent its predecessor, the Permanent Court of International Justice (PCIJ).

[11] Even the fact that there are UN members that sometimes disregard the ICJ's authority in delivering judgments and opinions in contentious and advisory procedures does not devaluate the ICJ's role as the world's primary judiciary organ. These actions are very often ideologically motivated and resembling actual policy trends but they do not prevent the development of a body of new international jurisprudence based on the findings of the ICJ. See e.g. the *Nicaragua* case discussed in part B chapter 1 and part C chapter 1 with the reactions of the USA during the ICJ proceedings.

[12]See part C chapter 1 above on state responsibility. with its legal authorities.

[13] See above part B for an overview of the US opposition to the establishment of the ICC.

US Supreme Court,[14] suggest that the US will be more supportive of envisaged International Court of Human Rights Litigation in the form proposed here.

The complementary nature of the court confirms the primacy of civil proceedings in the domestic jurisdictions of the member states. The draft therefore acknowledges the principle of state sovereignty in respect of civil jurisdiction and follows the example of the ICC with its jurisdiction being merely complementary in nature to the jurisdiction of domestic criminal courts.[15]

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State") as a separate chamber to the International Court of Justice.
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

Article 4

Organization of the Court

The Court shall consist of the following organs:

a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;
b. The Trial Advocate; and
c. The Registry.

[14] *Sosa v. Alvarez-Macchain*, where the Supreme Court basically reconfirmed the role of ATCA litigation for the future, see part C chapter 2 above.
[15] See Articles 1 and 17 of the Rome Statute.

Commentary

One of the novelties of the Draft Statue lies in the establishment of the Trial Advocate as an independent organ of the court. This office combines the duties of a victim-plaintiff's counsel with those of a prosecutor in criminal matters, which is necessary here because of the closeness of the subject matter to that in criminal proceedings which demands strong standards with regard to immunity and powers in respect of discovery of documents and fact-finding missions *in situ*.[16]

The trial advocate's further role is that of main counsel for the victim-plaintiff and is comparable to the role of an impartial "pro bono" attorney who ensures that actions brought before the court are based on strong legal and factual grounds and are not brought for the sole benefit of the "billing" lawyer. Recent US case law documents this unfortunate trend and shows how the US legislation tries to regulate this phenomenon in US court actions.[17] The creation of the Trial Advocate as an independent plaintiff counsel could be a possible solution to these negative developments. The proposal for the creation of an independent defence unit for proceedings before the two *ad hoc* criminal tribunals,[18] which was made during a 2001 symposium on developments in international criminal law, reflects growing acceptance of the establishment of such institutionalized (semi-)organs of the court.[19]

The court resembles a partly adversarial and partly inquisitorial structure. The draft combines the structural and procedural elements of common law adversarial trial proceedings with those of the inquisitorial powers of judges in civil law jurisdictions. The role of the judges follows common law principle, which limits their role to supervising the fairness of the trial and its procedure as opposed to a more active participation in the trial through their own independent inquisitorial acts – as is the case in (continental) civil law jurisdictions.

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[16] In the U.S ATCA case of *Paul v. Avril* 901 F.Supp.330 (S.D.Fla.1994), the plaintiff's lawyer in Haiti was murdered while trying to gather evidence. See Stephens and Ratner *International Human Rights Litigation in US Courts* (1996), 179.

[17] The newly enacted US Class Action Fairness Act of 2005 refers in section 2 (a) (3) (A) to the present situation in state class actions where the legal counsel is awarded high fees while the plaintiff is left with nothing or coupons of little value. The unfortunate example of the "*Holocaust"*- counsel Ed Fagan serves as justification for limiting the rights of lawyers to start actions. He is even 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. See part B chapter 2 for more details.

[18] The ICTY and the ICTR.

[19] See the authoritative report on international criminal law "Developments In The Law-International Criminal Law" in 114 *HLR* (2001), 1947-2071, 2005.

In this regard the role of the Trial Advocate differs: he/ she plays an active role in the trial proceedings through his/her own investigations and fact-finding missions and through his/her right to cross-examine witnesses. His active role in the proceedings with quasi-inquisitorial powers strengthens the position of the victim-plaintiff in an otherwise adversarial court proceeding. The creation of a Trial Advocate will make the inclusion of further victim empowerment rights unnecessary and obsolete. A practical example of such an empowerment right would be the inclusion of rules which explicitly shift the onus of proof onto the corporate defendant, thus favouring the plaintiff. Such a burden - shifting finds its precedent in the law governing domestic and international product liability[20] and effectively reduces the burden on the plaintiff to prove the facts of the case.

The Trial Advocate resembles a *novum* in procedural law, incorporating elements of two sets of different legal procedures. One example of the existence of such a "mixed" organ can be found e.g. in German Criminal Procedure where the victims of serious crimes have the right to join personally or through a counsel (in cases of mandatory representation) the public prosecutor in the prosecution of these crimes. The victim and his counsel, then have similar investigative powers and other procedural rights as the prosecutor.[21] The Investigative Judge of the Iraqi Special Tribunal (IST) plays a similar role.[22]

Article 5

Composition of the Chambers

1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:
   a. Three judges shall serve in the Trial Chamber
   b. Five judges shall serve in the Appeals Chamber
2. Each judge shall serve only in the Chamber to which he or she has been appointed.
3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or

[20] Compare § 1 (4) of the German "Produkthaftungsgesetz", product liability statute, of 1989 in its amended version of 19.7.2002, BGBl. I S. 2198, which imposes the onus of proof in regards to the non faultiness of the product on the producer. Reasons for the exclusion of liability for a faulty product are defined in subsections 2 and 3 of § 1.

[21] §§ 395ff of the German Criminal Procedure Code ("Strafprozeßordnung", StPO) gives the victim and its relatives the right to start a joint (criminal) action incidental to criminal proceedings. He or his counsel (in cases of mandatory representation) has procedural rights under § 397 StPO which are similar to the rights of the prosecutor. The German legal texts can be retrieved from http://bundesrecht.juris.de/bundesrecht/stpo.html

[22] See Article 3 Zif. a) lit. 3 of the Statute of the Iraqi Special Tribunal of December 2003 of the Coalition Provisional Authority (CPA), 43 *ILM* 231 (2004).

she was elected. The presiding judge of the Appeals Chamber shall be the President of the Court.

4. If, at the request of the President of the Court, an alternate judge or judges have been appointed by the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 6
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its aims.

2. The Court shall make rules for carrying out its functions. In particular, it shall lay down rules of procedure and evidence.

Commentary

The technical specifications of the court's relationship with the UN and the host state follow the examples of the ICC and the two ad-hoc tribunals.[23] Paragraph 2 finds its corresponding provisions in the wording of Articles 30 of the ICJ Statute, 51 of the ICC Statute, 14 of the ICTR Statute and 15 of the ICTY Statute.

