CIVIL RESPONSIBILITY FOR GROSS HUMAN RIGHTS VIOLATIONS

THE NEED FOR A GLOBAL INSTRUMENT

Sascha-Dominik Bachmann

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Civil responsibility for gross human rights violations: The need for a global instrument

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To my mother

‘Suum cuique’

Acknowledgments

This work is the result of an academic endeavour which started nearly eight years ago when GP Kemp, Senior Lecturer of the University of Stellenbosch, introduced me to the complex topic of civil liability for human rights atrocities in the course of my LLM studies in International Public Law. After completion of my studies at Stellenbosch, I was determined to subject this topic to further scrutiny. My supervisor, Professor HA Strydom of the University of Johannesburg (UJ) enabled me to do so by accepting me as his doctoral candidate in January 2004 and by seeing me complete this task in September 2006. The book in its present form is the result of my LLD studies and my subsequent research undertaken as a postdoctoral research fellow with UJ.

I am beholden to Ms SS Afrika, my girlfriend, for her love and her moral support and Helgard Renate Bachmann, my mother, for her motherly love, understanding and support during all my life.

Semper fidelis!

Sascha-Dominik Bachmann

November 2007

Abbrevations

Law reports and official publications

AC	-	Appeal Cases
AD	-	Annual Digest and Reports of Public International Law Cases 1919-1949
AHRLJ	-	African Human Rights Law Journal
AJCL	-	American Journal of Comparative Law
AJIL	-	American Journal of International Law
All ER	-	All England Reports
BYIL	-	British Year Book of International Law
BYULR	-	Brigham Young University Law Review
CLP	-	Current Legal Problems
DAJV	-	Deutsch-Amerikanische Juristen Vereinigung-Newsletter
ECR	-	European Court Reports
EHRR	-	European Human Rights Reports
ER	-	English Reports
FILJ	-	Fordham International Law Journal
FLR	-	Fordham Law Review
F Supp	-	Federal Supplement
F 2d	-	Federal Reporter, Second Series
GAOR	-	General Assembly Official Reports
GLJ	-	German Law Journal
HHRJ	-	Harvard Human Rights Journal
HLR	-	Harvard Law Review
HRLJ	-	Human Rights Law Journal
HRQ	-	Human Rights Quarterly
ICLQ	-	International and Comparative Law Quarterly
ICJ Reports	-	International Court of Justice Reports
ILCYB	-	International Law Commission Year Book
ILM	-	International Legal Materials
ILR	-	International Law Reports
ISLR	-	Israel Law Review
IRRC	-	International Review of the Red Cross
JZ	-	Juristenzeitung
KB	-	Kings Bench Division
LCP	-	Law and Contemporary Problems
LNTS	-	League of Nations Treaty Series
MLR	-	Michigan Law Review
NELR	-	New England Law Review
NILR	-	Netherlands International Law Review
NJW	-	Neue Juristische Woche
NQHR	-	Netherlands Quarterly of Human Rights
PCIJ	-	Permanent Court of International Justice Reports
QB	-	Queens Bench Division
SA	-	South African Law Reports
SALJ	-	South African Law Journal
SAJHR	-	South African Journal of Human Rights
SAYIL	-	South African Yearbook of International Law
SCOR	-	Security Council Official Records
SJZ	-	Süddeutsche Juristenzeitung
TSAR	-	Tydskrif vir die Suid-Afrikanse Reg
TJICL	-	Tulane Journal of International and Comparative Law
UNTS	-	United Nations Treaty Series
US	-	Reports of the United States Supreme Court
WLR	-	Weekly Law Reports
YHRDLJ	-	Yale Human Rights and Development Law Journal
YILC	-	Yearbook of the International Law Commission

Other

ACHR	-	American Convention on Human Rights
ACHPR	-	African Commission on Human and Peoples' Rights
ACtHPR	-	African Court of Human and Peoples' Rights
AU	-	African Union
BGH	-	Bundesgerichtshof (The German Federal Supreme Court)
CCL	-	Control Council Law 10
CAT	-	Committee Against Torture (the UN Convention Against Torture and Other Cruel, Inhuman Or Degrading Treatment or Punishment is abbreviated as Torture Convention)
CCPR	-	International Covenant on Civil and Political Rights
CEDAW	-	Convention on the Elimination of All Forms of Discrimination against Women
CERD	-	Committee for the Elimination of Racial Discrimination
CESCR	-	International Covenant on Economic, Social and Cultural Rights
CoE	-	Council of Europe
CSCE	-	Conference on Security and Co-operation in Europe
EC	-	European Community
ECHR	-	European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950
ECtHR	-	European Court of Human Rights
ECOSOC	-	Economic and Social Council
EU	-	European Union
GA	-	General Assembly of the United Nations
IACHR	-	Inter-American Commission on Human Rights
IACtHR	-	Inter-American Court of Human Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
ICRC	-	International Committee of the Red Cross
ICC	-	International Criminal Court
ICCPR	-	International Covenant on Civil and Political Rights
ISTCH	-	Iraqi Special Tribunal for Crimes Against Humanity
ICJ	-	International Court of Justice
ILA	-	International Law Association
ILC	-	International Law Association
ILO	-	International Labour Organization
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the former Yugoslavia
IMTFE	-	International Military Tribunal for the Far East, Tokyo
NATO	-	North Atlantic Treaty Organization
NGO	-	Non-governmental Organization
OAS	-	Organization of American States
OAU	-	Organization of African Unity
OHCHR	-	UN Office of the UN High Commissioner for Human Rights
OSCE	-	Organization for Security and Cooperation in Europe
PCIJ	-	Permanent Court of International Justice
SC	-	Security Council of the United Nations
SCSL	-	Special Court for Sierra Leone
SG	-	Secretary General of the United Nations
SS	-	Schutzstaffel (Nazi Elite Formation)
TRC	-	Truth and Reconciliation Commission of South Africa
UN	-	United Nations
WHO	-	International Health Organization
WTO	-	World Trade Organization

Introduction and overview

1 Introduction and overview

1.1 Present systems of monitoring and protecting human rights

The post-1945 era saw a dynamic promotion of human rights and as a consequence, human rights instruments were codified at a rate never encountered before.[1] The then newly established United Nations (UN) — which was still trying to cope with the horrors of two world wars in general and, in particular, with human rights atrocities committed by Nazi Germany during the Second World War — declared the promotion of human rights one of its main objectives: Article 1(3) of the UN Charter of 1945 stipulates as one explicit purpose, common to all member states, the achievement of 'international co-operation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[2] The adoption of the 1948 Universal Declaration of Human Rights (Universal Declaration)[3] by the General Assembly reflects the resolve to protect human rights. This instrument established the acknowledgment of human rights as an inseparable principle of international law. Soon it became apparent, however, that such declarations would not in themselves protect human rights, and that human rights would remain a difficult issue to enforce under international law. Consequently, a sophisticated UN system of monitoring, promoting and eventually protecting human rights developed under the various UN charter and treaty

1 See Cassese *International law* (2004) 350, Dugard *International law — a South African perspective* (2005) 308-309.

2 Limiting its scope territorially, art 2(7) stipulates 'within the domestic jurisdiction'.

3 GA Res 217 A (III) Annex adopted on 10 December 1948.

instruments.[4] This 'backbone' of UN human rights protection is supplemented by other regional human rights protection systems.

Human rights protection today begins with the acknowledgment and subsequent codification of specific human rights and fundamental freedoms by an individual signatory state at international and regional level. The next necessary step is the safeguarding of these rights by means of special organs monitoring compliance, for example, human rights commissions which were established under the various regional instruments assisted in their work by various non-governmental organisations (NGOs). There are three main procedures of monitoring compliance: the examination of periodic state reports on their actual compliance, the review of inter-state complaints and, thirdly — the most effective procedure — the individual complaint mechanism which is an existing semi-judicial procedure of human rights protection.[5] Effectiveness of the third procedure can be measured by the extent of individual communications before regional human rights courts which establish actual judicial review mechanisms of human rights protection. These human rights procedures increasingly create state accountability for human rights violations and are matched by a set of increasingly varied remedies. The shift from mere monitoring and promoting human rights towards the creation of a system of accountability of states and, to a lesser extent, of individuals[6] for human rights violations has consequently become a reality in international law.

International human rights law ultimately means, in the words of the Inter-American Court of Human Rights (IACtHR), 'the international protection of human rights' which

> should not be confused with criminal justice. [...] The objective of international human rights law is 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.[7]

State accountability imposes on the individual state the duty to protect human rights and enforce these domestically and, to a limited extent, internationally. It materialises as various political, legal,

4 The legal development of human rights protection in the UN followed essentially three doctrinal influences: the western doctrine from 1945 to the mid-50s, the socialist doctrine from the mid-50s to the mid-70s and thirdly, from the mid-70s until today, the doctrine of developing countries, see Cassese (n 1) 354-356.

5 Cassese (n 1) 363.

6 An example of quite an effective system for individual accountability is US human rights litigation under the Alien Torts Claims Act and related acts. See part B for a discussion of US human rights litigation.

7 See the *Velasquez Rodriguez* decision of 1988 Ser C No 4 reported in (1988) 9 *Human Rights Law Journal* 212 par 134.

administrative and, to a lesser extent, financial sanctions imposed on an offending state.

1.2 A brief evaluation of the present systems of monitoring and protecting human rights

Systems for protecting human rights based on the Charter and treaties suffer from a 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 a violating state and even weaker in respect to the eventual enforcement of such sanctions.[8] The weakness of the existing human rights systems seems to haunt UN Charter and treaty-based procedures in particular.[9] One plausible reason for this shortcoming is that existing human rights protection regimes mainly address states as the bearers of human rights obligations and not an individual or corporate violator.[10]

The overall objective of establishing a workable regime for the global protection of human rights based on the existing systems of human rights protection, as established by the UN with its seven treaty systems and supplemented by the three regional systems of Europe, the Americas and Africa, has possibly not been achieved. The universal recognition and promotion of human rights has, however, become indisputably a key element and focus of today's international policy. Consequently, the notion of state responsibility for human rights violations has been developed, leading to an intra- and inter-state awareness of the existence of human rights and the need to protect them.

Existing forms of state accountability have failed to put an end to human rights violations, as the international community witnesses daily. The main reasons for this failure are, firstly, that compliance with human rights obligations still largely fall within the discretion of respective states with the direct consequence that only states with a highly-developed human rights law culture comply with obligations; secondly, the lack of supplementary human rights provisions, which establish individual and non-state actor responsibility, exempts the

8 With the overall problem of leaving the implementing of human rights often solely to the discretion of the individual signatory states.

9 As highlighted by UN Secretary-General's recent criticism of the work of the UN Commission on Human Rights (UNCHR), 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 subsequent UN Secretary General's report 'In larger freedom: towards development, security and human rights for all' UN Doc A/59/2005 of 21 March 2005 par 182.

10 Corporate accountability for human rights atrocities has become an established feature of US civil litigation. See 2.4.4 below for a detailed account of corporate liability under US law.

actual perpetrators of human rights violations from accountability;[11] and, thirdly, the lack of a universal forum for addressing violations such as a Universal Human Rights Court as body supplementary to the International Court of Justice (ICJ) or as a new independent judicial organ.

General awareness of the need to protect human rights, as documented in the various international and regional human rights instruments, will hopefully lead to improved human rights conditions. The constantly developing human rights protection regimes with their specific legal instruments provide the world with impressive guidelines and court authority for use in an additional and supplementing regime of individual civil accountability.