Article 7
The Trial Advocate

1. The Trial Advocate shall be responsible for the investigation of the alleged offences after proceedings have been instituted before the Court. The Trial Advocate shall act independently as a separate organ of the Court. He or she shall not seek or receive instructions from any government, party to trial proceedings or from any other source.

2. The Trial Advocate has the authority to approve or disapprove of the legal counsel chosen by the victim. His decision can be challenged before the Court. The Court's decision is final.

3. The Trial Advocate shall have the power to question the parties and witnesses, to collect and secure evidence and to conduct on-site investigations. In carrying out these tasks, the Trial Advocate shall, as appropriate, be assisted by the state authorities concerned.

[23] See e.g. Articles 2 to 4 of the ICC Statute.

4. The Trial Advocate shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character, possess the highest level of professional competence, and have extensive experience in the conduct of investigations and proceedings in civil and criminal cases.

5. The Trial Advocate shall be assisted by a Deputy Trial Advocate, and by court and such international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Commentary

The Trial Advocate's power to approve or disapprove of the choice of counsel made by the plaintiffs constitutes a necessary right in order to enable the Trial Advocate to act as the "Guardian" of the victim-plaintiff's interests. Consequently, his actions have to enjoy priority over other counsels' actions. This selection power applies only to the plaintiff's choice of legal counsel. The defendant's choice of counsel is unaffected by such limitations.

The Trial Advocate's powers in respect of the investigation of the alleged tortious behaviour and the collecting of the necessary evidence are regulated in paragraph 3. His strong, independent position as the primary organ for the investigating of cases is safeguarded through the explicit obligation of the member states to this statute to support him in carrying out his tasks. The direct appointment of the Trial Advocate by the General Secretary as stipulated in paragraph 4 makes his position comparable to that of an international prosecutor before criminal forums.[24] These provisions are necessary to enable him to carry out his assigned tasks with as little outside interference as possible.

Typical deficits and weaknesses of international litigation are often encountered in the context of evidence and the discovery of documents: judicial requests are often not honoured and local authorities can even actively prevent the successful conduct of acts of discovery. The position of the Trial Advocate as a quasi-prosecutorial organ of the court should protect his work from such future difficulties and probable interference and enable him to function in a similarly effective way as e.g. the chief prosecutor of the ICTY (and, formerly, the ICTR), Carla Del Ponte, was able to do.[25]

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[24] IST Article 18 Tribunal Investigative Judge and Article 15 of the SCSL

[25] Carla Del Ponte's success in prosecuting war criminals of the former Yugoslav civil wars can be measured in the way she is nicknamed. See "Profile: Carla Del Ponte", BBC News, 28/08/2003 at http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/1809185.stm

Article 8

The Registry

1. The Registry shall be responsible for the administration and servicing of the Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Court and shall be a staff member of the United Nations. He or she shall serve for a three-year term and be eligible for re-appointment.

4. The Registrar shall set up a Victim and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Trial Advocate, protective measures and security arrangements, counselling and other appropriate assistance for witnesses and victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit's personnel shall include experts in trauma counselling, including trauma related to crimes of sexual violence and violence against children.

Commentary

This Article follows the wording of Article 16 of the Statute of the Special Court for Sierra Leone (SCSL) and provides in its Paragraph 4 special protective measures for victims and witnesses as already established in other procedures before international criminal forums.[26] What is important, however, is that, unlike those procedures in criminal matters, the protective measures only start with the commencing of the trial procedures, thus taking into account the nature of the court as being primarily a civil and not a criminal forum. Without such a differentiation, the procedures of the court would become semi-prosecutorial in their nature and scope and eventually neglect the principle of party autonomy, which is a crucial feature of any civil proceeding and which applies here, on a reduced scale, as well.

Article 9

The Status, Privileges and Immunities of the Court

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the Court, the judges, the Trial Advocate and his/her staff, and the Registrar and his/her staff.

2. The judges, the Trial Advocate and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

[26] Article 16 (4) of the SCSL Statute, Article 43 (6) of the ICC Statute, Articles 21 and 22 of the ICTR and ICTY Statute.

3. The staff of the Trial Advocate and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the parties, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Commentary

The provisions on status, privileges and immunities of the court, its organs and other persons required at the seat of the court (such as counsel and witnesses), follow the example of provisions applicable to the ICJ and other international criminal tribunals.[27] The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 provides for strong protective rights for personnel of the UN.[28]

Article 10

Independence of the Court

1. The members of the Court shall be independent in the performance of their functions.

2. No member shall engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

3. No member of the Court, with the exception of the Trial Advocate, may act as agent, counsel, or advocate in any case.

4. No member of the Court with the exception of the Trial Advocate, may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

5. Any question regarding the application of paragraphs 3 and 4 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Commentary

Article 17 ICJ Statute and Article 40 ICC contain similar provisions in respect of the independence of the judges. The draft follows the wording of these authoritative instruments

[27] See Articles 30 and 29 of the ICTY and the ICTR Statute, Article 48 ICC and Article 19 ICJ Statute.

[28] Convention on the Privileges and Immunities of the United Nations, 1 *UNTS* 15, 13 February 1946

for reasons of their conclusiveness and proven effectiveness, as demonstrated by the ICJ's decade-long jurisprudence.

CHAPTER 2
THE DRAFT – SUBSTANTIAL RULES

Article 11
International Torts within the jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious breaches of international human rights and humanitarian law of concern to the international community as a whole ("international human rights torts"). The Court has jurisdiction in accordance with this Statute with respect to international human rights torts arising out of the following gross violations of international law ("crimes"):[29]

(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of torture
(e) The crime of terrorism
(f) Other systematic and gross violations of human rights

Commentary

Choice and terminology of the selected international torts, which fall under the jurisdiction of the Court, follow the prescriptions of international criminal and human rights law and merge both fields of law.

The actionable torts chosen find their corresponding provisions in international criminal law where such offences would qualify as so-called core crimes[30] and as such would constitute "the most serious crimes of concern to the international community as a whole",[31] or "serious international crimes".[32]

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[29] The terminus international human rights torts refers as stated in Article 11 to the "most serious breaches of international human rights and humanitarian law of concern"; it therefore constitute a symbiosis of humanitarian and human rights law, violations, respectively.

[30] See Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution" in 12 *HHRJ* (1999) 6. See part B for more detailed information on the choice and terminology of international core crimes.

[31] As codified in Article 5 (1) ICC Statute and Articles 16-18 and 20 of the 1996 ILC's Draft Code. Note that the crime of aggression as the most recent offence codified under international criminal law still remains an undefined concept.