Generally, conventions, having the nature of international treaties, leave the future implementation of human rights solely within the discretion of the individual signatory states. 'Opting out' and 'claw-back' clauses and legal possibilities for states to eventually suspend their membership or even withdraw totally from human rights treaties without any mandatory sanctions[12] are further reasons for non-compliance with existing human rights regimes.

The predominantly weak enforcement mechanisms of existing human rights regimes further reduce their already limited effectiveness.[13] An individual victim seeking redress for violations of his or her human rights, or an organisation or NGO acting on his or her behalf, is dependent on the existence of an effective system. The lack of an effective system will ultimately deter not the human rights offender, but those seeking protection from gross human rights abuses. Consequently, the establishment of an international judicial organ for human rights protection in the form of a permanent 'Universal Human Rights Court', in addition to or integrated with the ICJ, which is equipped with universal human rights jurisdiction and explicit means of enforcement would improve the protection of human rights considerably.

In conclusion one can state that there are serious shortcomings and weaknesses in existing international and regional human rights monitoring and protection mechanisms. These mechanisms create only the opportunity to publicise human rights atrocities, organise

11 Nowak *Introduction to the international human rights regime* (2003) 289.

12 See, for example, the withdrawal of its member states Jamaica, Trinidad and Tobago from the American Convention in the 2002 document.

13 See the *Shaka Sankofa* case before the Inter-American Commission on Human Rights Case 11 193 of 11 August 1993, as a drastic example of non-compliance of a member state with a human rights organ's request. The petitioner was executed by the US while his complaint was pending before the Commission and after the US was formally requested to suspend the execution, Inter- American Commission on Human Rights *Press Release No 9/00* 28 June 2000.

support for the victims and their relatives and apply pressure on states and individuals through documenting and denouncing atrocities.[14] Safeguarding actual human rights protection, preventing human rights violations and, ultimately, deterring future human rights abuses are at present beyond the actual capabilities of existing human rights regimes.[15] The Rwandan mass violations case[16] before the African Commission on Human and Peoples' Rights (ACHPR) exemplifies this inherent weakness of current human rights protection regimes. Even the documentation of serious human rights violations before an international forum did not prevent the subsequent genocide in Rwanda in 1994.

1.3 Criminal accountability for human rights atrocities

Existing human rights protection regimes have one severe defect in common: They engage only individual member states and not the individual as the bearer of human rights obligations. Lacking such recognition, the atrocities of an individual human rights violator do not fall under the provisions of the 'inter-state' human rights regimes. The failure to establish accountability and responsibility of the individual or corporate[17] perpetrator under the main existing human rights treaties is an important reason for the limited success of regimes.

The traditional perception of human rights — active or passive rights of individuals in relation to their home states,[18] lacking necessary sanction mechanisms for non-compliance — does not address the reality where, first of all, human rights atrocities are committed by individuals[19] and not by abstract entities such as states. This perception does not reflect the famous opening address of the US Chief Prosecutor Jackson before the International Military Tribunal

14 Especially the latter is becoming increasingly important with regard to subsequent criminal and civil accountability.

15 See Lattimer 'Enforcing human rights through international criminal law' in Lattimer & Sands *Justice for crimes against humanity* (2003) 387 *et seq*, who identifies 'a crisis in the international system of human rights protection'.

16 See the (joined) communication no 27/89, 46/91, 49/91 and 99/93 before the ACHPR, retrievable at http//www.achpr.org.

17 Since the end of the Cold War, multinational corporations (MNCs) have become prominent perpetrators of human rights violations. See part A ch 2 for a detailed account on corporate human rights violations with their civil adjudication before US federal courts.

18 See, eg, the International Covenant on Civil and Political Rights (CCPR) which contains in arts 6-27 classical first generation human rights as rights which bind the individual state party to comply with and restrain from certain violations. The International Covenant on Economic, Social and Cultural Rights (CESCR) depicts social and economic rights as second generation human rights.

19 Acting either as an organ or agent of a state and/or in their individual capacity. The 2003 atrocities, committed in Liberia and Burundi by so-called, self-appointed war lords reflect the present reality where non-state actors are increasingly the main perpetrators.

for the Trial of the Major War Criminals (IMT) in Nuremberg: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[20] Only the establishment of a separate accountability system for the individual human rights violator could deter them. Such an accountability system, however, cannot derive directly from the existing human rights protection regimes because existing instruments only establish and govern the relations between signatory states.

Existing human rights instruments establish state responsibility[21] to a certain extent, for human rights violations, which are attributable to state organs. Additional ways of establishing a working regime for individual criminal or civil responsibility[22] for these violations obviously fall outside the scope of these instruments. At present, and considering the nature of the existing instruments, they can only serve as general guidelines and provisions for a future *corpus* of individual criminal law.

1.4 Brief evaluation of criminal prosecution of human rights atrocities

The present practice of establishing individual criminal responsibility for core crimes and subsequent prosecution in international and domestic forums have developed rapidly into an emerging system of international criminal justice.

The balance sheet of prosecuting international crimes looks quite impressive at first glance: The last decade has seen the establishment of three *ad hoc* tribunals,[23] one permanent criminal court,[24] the de-

20 IMT, judgment of 1 October 1946 in 22 IMT Trials 466 reprinted in (1947) 41 *American Journal of International Law* 172-221.

21 With the possibility of state civil liability in a more or less developed state. See part A ch 1 below for an evaluation and discussion of the question of state civil responsibility.

22 By requiring state parties to create workable means of criminal accountability for the individual perpetrator by imposing eg the prime obligation to either prosecute or extradite, the *aut dedere aut judicare* of international criminal law; see eg arts 6-7 of the Genocide Convention.

23 The International Criminal Tribunal for the former Yugoslavia (ICTY) established under SC Res 827 UN Doc S/Res/827 (1993) with its Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia of 25 May 1993 (ICTY Statute) the International Criminal Tribunal for Rwanda (ICTR) established under SC Res 955 UN Doc S/Res/955 (1994) with its Statute of the International Tribunal for Rwanda, adopted by the same SC Res and reprinted in (1994) 33 *International Legal Materials* 1598, 1600 and the Special Court for Sierra Leone (SCSL), established as a mixed legal court in 2002 in pursuant to SC Res 1315 UN Doc S/Res/1315 (2000).

24 The International Criminal Court (ICC) in The Hague with its statute, the Statute of the International Court of 17 July 1998 (ICC Statute).

termination to prosecute high-ranking officials for core crimes[25] and the development of various domestic penal codes asserting universal jurisdiction.[26] The development of international justice, however, must be seen as a direct consequence of a 'crisis in the international system of human rights protection'[27] which in effect denounces 40 years of human rights protection as weak, underdeveloped and, in some cases, even futile.

The second method of human rights protection — by means of criminal prosecution — is still developing and only a partial solution. The following shortcomings and obstacles can be summarised: The doctrine of *functional* immunity for serving heads of state and other state officials limits the exercise of the principle of universal criminal jurisdiction;[28] the chronic lack of resources necessary for effective prosecution; problematic and sometimes non-existent judicial co-operation in criminal matters; the oftenly 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 International Criminal Court's (ICC) *ratione materiae* to effectively process crimes and the supplementary nature of its jurisdiction.

25 Examples hereof are the *Pinochet* case, *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (No 3) (HL) (E) [2000] 1 AC 147, the conviction for genocide of the former Rwandan prime minister Jean Kambanda in 1998, ICTR-97-23-T and the indictment before the ICTY of (now deceased) Serb president Slobodan Milosevic (IT-02-54).

26 Lattimer & Sands (n 15 above) 12.

27 As above 387 with additional references.

28 See the *Case Concerning the Arrest Warrant Of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ICJ (14 February 2002) (2002) International Court of Justice Reports retrievable at http://icj-cij.org for an example of how the international community limited the scope of prosecuting *jus cogens* crimes. On 11 April 2000, a Belgian investigating judge issued and afterwards circulated an international arrest warrant against the incumbent Minister of Foreign Affairs of the Democratic Republic of Congo, (DRC), Yerodia Ndombasi. The charges of grave breaches of the Geneva Conventions of 1949, of the Additional Protocols thereto and crimes against humanity were punishable in Belgium under its 'Genocide' Law of 1993 as amended in 1999. Yerodia was indicted for his hate speeches, aimed at inciting violence against Tutsi residents in Kinshasa, DRC. On 17 October 2000 the DRC issued the ICJ with an application instituting proceedings against Belgium in respect of the inter-state dispute arising from the issuing of the arrest warrant. The DRC claimed that Belgium had violated the 'principle that a State may not exercise its authority on the territory of another State', the 'principle of sovereign equality among all Members of the United Nations' […] as well as 'the diplomatic immunity of the Minister of Foreign Affairs […]'. In essence, the court's judgment of 14 February 2002 found that the DRC's application was admissible, the issuing of the arrest warrant 'constituted violations of a legal obligation' of Belgium towards the DRC under international law and that 'Belgium failed to respect the (full) immunity from criminal jurisdiction' that Yerodia enjoyed as an incumbent Foreign Minister, as above para 78(1) and (2).

Certain obstacles still stand in the way of effective protection of human rights by means of criminal prosecution: the supplementary and limited jurisdiction of the ICC; the *ad hoc* tribunals' current difficulties in prosecuting effectively because of a case overload; the lack of sufficient resources; the absence of the political will to comply with requests of judicial co-operation and enforcement, et cetera. With the *DRC v Belgium* decision of the ICJ, the evolving attempts to prosecute international crimes before domestic criminal courts have been severely impaired for the sake of upholding an outdated principle of state sovereignty. As a consequence, the perception that 'states have only established or engaged domestic or international *fora* to hold persons accountable sporadically and often with reluctance'[29] continues to hold its worth.

These shortcomings demand alternative, supplementing measures against the perpetrators of international human rights violations. Examples can be found in the US and Canadian practice[30] of denaturalisation and deportation as additional means of establishing accountability. This practice, which is well used in the Anglo-American sphere, is nearly unknown to continental European criminal law practice. Its value is limited to cases where the deportee perceives such measures as 'punishment'. It is doubtful to what extent this creates a general deterrence.

Given these obstacles and shortcomings, it seems unlikely that the goal of establishing a more comprehensive system of international criminal justice will be achieved soon. Other supplementary and additional ways of human rights protection as alternatives to criminal prosecution, should be utilised and, if necessary, developed further. One additional means worth considering is the concept of human rights litigation as developed over the last three decades in the US. The next part of this study explains the development of the concept of civil liability for international human rights atrocities, the realisation of this principle through human rights litigation and its impact on the protection of human rights.

The difficulties as discussed hinder the creation of a universal system of individual criminal accountability with the result that necessary deterrence does not exist. In addition to criminal accountability, the supplementary or isolated use of alternative accountability means, such as the establishment of investigatory and reconciliation commissions and/or the use of immigration measures, for example, repatriation, are equally questionable from a deterrence point of view.

29 Ratner & Abrams *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy* (2001) 331.

30 See eg the US Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Pub L 104-208 Div C 110 Stat 3009-546 and the Canadian Citizenship Act.

The establishment — in addition to existing ways of protecting human rights — of an international regime of strict individual civil liability for the commission of both international core crimes and other gross human rights violations, termed 'human rights atrocities'[31] might well prove to be a solution to existing shortcomings.

Part A discusses the present situation on civil liability and responsibility under international and domestic law, respectively. Part B introduces a draft Statute for a Convention on Individual Civil Liability for Human Rights Atrocities as a supplement to existing human rights protection measures.