[32] *The Princeton Principles on Universal Jurisdiction* (2001) retrievable at http://www1.umn.edu/humarts.instree/princeton.html (hereinafter *Princeton Principles*) refers to this category of

This terminology follows closely the definition in human rights law of "gross violations" and refers to the serious character and nature of the committed offences, which constitute in their intensity and impact a violation of the principles of international law.[33] Article 7 Paragraph 2 of the ECHR qualifies these acts as acts that grossly violate the laws of civilized nations – as behaviour that "…when it was committed, was criminal according to the general principles of law recognised by civilised nations".[34]

Common to this choice of serious breaches of international human rights and humanitarian law is their status as *jus cogens* norms of international public and criminal law.[35]
The tort of "other systematic and gross violations of human rights" under (f) refers to tortious behaviour that does not constitute an "international crime" *strictu sensu* because they do not meet the threshold requirement of resembling a core crime or *jus cogens* of international law. Instead it describes human rights violations that, although lacking the intensity and impact of a criminal act, do nevertheless qualify as a *jus cogens* of international human rights law as stipulated in internationally acknowledged human rights treaty law.[36] Such tortious behaviour can furthermore consist in any systematic, serious and ongoing violation of certain rights contained in the domestic constitution or laws of a state party to the Statute.

Article 12
Personal jurisdiction

1. The Court shall have jurisdiction over natural and legal persons pursuant to the provisions of the present Statute.
2. The status of a legal person is determined through the applicable law as stipulated in article 20. The fact that a legal person is listed as a corporate entity at a domestic or international stock exchange serves as *prima facie* evidence of its legal personality.
3. The natural persons representing the legal person as directors or in a similar leading role are separately and jointly liable for the tortious acts committed by the legal person.

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crimes as "Serious Crimes Under International Law" in Principle 2 (1) and adds to the above listed four crimes the crimes of piracy, slavery and torture. Further Ratner and Abrams, (n 16) 162 with additional sources.
[33] 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), chapter IV. E.2)* 285
[34] Article 7 II ECHR
[35] See supra part B on the classification and consequences of *jus cogens*.
[36] As codified in international human rights instruments for e.g. the CCPR, the CESC or the CERD, see above part B. An example hereof is the individual act of racial discrimination, committed by a state official, which itself constitutes an internationally wrongful act even if it is lacking the necessary practice requirement that would give a clear evidence of such a wrongful behaviour.

Commentary

Paragraph 1 establishes civil liability for the tortious behaviour of natural and legal persons. The Draft acknowledges therefore the accepted notion that corporations as legal persons are capable of committing human rights atrocities and other international crimes and should therefore be held accountable for such criminal and tortious behaviour.[37]

The Statute's regulations on corporate existence, organization and group structure of a legal person involved in proceedings before the court follow the regulations on corporate entities as found under international and domestic law. Domestic law in this respect refers to the laws of the state which are members to the statute and under whose jurisdiction the legal persons fall. Unlike the choice of law, which the victim has in respect of the applicability of domestic law as concluded below in the commentary to article 11, the law on legal persons is not subject to such a victim-plaintiff's discretion because of the wide diversity of the applicable law on juristic persons. Comparing common law and civil law jurisdictions, significant differences in respect of forms of corporate entities, the nature of their legal personality and ways of formation are obvious. The *prima facie* rule of paragraph 2 accounts for the plaintiff's interest in obtaining an economically strong defendant, for e.g. a corporation with assets which can be attached in the proceedings.

The liability rule in paragraph 3 ensures that the tortious conduct of legal persons results in some form of accountability to the victim. The separate liability rule should be invoked in cases where the civil liability of a legal person cannot be established at all or when attachable assets do not exist. Joint liability is an important feature in accounting for a situation where individuals may be using the corporate screen of a simple and informal corporate structure to reduce their own financial risk in shifting the latter towards the legal person.[38]

It is important to understand that the Court does not distinguish between state and non-state actions in respect of establishing individual financial responsibility for the committed acts.

[37] See part C on the aspects of corporate civil liability and part B on criminal responsibility of business enterprises.
[38] The Close Corporation in SA law, as amended by the Close Corporation Act No. 69 of 1984, is one example where the applicable legal framework provides only basic and simple rules in order to provide for corporate personality for small business enterprises without focusing on financial means and the scope of the business activities. This situation can be found to a lesser extent in the example of the German "Gesellschaft mit beschränkter Haftung" (GmbH), which is regulated in the GmbH statute and has close resemblance to the Close Corporation.

Legal difficulties with regard to the applicable norms and breaches thereof, as known in US human rights litigation, do not therefore arise.[39]

Article 13
Individual civil responsibility

1. A person or legal entity who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a international tort referred to in article 19 of the present Statute, shall be individually responsible for this tort. A prior or simultaneous criminal conviction is not a precondition for such a liability.
2. The official position of any defendant, whether as Head of State or Government or as a responsible Government official or as director of a legal entity shall not relieve such person of his/her civil responsibility.
3. The fact that any of the acts referred to in Article 11 of the present Statute was committed by a subordinate or subsidiary entity does not relieve his superior or the entity's holding company of civil responsibility if he/she knew or had reason to know that the subordinate or subsidiary was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts.
4. The fact that the defendant acted pursuant to an order of a government or of a superior shall not relieve him/her of civil responsibility, but may be considered in mitigation of the later award of damages if the Court determines that justice so requires.

Commentary

The Statute's regulations on individual civil responsibility follow the definition on criminal responsibility as stipulated in the statutes of the existing criminal courts.[40] Paragraph 1 confirms the independence and autonomity of procedures before the Court. The fact that the Court has civil jurisdiction over tortious behaviour which might otherwise qualify as criminal constitutes a reason why its jurisdiction may become recognized by states that are otherwise hostile towards criminal courts exercising universal jurisdiction because of the fear of possible infringements of their state sovereignty or of that of their organs.

[39] See part B chapter 2 on the difficulty to adjudicate private, non-state actor breaches of the "law of nations" with reference to the *Kadic v. Karadzic,* 70 F 3d 232 (2d Cir 1995) and *Doe v. Unocal Corp*., 110 F.Supp.2d 1294 (C.D.Cal. Aug 31, 2000) (NO. CV 96-6959 RSWL BQRX, CV 96-6112 RSWL BQRX) decisions of US Federal Courts.
[40] See e.g. Article 6 & 7 ICTY Statute, Article 25 ICC Statute.