[31] The term 'human rights atrocities' refers to serious international crimes and human rights violations such as genocide, crimes against humanity, war crimes, the crime of aggression, torture and (state-sponsored) terrorism. These crimes are also referred to as so-called core crimes, see eg Murphy 'Civil liability for the commission of international crimes as an alternative to criminal prosecution' (1999) 12 *Harvard Human Rights Journal* 6. These acts constitute *jus cogens* violations, imposing on international states an *erga omnes* duty of *aut dedere aut judicare*. See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ICJ (1970) ICJ Reports 3 as an exemplary judicial example on state responsibility for *jus cogens* violations.

Part A

Civil accountability for gross human rights violations under international and domestic law

Introduction and overview

The following section[32] introduces and outlines concepts and mechanisms of civil liability for human rights atrocities that are presently available in international and domestic law. The different approaches are evaluated within their historical and country-specific contexts. 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 of future protection of human rights on a global scale.

[32] Certain themes in this section were discussed in Bachmann 'Liability for gross human rights violations: from criminal to civil remedies' unpublished LLD thesis, University of Johannesburg, 2006 and in two further articles, SDOV Bachmann 'Where do we stand with human rights litigation against corporations?' (2007) 2 *Tydskrif vir Suid-Afrikaanse Reg* 292-309 and Strydom & Bachmann 'Civil liability for gross human rights violations' (2005) 3 *Tydskrif vir Suid-Afrikaanse Reg* 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 discussion relates to mapping and understanding the historic legal roots of states' civil accountability[33] as a precursor to individual civil liability. Following the century-old concept of states and not individuals being the bearers of rights and obligations under international law, state responsibility resembles primarily a system of state liability for inter-state wrongs.

Historically, the practice of holding states civilly accountable for their acts towards other states was 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. In exchange for peace, the defeated were to pay hefty financial compensation and relinquish territory. An example is the (second) Peace Conference of Versailles of 1919, where Germany became subject to financial and territorial reparations unknown in Europe since the Middle Ages.[34]

A further development of the concept of state accountability saw the evolution of an independent principle of international law on state civil responsibility.[35] The Permanent Court of International

33 The terms 'responsibility' and 'accountability' are used as interchangeable terms in this chapter.

34 Over 40 per cent of the Reich's original territory, in addition to all German colonies of that time, were ceded to the victors to punish the German people for war guilt which had been determined solely by the victorious powers. This is arguably one factor that led to the subsequent rise of the Nazi movement in Germany.

35 See Shaw *International law* (2003) 696, for requirements of 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.

Justice (PCIJ) established with its *Chorzow Factory*,[36] decision the principle that states are civilly liable for attributable acts of international wrongs and responsible for financial reparations.[37]

The ICJ has followed this principle on state responsibility in its jurisprudence since its establishment in 1945.[38] A fairly recent example is the *Nicaragua v United States of America* case,[39] which confirmed the ICJ's determination[40] to hold states accountable for international wrongs.[41]

The International Law Commission (ILC) acknowledged these dicta in its 'Draft articles on responsibility of states for internationally wrongful acts'.[42] Article 1 stipulates that 'every internationally wrongful act of a state entails the international responsibility of that state'[43] and consequently obliges it to make restitution.[44] Today, such state liability can arise from any inter-state action or omission

36 *Chorzow Factory* (Ger v Pol) Jurisdiction (1927) 9 Permanent Court of International Justice Reports 21: on the nature of reparations, *Chorzow Factory* (Ger v Pol) Indemnity (1928) 17 Permanent Court of International Justice Reports (Ser A) 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 15 May 1922.

37 Indemnity (1928) 17 Permanent Court of International Justice Reports (Ser A) 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.'

38 See eg the *Corfu Channel* case (UK v Albania) (1949) ICJ Reports 244; *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* (2996) ICJ Reports 9 *et seq*.

39 *Case concerning military and paramilitary activities in and against Nicaragua* (Nicaragua v United States of America); there the ICJ found that the US under the 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 1980s, see (1986) ICJ Reports 14.

40 The US withdrew from the proceedings after the ICJ had ruled that it had jurisdiction over the case despite the US' objections hereto. The US under the Reagan administration revoked its acceptance of the optional clause to the ICJ of 1946.

41 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. Summary No 2004/2 retrievable at http://www.icj-cij.org/docket/decisions/Summary.

42 'Draft articles on responsibility of states for internationally wrongful acts' of 2001 in *Official records of the General Assembly 55th session Supplement No 10 (A/56/10) Ch IV E1*.

43 Art 2 defines the further requirements of such liability. See also art 3 of the earlier 'Draft articles on state responsibility' of 1975 UN Doc A/CN 4/SER A/1975/Add 1 by the International Law Commission (ILC).

44 'Draft articles' (n 42 above) art 35.

(that is, failure to protect other states from the occurrence of such acts that are attributable to the state in question and not justifiable to the point that wrongfulness is overlooked.[45] Examples of such internationally wrongful acts,[46] as found in international jurisprudence and treaty law, are shooting down aircraft, sinking or damaging ships, attacking diplomatic missions and its personnel and trans-state pollution.[47]

Besides the ICJ and the International Tribunal for the Law of the Sea, suitable forums for adjudicating these state liability claims are international arbitration tribunals and *ad hoc* claims tribunals and commissions,[48] with the latter often established through bi-national peace treaties.

In 1991 Iraq was reminded of the 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'.[49] Another example of addressing state accountability in this form is the UN General Assembly's 'Resolution on a definition of aggression' of 1974,[50] which established state responsibility for an act of aggression.[51]

2 State responsibility for human rights violations

State civil responsibility for acts constituting violations of basic human rights is not a new concept in international law. For instance,

45 As above arts 20-27 list circumstances which preclude the wrongfulness of the state's action.

46 Civil liability for unlawful state action requires in addition to the existence of a wrongful act a necessary sufficient causal link between the action and damage.

47 The ILC provides in its commentary to its 'draft articles' (n 42 above) 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' 248-263.

48 See eg the UN Compensation Commission for Iraq, established under UN SC Resolution 692 (1991) UN Doc S/22559 of 2 May 1991; the Iran-United States Claims Tribunal, see Shaw (n 35 above) 247 and the most recent Eritrea-Ethiopia Claims Commission (EECC) which was established pursuant art 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 12 December 2000; reprinted in (2004) 43 *International Legal Materials* 1249.

49 UN SC Res 687 (1991) par 16.

50 UN GA Res 3314 (XXIX) of 14 December 1974.

51 Para 2 of art 5 of the Resolution reads '[a]ggression gives rise to international responsibility'.

a general principle of state liability for 'grave breaches'[52] of humanitarian law by its forces during times of armed conflict can be found in provisions of the four Geneva Conventions of 1949.[53] This concept of state liability was already developed under the 'Law of Hague' where article 3 of Hague Convention IV[54] of 1907 recognises a general obligation on the perpetrator state to pay compensation for breaching the Convention.[55] Following the IMT's recognition of the 'Law of Hague' as resembling customary law in 1939,[56] the principle that states are financially liable towards individual victims for war-time human rights atrocities emerged as a concept in international law. Furthermore the general notion[57] currently exists that states could be held liable for human rights atrocities in cases where such acts resemble *jus cogens* violations[58] of an *erga omnes* nature. The final version of the ILC's 'Draft articles on responsibility of states for internationally wrongful acts'[59] (2001) reaffirms this form of state liability in principle in articles 40 and 41.[60]

One example of the acknowledgement of the protection of human rights as a state obligation under international law is the above-mentioned UN Security Council Resolution 687 where Iraq was found responsible for the commission of 'inhumane acts' during its unlawful occupation of the territory of Kuwait in 1990.[61] Consequently, the UN Compensation Commission (UNCC) compensated the victims of human rights and humanitarian law violations, committed by Iraqi military

52 As defined in art 147 of the fourth Geneva Convention of 1949, IV. Reference is made to the grave breaches provisions of arts 50 GC I, 51 GC II, 130 GC III and 147 GC IV.

53 See art 51 of GC I, art 52 of GC II, art 131 of GC III and art 148 GC IV.

54 Hague Convention (IV) Respecting the Laws and Customs of War on Land, reprinted in 2 *American Journal of International Law*. Supp 90 and entered into force on 26 January 1910, retrievable at http://www1.umn.edu/humanrts/peace/docs/con4.html.

55 As above. Art 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.'

56 The IMT regarded violations of existing laws and customs of war according to the Hague Rules on Land Warfare of 1899 and 1907 as violations of customary international law.

57 See Shaw (n 35 above) 116 with judicial authorities mentioned.

58 See *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (1970) ICJ Reports 3 as an exemplary judicial example on state responsibility for *jus cogens* violations.

59 Note 42 above.

60 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, art 40 to para 3 of art 41, establishing state responsibility for violations of peremptory norms with the duty to make reparations under arts 34-39 as a consequence. See 'Commentaries to the draft articles on responsibility of states for internationally wrongful acts' (n 47 above) 283-284 and 291.

61 See UN SC Res 687 (1991) par 16 (n 49 above).

and security forces during the occupation of Kuwait, as so-called individual claims.[62]

In *Bosnia and Herzegovina v Yugo*,[63] the ICJ, as the main judicial forum of the UN, was faced for the first time with the question of state liability for gross human rights violations.[64] It found that Yugoslavia (Serbia and Montenegro) was obliged to pay Bosnia and Hercegovina, a sum to be determined by the Court, in its own right and as *parens patriae* for its citizens, reparations for damages caused to persons by violations of international law.[65] At regional level, the IACtHR established the *dictum* in the well-known *Velasquez Rodriguez v Honduras* case,[66] that states are explicitly obliged to protect human rights not only under regional (human rights) treaty law but also under customary international law.[67]

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

The legal concept of the individual as victim and claims holder in *persona* is at present developing in terms of 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: International law still follows the principle of the classical law of aliens where the individual as such provides only the *casu* for subsequent inter-state responsibility but does not hold a right on his or her own.[68] The individual's state will then act on his or her behalf through means of

62 See para 12 of art 1 of the Commission's 'Provisional rules for claims procedure' UN Doc S/AC 26/1992/10.

63 (1993) ICJ Reports 3.

64 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.

65 See judgment 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.

66 'Inter-American Court of Human Rights: judgment in Velasquez Rodriguez case' (1989) 28 *International Legal Materials* 291.

67 As above paras 164-165.

68 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' (1991) 40 *International and Comparative Law Quarterly* 827 830-832.

diplomatic protection.[69] 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

The notion that the individual (victim) is entitled to hold enforceable rights on his or her own has developed in terms of emerging human rights treaty regimes: Article 8 of the Universal Declaration[70] grants 'everyone the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law'.

The International Covenant on Civil and Political Rights' (ICCPR) Human Rights Committee applies article 2(3) of the ICCPR — 'any person whose rights or freedoms as herein recognised are violated shall have an effective remedy' — for granting financial reparation to victims of human rights violations.[71] What remains uncertain, however, is whether this right constitutes only a procedural right or the right to an effective financial remedy as well.[72]

In line with 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 be financial. Tomuschat,[73] on the contrary, uses the fact that compensation for acts of miscarriage of justice under article 14(6) takes place in the domestic context of the violating state to motivate that the term 'effective remedy' in article 2(3) is of a procedural nature only. The HRC reads article 2(3) as a right to financial remedy[74] for the victim of state infringements of the ICCPR[75] and bases its view mainly on

69 See the *Mavrommatis Palestine Concessions* case on state responsibility for international wrongs and the enforcement of these claims through diplomatic protection. *Greece v UK* 2 (1924) Permanent Court of International Justice Reports (Series A) 12.