Paragraphs 2 to 4 concern defences that are most likely to be found in criminal procedures and that are not presently recognized under international criminal law.[41] The draft includes them and is thus more progressive than many domestic jurisdictions.[42] Paragraph 3 imposes the principle of strict liability on defendants who, because of their position hold the power of command: this refers to command structures that can be found either in classical military and security structures or in the corporate world. The issue of strict liability is directly linked to the *mens reus* element and the *due diligence* defence applicable in criminal procedures. This strict liability principle constitutes an evidential rule, which reverses the burden of proof and imposes the legal burden of proof on the defendant.[43]

Article 14

Applicable Law

1. The Court shall apply in respect of the determination of the elements of crimes as international torts:

(a) the applicable treaties and conventions on the international law of armed conflict and human rights law;

(b) domestic laws of the member states;

(c) international custom on the international law of armed conflict and human rights law, as evidence of a general practice accepted as law;

(d) the general principles and rules of international law, including the established principles of the international law of armed conflict and human rights law;

(e) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the elements of crimes.

2. The Court may apply principles and rules of law as interpreted in previous decisions of international judicial bodies.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other

[41] See e.g. Article 7 ICC Statute.

[42] part A chapter 2 above.

[43] In legal terminology there is the distinction between legal and evidential burden of proof: the former, also known as "persuasive burden", places the burden to prove his innocence *in toto* on the accused in criminal matters while the latter places the evidential burden on him to introduce evidence in support of his innocence which then lead to the obligation of the prosecution to prove his guilt beyond reasonable doubt. Considering this distinction and the civil trial nature of the proceedings before the court, burden of proof refers to the legal burden of the defendant. See for a discussion of this aspect of strict liability of corporate (criminal) behaviour, Pinto and Evans *Corporate Criminal Liability* (2003), 168-70.

opinion, national, ethnic or social origin, wealth, birth or other status.

Commentary

The Court has a wide discretion in the choice of applicable law under Article 14. The structure follows in general Article 38 ICJ Statute with necessary amendments for the inclusion of a wide variety of international torts. The primary source of law is the body of international humanitarian and human rights law which is accepted as the law of nations. The secondary source for defining a tortious act actionable before the Court lies with the domestic laws of the member state whose citizen has committed the tort or whose citizen is the victim of such tortious behaviour. The victim is in that regard privileged in his choice of law. The other sources of law follow the definition on applicable law as stipulated in Article 38 ICJ Statute, providing the court and the victim, assisted by the Trial Advocate, with a further discretion concerning the application of the suitable law.

Paragraph 2 authorizes the court to refer to (future) own jurisprudence without, however, establishing a "stare decisis" doctrine. Article 21 (2) ICC Statute gives the same discretion to the court.

The choice and applicability of law is limited through the "anti-discriminatory" clause in paragraph 3 which ensures that there are no different standards applied in respect of the application and choice of law.

Article 15

Statute of Limitations

1. No actions for international torts under this statute shall be asserted unless they are commenced within 10 years after the tortious act was committed.

2. This statute of limitation should be tolled during the time the defendant was absent from the jurisdiction of this court or incapable of starting an action. The fact that a defendant was shielded by civil immunity in his home state from pursuing claims arising from the same tortious acts against him before domestic courts shall also exclude any period from being taken into consideration for purposes of this article.

Commentary

The statute of limitations is limited to 10 years after the commission of the tort. The draft hereby follows the example of the US TVPA,[44] which contains in its section 2 (c) a ten-year statute of limitations. The German BGB, by contrast, as an example of civil law legislation, provides in its § 199 (2) for a 30-year statute of limitation for all claims arising from torts which involve violations of life, integrity of the body, health or personal freedom.[45]

Due to the absence of a clause which explicitly limits the scope of applicability of this statute to actions for torts committed only after the entry of this draft statute into force, the 10-year statute of limitations creates the possibility of adjudicating human rights crimes which had been committed long beforehand. Therefore, the question of a possible violation of the non-retroactivity principle could arise. However, considering the fact that all of the international torts in question find their legal basis or equivalent in already existing human rights and humanitarian law instruments, the probability that this draft would constitute "new", albeit retroactive law, which could qualify as a violation of the non-retroactivity principle,[46] does not arise. This line of argumentation finds its support in US federal jurisprudence, where the US Supreme Court ruled in its decision *Landgraf v. USI Film Products*[47] that newly enacted law may be applied to prior acts of conduct, when this new law does not "impair rights a party possessed when […] acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed".[48] Considering that the nature of the civil liability for the commission of international torts established here under this statute does not lead to "new" consequences for the defendant, but to a comprehensive compilation of already established and adjudicated forms of civil liability, as can be found in international humanitarian, human rights and public law,[49] this statute does not create a genuinely retroactive effect.[50]

The tolling grounds of paragraph 2 account for a variety of probable scenarios which may otherwise jeopardize a future action. A major one is the non-accessibility of the jurisdiction of the court for the plaintiff as a ground for tolling. This accounts for the possibility that the

[44] 28 U.S.C § 1331 Pub.L.No 102-256, 106 Stat.73 (TVPA)
[45] "Schadensersatzansprüche, die auf der Verletzung des Lebens, des Körpers, der Gesundheit oder der Freiheit beruhen ...", translation by the author.
[46] Also note that the threshold in civil proceedings is lower than in criminal proceedings.
[47] 114 S.Ct. (1994) 1483.
[48] *Id.*, 1505.
[49] See part C on the different, already available forms of liability.
[50] (n 47) 1503.

plaintiff does not enjoy the necessary personal or factual freedom to access the court for starting his human rights action. The reasons for this can lie in the existence of legal or factual reasons which deny the plaintiff the enjoyment of such rights: an example here is the former Eastern European slave labourers of the German Nazi holocaust, who were barred from approaching US federal courts to start an ATCA action against German defendants because of the East–West conflict. This "permanent" inability to access US courts lasted until the end of this political conflict in 1991 with the downfall of the Warsaw pact and amounted to a de facto absence of the plaintiff from jurisdiction.

The second tolling ground, "incapacity to start an action" refers to a whole variety of "temporary", subjective obstacles to approach the court's jurisdiction. Some examples of such temporary incapacity are imprisonment, severe or chronic illness of the victim-plaintiff and other forms of incapacity which prohibit the plaintiff from proceeding with his action

The immunity tolling acknowledges the new court's complementary nature[51] in respect of domestic civil procedures before the judicial forums of other member states. It accounts for the possibility that initial proceedings before the domestic courts failed because of the probable invoking of immunity from civil proceedings[52] by the defendant. The immunity tolling leaves the door open for later litigation before the court.

Article 16

Victims of violations of international human rights and humanitarian law

1. A person is "a victim" where, as a result of acts or omissions that constitute an international human rights tort as defined under Article 11, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering and economic loss.

2. A "victim" may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.

[51] As formulated in Article 1 of the Statute.

[52] See in that respect the cases *Al-Adsani v United Kingdom*, *Fogarty v United Kingdom* and *McElhinney v Ireland*, before the ECHR in which the principle of civil immunity of states was upheld; see part C chapter 1.

Commentary

Wording and definition of the term victim follow the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law” as adopted by the Commission on Human Rights in 2000.[53] Paragraph 1 defines the individual and collective victim status of an international human rights tort. The latter has a particularly practical relevance in respect of class action proceedings, as the ATCA mass tort actions have demonstrated.[54]

The extension rule in paragraph 2 takes into account that other categories of non-immediate victims shall be included in the victim category in order to account for their (indirect) sufferings as well. The last category of victims includes individuals who were victimized because of their voluntary involvement in the committed international torts in order to intervene or prevent these crimes and accounts for forms of “collateral damages”. The idea that a person who suffers damages because of his courageous engagement for the sake of third parties shall not be left without a remedy is not totally new under international and domestic law: the German civil code (“BGB”) grants a general right to a remedy for a person who acts on behalf of a third party without prior authorization but with the intent to protect the third party from imminent dangers.[55]

Article 17

Treatment of Victims

1. Victims should be treated by the Court with compassion and respect for their dignity and their human rights, and appropriate measures should be taken by the Victims and Witnesses Unit after the start of court procedures to ensure their safety and privacy as well as that of their families.
2. The Court shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in-camera proceedings and the protection of the victim’s identity.

[53] UN Doc. E/CN.4/2000/62. This draft was adopted by the UN Commission on Human Rights in 2005 as the amended “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”, UN Doc. E/CN.4/RES/2005/35. See part C chapter 1 for an overview of the drafting process.
[54] See part C chapter 2 on a brief summary on the mass tort cases under the ATCA.
[55] See §§ 683, 680, 677 BGB, the so called “Geschäftsführung ohne Auftrag”.

3. The Court should ensure that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her retraumatization in the course of the legal procedures designed to provide justice and reparation.

Commentary

As regards defining a victim and his treatment, the draft follows the new developments in international law.[56] Both steps are important for the later legal standing as a plaintiff or the option of asserting a class action.

[56] See e.g. Article 22 of the ICTY Statute, paras 8 and 10 of UN ECOSOC's *Basic Principles and Guidelines on the Right to a Remedy and Reparation for victims of International Human Rights and Humanitarian Law,* E/CN.4/2000/62.

CHAPTER 3

THE DRAFT – PROCEDURAL RULES

Article 18

Locus standi

1. The individual victim or his relatives represented through their counsel as approved by the Trial Advocate have the right to start legal proceedings before the court.

2. Minors lack an own standing before the Court. A minor is a person under the age of 18 years. Proceedings can be instituted on his behalf by his legal guardian. The Court can appoint a curator *ad litem* to represent the minor. As an exception, the Court may grant a minor who is approaching the age of majority the right to institute proceedings without representation.

3. Plaintiffs and defendants have the right to joinder of parties when subject matter, parties and other particulars of the case give rise to a direct and substantial interest. The Court can temporarily abstain from adjudicating the matter in cases where a joinder is opportune and the parties do not join. The Court will exclude such parties from further proceedings after they have failed to comply with its notice to join. The decision of the Court is final.

4. Plaintiffs have the right to assert a class action with the Court under the following preconditions:

   (a) the sheer number of victims makes a joinder under paragraph 3 impossible,

   (b) common questions of law and fact,

   (c) typicality of claims and defences brought before the court

   (d) adequacy of class representation.

which enable the court to rule in *toto*. The final decision lies with the Court.

Commentary

The mandatory representation through counsel is regulated in Article 19 below and discussed in the commentary there. The standing of minors follows acknowledged principles of domestic procedural law.[57] Paragraph 2 sets the age for majority at 18 and thus follows the rules on majority in the civil law of most countries.[58]

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[57] See Section 1 of the Age of Majority Act 57/72 of SA, together with the Guardianship Act 192 of 1993. On the topic of appointing of a curator *van der Merwe v. Die Meester, Hooggeregshof en Andere* 1966 (1) SA 301 (SWA) at 303E-H. *Ex parte Goldman* 160 (1) SA 8 (D) on the possibility of a court granting the right to instigate proceedings to a minor. While in many common law countries the age barrier for legal and procedural capacity is set at 21, civil law jurisdictions follow the rule that 18 years are sufficient for reaching legal maturity.

[58] See e.g. §§ 25 ff of the German ZPO on the locus standi of minors. The general rule in civil law jurisdictions is that the minor possesses legal standing in court procedures to the extent that he possesses unlimited legal capacity, which sets the age of majority at 18.

Paragraph 3 allows the joinder of parties. It follows the principles of common law and civil law jurisdictions on joinder of parties out of necessity or convenience.[59] In cases of a necessary joinder, the court has the right and duty to exclude the non-complying parties permanently from the further proceedings.[60] The terminus "party" refers only to persons who are already named as parties to the actual court proceedings unlike the terminology in civil jurisprudence which extends to persons outside the proceedings. The reason for this limitation lies in the nature of the proceedings before the International Court of Human Rights Litigation which resemble a mixture of civil and criminal procedure. By following the rules on procedure in a civil court case every future party to a case could block any further court proceeding simply by its passivity in not joining[61] the ongoing proceedings. The limitation in the Statute therefore serves the purpose of ruling out situations that would lead to the cessation of the court's work.

Paragraph 4 is of particular importance due to the fact that it opens the way to class action lawsuits following the US example of mass tort actions under Rule 23 (a) of the Federal Rules of Civil Procedure (as amended 1966).[62] This procedural device permits the asserting of class actions under certain defined preconditions which have been discussed in detail in Part C Chapter III of this research.[63] In brief, class actions are legal actions where a small group of plaintiffs can represent the interests of thousands of other (probable) victims in court; the relevance for international tort litigation is obvious through its financial impact and the additional consequences such as media and public attention. The wording of paragraph 4 follows the wording of rule 23 (a). The further prerequisites for asserting a class action as a "mandatory" procedure as stipulated in US procedural law under rule 23 (b), must, however, not be met. It remains therefore in the sole discretion of the court to decide on the admissibility of such action.