70 G A Res 217 A UN Doc A/RES/271 A (III) (1948).

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

72 Tomuschat (n 68 above) 298 characterises redress as being solely procedural in nature. He refers to the French and Spanish versions of the text, which, by using the terms '*recours*' and '*recurso*', imply that only a procedural remedy was intended by the ICCPR.

73 n 68 above.

74 Tomuschat 'Reparations for victims of grave human rights violations' (2001) 10 *Tulane Journal of International and Comparative Law* 157, 167.

75 Tomuschat (n 68 above) 298-299 commenting on the HRC's findings on financial remedies in the last 25 years.

customary international law governing the consequences of internationally wrongful acts and the duty to pay compensation.[76] This view is supported by other legal opinion, which reasons that the rationale behind article 2(3)(*a*) of the ICCPR requires that a substantive claim indeed arises as a mandatory consequence of the violation.[77]

Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Torture Convention),[78] stipulates that the individual victim of acts of torture, or his or her dependants in the case of death, shall, besides domestic remedies, have a direct right to financial compensation for suffering.[79] This important, additional remedy for victims of torture is yet to be harnessed by the Committee Against Torture (CAT). The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[80] acknowledges the general principle of financial compensation for victims of particular 'state crimes' such as unlawful detention and acts of police brutality.

The UN General Assembly widened this limited scope of compensable human rights violations in 1998 by including the violation of human rights and fundamental freedoms as redressable. 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[81] 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 […]'.[82] These declarations document the UN's growing determination to find an international principle on, and formula for, state responsibility for human rights violations with financial redress as further consequence.

Examples of this determination can be seen in the recent efforts by the Economic and Social Council (ECOSOC) to develop and implement 'Basic principles and guidelines on the right to a remedy

76 As above, 299.

77 See Klein 'Individual reparation claims under the International Covenant on Civil and Political Rights: the practice of the Human Rights Committee' in Randelzhofer & 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 art 2(3) could be used to develop a financial claim against the individual perpetrator as part of his or her own state's general liability.

78 Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984.

79 Art 14(1) of the Torture Convention provides that '[e]ach 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'.

80 GA Res 40/43 of 29 November 1985.

81 GA Res 53/144 of 8 March 1999.

82 As above, art 9(1).

and reparation for victims of violations of international human rights and humanitarian law'.[83] These principles and guidelines result from a drafting process which lasted 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,[84] which was undertaken by the UNCHR's Special Rapporteur, Professor Van Boven from the Netherlands. The findings of the study were used for two subsequent drafts – those of 1996 and 1997 – of later codifications.[85] In 1998 Professor M Cherif Bassiouni was appointed by the UNCHR as the next Special Rapporteur to carry out the task of finalising the draft codification.[86] A finalised 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 UNCHR on 20 April 2005[87] and recommended for later adoption by ECOSOC and the General Assembly. This draft, which was eventually adopted on 16 December 2005 by the UN General Assembly,[88] 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'.[89]

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 abovementioned regional human rights systems[90] provide financial compensation in theory at least. Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)[91] (Protocol 11) grants the right to an effective remedy to 'everyone whose rights and freedoms as set forth in this Convention are violated' and authorises in article 41 the European Court of Human Rights (ECtHR) to grant partial financial compensation in cases where domestic legislation of the affected member state allows for it.

In addition to the European Convention system, treaty law of the European Community (EC) could provide for individual remedies for

83 E/CN 4/2000/62 of 18 January 2000.
84 E/CN 4/Sub 2/1193/8 of 2 July sec IX 1993.
85 E/CN 4/1996/17 of 24 May 1996 and E/CN 4/1997/104 of 16 January 1997.
86 E/CN 4/RES/1998/43.
87 E/CN 4/RES/2005/35.
88 A/RES/60/147.
89 As above Ch IX par 15 of the adopted basic principles.
90 See above Introduction and Overview.
91 Protocol No 11 to the European Convention (1994) 33 *International Legal Materials* 960, 963.

violations of EC law: The new Charter of Fundamental Rights[92] 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 EC as principal judicial organ. The Court has already granted financial remedies to individual citizens of the EC against individual member states for actions and omissions as well as failures to comply with EC standards and[93] their timely implementation in domestic law.[94]

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 (the American Convention) authorises the IACtHR to rule that 'fair compensation shall be paid to the injured party'.[95] The authorisation to grant financial remedies is a further development of the original 'right to judicial protection' as set out under article 25 of the ACHR. The IACtHR 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'.[96]

The African human rights system seems to acknowledge, in principle, the possibility of redressing human rights atrocities in article 27(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, whereby 'the Court shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.[97]

92 Charter of Fundamental Rights of the European Union 2000 O J (C 364) 1, coming into force on 7 December 2000.

93 See the case *Van Gend & Loos* where the Court found that EC and its member states were obliged to respect the law determining individual EC 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 (1963) European Court Reports 1.

94 In *Francovich* Germany was held liable for its omission to timely implement an EC directive 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 (1991) European Court Reports 5357.

95 American Convention art 63 1144 *UNTS* 123.

96 See the 1988 *Velasquez Rodriguez* decision, Ser C No 4 in (1988) 9 *Human Rights Law Journal* 212, par 134 and in (1989) 28 *International Legal Materials* 291.

97 See art 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 at http://www.africa-union.org/home/welcome.htm under [treaties].

3.3 Shortcomings

Pursuing civil remedies for human rights atrocities suffers 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 procedure for the individual victim to proceed with a financial claim, nor a judicial forum that is directly accessible to the individual claimant. The ICCPR's UNCHR — the only international treaty body with proven relevance in individual remedies in the international field — has the right to grant financial remedies only in the context of already processed individual complaint procedures. The UNCHR does therefore not resemble an explicit forum for the adjudication of financial claims of an individual victim. In this context, financial claims can only be made during a complaint or communication procedure that has already commenced. As a consequence, the ICCPR with its UNCHR constitutes only an indirect and weak procedure, lacking power to force a perpetrator state to process financial claims of the individual human rights victim generally. Given the difficulties documented in part A concerning compliance with the UNHRC's findings, combined with lengthy individual communication procedures, the few findings of the UNHRC have failed to establish the necessary *consuetudo*[98] in international human rights law.