Under US law and jurisprudence, class actions have been successfully used in legal actions brought against the corporate world in health hazard tort actions and race discrimination

[59] See Rules 10, 12 of Section 27 of the Supreme Court Act of South Africa and §§ 50 ff ZPO of Germany which know a similar distinction between necessary and convenient joinder.
[60] See on the topic of necessary joinder the SA case *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK en andere* in (3) *SA 653 NC* (2002).
[61] Compare the consequences in a Rule 12 of Section 27 of the Supreme Court Act of South Africa situation where a party does not join and the court does not adjudicate the matter further.
[62] Fed. R. Civ. P. 23 (amended 1966) of the USA.
[63] See part B chapter 2 for more details.

labour actions.[64] The severe legal consequences of such mass actions for the defendant facing thousands of individual claims through one single lawsuit are obvious. Consequently, mass torts have been used frequently in human rights litigation before US federal courts with their impact best documented in the enormous settlements in the *Holocaust I & II.*[65] One of the reasons for opting for such a powerful mass action lies in its direct financial impact on the defendant with further implications in respect of the public observer. Especially in the case of corporate defendants, mass tort actions involving numerous beneficiaries are most likely to create strong media attention, which is most likely to add additional pressure through the bad publicity it can generate. The dual effects of financial deterrence and negative public attention are effective means of achieving compliance with standards and norms of human rights and humanitarian law. The recent trend in the US to curb the applicability of class actions in state court actions should be noted in this regard; it does not, however, prevent the inclusion of this important procedural principle in the Draft.[66]

Article 19
Representation of Parties

1. The parties have the right to appear in persona or be represented by agents. The representation of plaintiffs by agents shall be mandatory in cases where the plaintiffs' safety or that of their relatives is in danger should they appear in person. The Court decides on appropriate measures.
2. The assistance of counsel or advocates is mandatory for the proceedings before the Court. Such assistance may only be provided by suitable members of the law profession. The Trial Advocate gives his consent on the suitability of the respective counsel after the instigation of proceedings. The Court rules on the suitability of the respective counsel or advocate before it commences for its first session. Its decision is final.
3. Agents, counsel and advocates of the parties before the Court shall enjoy the privileges and immunities necessary to the independent exercise of their duties.
4. In relation to the co-counsel of the victim-plaintiff, the Trial Advocate has priority in respect of any motion, actions and other procedural acts.

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[64] Such an example for a health hazard case is the Asbestos litigation, which has seen so far over 500,000 individual claims and around 40 corporate defendants filing for insolvency because of the anticipated damages and other costs, see e.g. In re Joint Eastern and Southern Districts Asbestos Litigation, 878 F. Supp. 473 (E.D.N.Y. 1995) 78 F.3d 764 (1996). The ongoing lawsuit 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, resembles an impressive example for such human rights litigation.

[65] See part C chapter 2 for the *Holocaust I&II* and the *Apartheid* class actions.

[66] See above part B chapter 2 for more information on recent legislative limiting the availability of class actions in state court cases.

Commentary

Structure and wording follow Article 42 of the ICJ Statute and other principles of procedure before international and domestic criminal and administrative forums.[67] Paragraph 2 reconfirms the strong position of the Trial Advocate as the "guardian of the victim" as discussed in the commentary to Article 7 above. His discretion in choosing the suitable counsel is subject to the court's supervision. Paragraph 4 clarifies the position of the Trial Advocate as the plaintiff's main counsel and this means that he is privileged in his actions and standing vis-à-vis the other counsels.

Article 20

Trial Procedure

1. Any proceeding before the Court is initiated by way of summons.
2. The Trial Procedure is divided into three stages:
   (a) The pleading stage;
   (b) The preparation for trial stage; and
   (c) The Trial itself.
3. The pleading stage and the preparation for trial stage shall be conducted in writing; the Trial itself shall take place as an oral proceeding.
4. The written proceedings shall consist of the communication to the Court and to the parties of memorials, counter-memorials and, if necessary, replies; also all papers and documents in support.
3. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.
4. A certified copy of every document produced by one party shall be communicated to the other party.
5. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel, and advocates. The Trial Chamber shall read the plaintiff's summons, ensure the presence of parties and their counsel and enquire about the possibility of a settlement. In cases where such a settlement is not reached, the Trial Chamber shall then proceed with the oral proceeding.
6. The Trial concludes with the closing of the hearing by the President.

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[67] See e.g. procedures before German administrative courts (Verwaltungsgerichten) and regional criminal courts (Strafkammern der Landgerichte) as stipulated in the respective procedural codes ("Verwaltungsgerichtsordnung", VwGO and StPO) which demand the representation of the private party through a counsel.

Commentary

The trial procedure follows the principles of procedure used in common law and civil law jurisdictions[68] and accounts for the fact that the nature of the proceedings before the court resemble first of all civil procedures. The court should offer the parties the possibility of a settlement without prejudice.[69] This option stresses the point that the procedure before the court is in principle a civil procedure which acknowledges the right of the parties to find an amicable settlement. This procedure finds its counterpart in various domestic jurisdictions and has proved to be an important element of the autonomy of the parties.[70]

Article 21

Conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the defendant and due regard for the protection of victims and witnesses.

2. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Commentary

This article finds its corresponding regulation in Article 20 of the ICTY Statute and Article 64 (2) and (7) of the ICC. It takes into account the nature of the alleged torts as resembling possible international crimes as well, which demand further protective elements. Witness and victim protection and the possibility of conducting closed proceedings are protective features which are typical and necessary in criminal court proceedings. Paragraph 2 accounts for the public's interest of access to information without limiting the court's options in regard to confidential procedures.

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[68] The three part division of the trial is identical to the SA action procedure but finds its counterpart in civil law jurisdictions as well: the German civil action procedure knows a tripartite structure as well. The German procedures in civil law, administrative and criminal law know the tripartite trial structure as well: the "Vorverfahren" (preliminary (preparatory) proceedings) serve as the stage where legal action is started through the appropriate summons or pleadings, in the "Zwischenverfahren" (interlocutory proceedings) the parties prepare their case through motions and requests in respect of the admission as evidence etc. and finally the "Hauptverfahren" (Trial) stage where the actual hearing takes place.

[69] This form of settlement does not acknowledge any liability and as thus is not a form of the outdated "payment in court" action in common law procedures.

[70] The German Civil Procedure Code, ZPO, stipulates in its § 278 (1) that the court should at any stage of the proceedings consider the ending of the lawsuit through an amicable settlement among the parties. This conciliatory idea has found its manifestation through the incorporation of arbitral elements in the ZPO in 2004. See http://dejure.org/gesetze/ZPO/278.html

Article 22

Evidence

1. The Court may, even before the hearing begins, call upon the parties to produce any document or to supply any explanations. Formal note shall be taken of any refusal.

2. The Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select with the task of carrying out an enquiry or giving an expert opinion.

3. The Court considers the prior investigative findings of the Trial Advocate carried out under Article 7 Paragraphs 1 and 3 as evidence brought on behalf of the plaintiff and grants him further authority to instigate proceedings as laid out in Paragraph 2.

4. During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 6.

5. After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

Commentary

This article closely follows the wording of Articles 49 to 52 of the Statute of the ICJ. Paragraph 3 stresses the strong role of the Trial Advocate as outlined in Article 7 above.

Article 23

Default Judgment

1. The Court can enter a default judgment when the defendant fails to defend himself and thus enters into default. Entry of default can take place at any stage of the Trial proceeding.

2. The plaintiff has filed for default judgment asking the Court to set damages and issue a money judgment.

Commentary

Default judgments are known in civil trial proceedings under both common and civil law jurisdictions.[71] Article 53 Paragraph 1 of the ICJ Statute acknowledges this procedure when it calls on the court to rule "in favour" of the present party.

Default judgments follow a three-stage procedure, with the defendant defaulting in a trial proceeding, the plaintiff filing a motion for a default judgment and the court entering into a

[71] See §§ 331, 330 of the German Civil Procedure Code (ZPO); Rules 26,31 and 39 of the South African Supreme Court Act of 1959; Rule 55 of the US Federal Rules of Civil Procedures.

default judgment. Given that the proceedings before the court are semi-criminal in their nature and effect, the example of US ATCA adjudication serves as a judicial precedent on how powerful such default judgments can be with the majority of defendants defaulting at one or another stage of the trial proceedings.[72]

Article 24
Judgment

1. When, subject to the control of the Court, the agents, counsel, and advocates have completed their presentation of the case, the President shall declare the hearing closed.
2. The Court shall adjourn to consider the judgment.
3. The deliberations of the Court shall take place in private and remain secret.
    (a) All questions shall be decided by a majority of the judges present.
    (b) In the event of an equality of votes, the President or the judge who acts in his/her place shall have the casting vote.
4. The judgment shall state the reasons on which it is based and shall contain the names of the judges who have taken part in the decision.
5. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
6. The judgment shall be signed by the President and by the Registrar. It shall be read in open court, due notice having been given to the agents.

Commentary

The procedures on finding a judgment follow the procedure of the ICJ Statute as stipulated in articles 54 to 58. The ICJ procedure offers a conclusive set of rules which seem to be acceptable for international proceedings before the court.

Article 25
Appeal of Judgments

1. A judgment of the Court under Article 23 may be appealed in accordance with the rules of this statute by either party, represented by their counsel.
2. The appeal has to be made within 1 month of receipt of the written judgment by the parties' counsels. The application has to state the grounds of appeal, which may be
    (a) Procedural error,

[72] See Stephens and Ratner, (n 16) 239 ff, for an overview of case law where the defendants defaulted.

(b) Error of fact, or

(c) Error of law.

The application to appeal must be brought to the notice of the Registry and the other party's counsel.

3. For the purpose of the appeal proceedings, the Appeals Chamber shall have all the powers of the Trial Chamber. The Appeal Chamber decides on the admissibility of the application. After having found that the application is admissible, the Appeals Chamber proceeds in accordance with Articles 19 and 20.

4. If the Appeals Chamber finds that the proceedings that were appealed were unfair in a way that affected the reliability of the judgment, or that the judgment appealed was materially affected by error of fact or law or procedural error, it may:

(a) Reverse or amend the judgment; or

(b) Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the judgment has been appealed only by the defendant it cannot be amended to his or her detriment.

5. If in an appeal against a judgment the Appeals Chamber finds that the awarded damages are disproportionate to the tortious act, it may vary the damages in accordance with Article 13 Paragraph 4.

6. The judgment of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgment shall state the reasons on which it is based. When there is no unanimity, the judgment of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.

7. The Appeals Chamber may deliver its judgment in the absence of the parties.

8. Decisions on the admissibility and the judgment are final.

Commentary

Article 24 follows the structure and proceedings of Articles 81 and 83 of the ICC Statute as one of the most compelling and recent compilations in international law. It has been modified to accommodate necessary elements of civil proceedings.

Paragraph 1 clarifies that only (final) judgments of the court as defined in Article 23 may be appealed. Default judgments and other decisions of the court are therefore not subject to an appeal. The reference to the other rules of the court clarifies that the Trial Advocate continues the exercise of his strong role in the appeal proceedings.

The relatively long appellation period as set forth in Paragraph 2 follows the continental example which grants a one-month period to appeal the decision.[73] The complexity of the proceedings before the court, which include a huge variety of legal questions and standards, justify the granting of such a long period. Unlike common law proceedings, the Draft does not impose on the parties the further necessity to apply for leave to appeal the court's judgment.[74] Paragraph 2 further gives the grounds on which the appeal may be based.

The procedure of the Appeals Chamber (outlined in Paragraph 3) follows the procedure of the Trial Court as stipulated in Articles 19 and 20. What is important in this regard is the fact that there is no pre-appeal stage with the Trial chamber deciding whether the application for appeal shall be refused or granted. This "one-tier" approach seems to be adequate considering the importance of the appeal stage in contributing to international justice.

Paragraph 4 defines the powers of the Appeal Chamber in respect of its judgment. A non-detriment[75] clause as known to criminal proceedings does not apply in the appeal proceedings.

The finality of the judgment under Paragraph 8 means that the parties do not have to be present when the judgment is delivered.

[73] See e. g. § 517 ZPO for the German "Berufung" (appeal).

[74] See e. g. Section 20 of the South African Supreme Court Act.

[75] Such a clause can be found in Article 83 Para 2 of the ICC Statute and essentially forbids a detriment of the sentence in the appeals procedure when the appeal was lodged by the convicted person or on his behalf.

CHAPTER 4
THE DRAFT – REMEDIES AND THE ENFORCEMENT OF VERDICTS

Article 26
Victims' Right to Reparation

A victim shall be entitled to adequate, effective and prompt reparation which shall aim to promote justice by redressing violations of international human rights or humanitarian law. Reparations shall be proportional to the gravity of the violations and the harm suffered.

Commentary

Given the importance of any form of reparation through financial compensation as an explicit recognition of the victim's suffering, his/her right to an adequate reparation restores his/her honour and dignity not only in respect of himself but also in respect of the public.[76] This opinion follows the basic principle in human rights theory whereby the granting of rights has to be supplemented by enforceable remedies, whose absence would otherwise question the existence of the correlative right itself.[77]

Acknowledging this principle, the Statute follows the wording of UN ECOSOC's *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of International Human Rights and Humanitarian Law*[78] as a more recent international compilation on the subject of redressing human rights atrocities.

Article 27
Scope of Damages

1. Restitution should, whenever possible, restore the situation as it was before the violation of international human rights or humanitarian law occurred.
2. Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

   (a) Physical or mental harm, including pain, suffering and emotional distress;
   (b) Lost opportunities, including education;

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[76] Part C chapter 1.
[77] Boyd "Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level" in *BYULR* (1999), 1182.
[78] (n 56) 5, para 15.

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity; and

(e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

Article 28

Punitive Damages

1. The Court has the discretion to award punitive damages in addition to individual monetary reparation as set forth under Articles 26 and 27.

2. The decision of the Court should state the reasons for awarding punitive damages as additional means of punishment and deterrence.

3. The decision of the Court should reflect the individual circumstances of the case which give rise to the awarding of punitive damages. In complying with this provision, the Court must determine whether

(a) the tortious actions of the defendant

(i) were either wilful, wanton or malicious; or

(ii) demonstrated a reckless indifference to the rights of others or an evil motive.

(b) the defendant possesses sufficient funds or assets.

(c) the defendant is a legal person who possesses sufficient funds or assets.

4. The Court shall award punitive damages when at least one of the requirements as set forth under Paragraph 3 is met.

Commentary

Another important aspect of civil remedies is their possible punishing and deterring effect because they hurt the offender financially. The possibility of awarding punitive damages is well established in the US ATCA adjudication with the explicit motive to punish and deter at the same time the perpetrator of human rights atrocities.[79] The position of the legal concept of punitive damages is a US legal speciality with nearly no corresponding principles in other legal jurisdictions.[80] Civil Law jurisdictions used to reject the acknowledgment of US punitive damages awards on the grounds of a possible *ordre public* violation because of their

[79] See *Filartiga* decision 577 F. Supp 866. See part C chapter 2.

[80] See Stephens and Ratner, (n 16) 215 for a summary. Nater-Bass "US-Style Punitive Damages Awards and their Recognition and Enforcement in Switzerland and Other Civil-Law Countries" in 4 *DAJV-Newsletter* (2003), 154-160, for a civil law perspective.

inherent penal components. The German Federal Court of Justice[81] and French higher courts[82] have recognized scenarios where punitive damages may be enforceable. A recent survey found that in Austria, the Czech Republic and Denmark, punitive damages were not enforceable, while courts in Germany, France, Finland, Hungary, Norway, Poland, Portugal, Spain and Sweden allowed under certain requirements the enforcement of punitive damages awards.[83] Punitive damages are as a concept also fairly unrecognized under international law.[84]

Considering the well-proven deterrent effect which punitive damages can create, the Draft follows the US ATCA example of combining personal damage awards with that of punitive damages. Aware of the fact that the ILC's "Commentaries to the draft articles on Responsibility of States for internationally wrongful acts"[85] rule out the applicability of exemplary, that is punitive damages, this Draft nevertheless adopts the concept of US civil law, arguing that the (a) nature of the torts constitutes severe breaches of international humanitarian and human rights law, (b) the fact that the future defendants will often be individuals or legal entities with sufficient assets acquired as a direct result of their tortious acts and (c) the necessity to use such exemplary damage awards as a form of financial punishment and deterrence, support the decision to include punitive damages as damages available under the Statute. It should, however, be noted as well that this type of remedy may have a deterring effect on the states' willingness to join this Convention.[86]

Paragraph 3 sets out the preconditions for awarding punitive damages: it places a two-fold condition on the court's discretion. Either the heinous nature of the tortious conduct or the personal circumstances of the defendant set the standard with regard to the choice of punitive damages. While the first standard applies mostly to grave human rights atrocities as international torts, the latter serves as a lever of accountability in cases where financial wealth is deprived from the tortious conduct. Unlike cases in which the first standard is applicable,

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[81] The German Federal Court of Justice found in 1993 that punitive damages awards should be recognized at a case by case basis, see Judgment of June 4, 1992, IX.ZR 149/91 in *NJW* 1992, 3096 ff.
[82] Nater-Bass, (n 80) 156.
[83] *Id.*, 157.
[84] See e.g. *Velasquez Rodriguez* case (Compensation) where the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages, 7 *Inter-Am. Ct.H.R.,Series* (1987), 52 and Judgement Para 38 in 28 *ILM* (1989) 291; Laplante, (n 7) 379-88 for a discussion on punitive damages as a remedy in international law and its implications.
[85] *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chapter IV. E.2)* 245.
[86] See Laplante, (n 7) 381, outlining the negative consequences of choosing punitive damages as a remedy.

the latter's applicability is open to other more ordinary international torts as stipulated in Article 11 (f) above. Its most likely application will be to legal persons as defendants.

Paragraph 4 limits the discretion of the court in deciding on the award of such damages in cases where the requirements of paragraph 3 are met; it therefore resembles a mandatory clause.

Article 29

Enforcement of Judgments and forfeiture measures

1. Each State Party shall give effect to the execution of judgments of the Court without prejudice to the rights of bona fide third parties, and in accordance with its domestic legal principles. Each State Party undertakes to review its domestic laws for compliance with this Statute.
2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds or assets owned by or under the control of the defendant and which is or was acquired through the defendants tortious conduct.
3. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds or assets as ordered by the Court.
4. The Court reviews the State Parties' compliance in respect of paragraphs 1 to 3 on an annual basis and reports non-complying states to the Secretary-General of the United Nations.
5. The Court enters into the necessary agreements with non-State Parties and International Organizations to ensure wide compliance with the Court's judgments.

Commentary

The enforcing of the court's judgments is key to its future success. The provisions of this Article borrow from Article 8 of the International Convention for the Suppression of the Financing of Terrorism of 1999[87] as the most conclusive and modern example of a provision on the subject of tracing and attaching financial assets globally. The fact that the defendants in proceedings before the court will include individuals and corporations with significant assets which might directly result from the tortious acts they committed, makes the topic of detecting, freezing and forfeiting of these resources extremely important for the civil remedies to be effective.

[87] As adopted by the General Assembly December 9, 1999. UN Doc. A/C.6/54/L.2, annex I.

The court's powers of review of compliance and the reporting of defaulting states under Paragraph 4 follow the procedures on compliance of the major human rights treaty system of the UN.[88] This procedure should be able to safeguard the court's efficiency.

Paragraph 5 empowers the court to extend its jurisdiction in respect of the enforcement of its judgments beyond the limitations of this Statute. The possibility of including enforcement mechanisms for the execution of the court's judgments in International Organizations' Agreements will empower the court's impact on the international community. Examples hereof may be the inclusion of enforcement clauses in multilateral agreements of powerful economic organizations such as the WTO or the European Union, thus following the already existing examples of human rights clauses in Trade Agreements.[89]

Article 30

Entry into force

1. This Convention shall enter into force on the sixtieth day following the date of the deposit of the fifteenth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the fifteenth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the sixtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

[88] See above part A chapter 1.

[89] The enforcement will take place through the signatory states itself and other international agreements under the supervision and jurisdiction, authority, respectively, of international trade organisations and institutions such as NAFTA, WTO and EU which incorporate a so called "human rights enforcement" clause in their treaties. The U.N.'s response to the threat of financing the terror in connection to September 11 and the war on terror will be utilized for the task of tracing and freezing of assets of alleged and convicted human rights violators.