The situation under the regional human rights regimes is only slightly better.[99] The ECtHR, for example, 'does not acknowledge a [general and independent] 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*,[100] confirmed this view when the Court held that while there had been a violation of article 2[101] of the European Convention by the UK through the actions of security organs, a further claim for financial damages under article 41 of the European Convention had to be dismissed as being inappropriate because the slain terrorists had without doubt intended to carry out a terrorist bombing in Gibraltar.[102]

98 Tomuschat (n 68 above) 167.

99 Tomuschat (n 68 above) 162 *et seq* for a comprehensive evaluation of the present practice.

100 App No 18984/91 (1996) EHRR 97. Three members of the Irish Republican Army (IRA) were shot dead by British security organs in Gibraltar, Spain, on 6 March 1988. This counterintelligence based military operation led to questions regarding the legality of such a 'hit' and military operations in asymmetric conflict scenarios.

101 As above par 214. In contrast hereto stands the prior decision of the then European Commission on Human Rights which found that the acts of the UK did not violate art 2 of the European Convention on the grounds that the use of lethal force had been a justifiable exception, having been absolutely necessary for the purpose of 'defending other persons from unlawful violence'. As above, paras 250-251.

102 As above paras 8 and 219.

The ECtHR found in three recent judgments, *Al Adsani v United Kingdom*,[103] *Fogarty v United Kingdom*,[104] and *McElhinney v Ireland*,[105] that conferring civil immunity on foreign states for the adjudication of claims arising out of human rights related violations under provisions of UK legislation[106] was lawful and thus did not violate the victim or plaintiff's right to a fair trial under article 6(1) of the European Convention.[107] 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 were acts of torture and as such *jus cogens* violations, punishable as an international[108] and domestic[109] crime and constituting a violation of article 3 of the European Convention 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*[110] to civil proceedings[111] and refusing to acknowledge the changes with regard to civil immunity for certain international crimes, such as torture and terrorism, in the jurisdictions of other states.[112] It remains an open question whether the *Pinochet* decision of the Law Lords has influenced the opinion of the British judiciary in general.[113]

A victim's right to financial redress under the European Convention remains therefore subject to his or her home state's internal domestic law with only very few exceptions permissible under the European Convention.[114] In contrast, the difficulties of the Inter-American regime of human rights protection in establishing a strong human rights civil adjudication are different: The lack of

103 App No 35763/97 Judgment 1 Nov 2001 in (2002) EHRR 273.
104 App No 37112/97 Judgment 21 Nov 2001 in (2002) EHRR 302.
105 App No 31253/96 Judgment 21 Nov 2001 in (2002) EHRR 322. All three decisions can be retrieved from the Court's homepage http://www.hudoc.echr.coe.int.
106 Here under sec 1(1) UK State Immunity Act 1978 c 33, reprinted in (1978) *International Legal Materials* 1123, whereby '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'.
107 See Strydom & Bachmann (n 32 above) for a detailed evaluation of the three cases; also Voyiakis 'Access to court v state immunity' (2003) 52 *International and Comparative Law Quarterly* 297-332. Note the further discussion of the topic of civil immunity for state human rights violations in para 2.3 above.
108 As stipulated in art 4 of CAT.
109 Torture is a crime in the UK under sec 134 of the Criminal Justice Act of 1988.
110 *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte* (No 3) (HL) (E) [2000] in 1 AC 147.
111 Judgment (n 103 above) 61.
112 Eg, the US FSIA was amended in 1996 by the AEDPA to preclude state immunity in cases of extrajudicial killings, terrorism and torture, see for a detailed account para 2.3.1 below.
113 See eg 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 where the Court limited the applicability of sovereign immunity protection in cases of *jus cogens* violations by individual state agents.
114 Tomuschat (n 74 above) 164, discussing other recent decisions of the ECtHR, identifying a change in case law towards a more applicant-'friendly' jurisprudence.

means necessary to enforce compliance with findings, jeopardises the creation of strong Inter-American human rights adjudication.

As early as 1988, with its decision in *Velasquez Rodriguez v Honduras*,[115] the IACtHR set a precedent of holding states financially liable for human rights atrocities. The Court has so far delivered more than 41 judgments on state responsibility for human rights violations and have ordered respective states to pay reparations.[116] However, as just mentioned, the Court's lack of power to execute its judgments[117] has stymied the creation of a strong legacy of state accountability for human rights violations in that region.[118]

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 from sole inter-state responsibility for international wrongs towards intra-state liability has been especially pronounced for human rights violations that constitute *jus cogens* violations. However, international law still follows the 'traditional' concept of international state responsibility whereby the claim-holder could only be a state as opposed to the individual victim. The latter, while being nominally the right holder, is left without a personal actionable claim and still depends on his or her home state who, as *parens patriae*, is to pursue claims on his or her behalf. Therefore, the traditional notion prevails that only states 'have the right and an interest to bring an [civil] action against the offending state'[119] and not the individual

115 'Inter-American Court of Human Rights: judgment in Velasquez Rodriguez Case', reprinted in (1989) *International Legal Materials* 291.

116 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' (2004) 22 *Netherlands Quarterly of Human Rights* 351 and Shelton *Remedies in international human rights law* (2005) 468-477.

117 The Inter-American Commission on Human Rights (IACHR) can only request information on measures adopted by member states and not force a state to comply with its findings or follow its recommendations. A charter-based adoption of an increased intervention mechanism for organs of the Organisation of American States (OAS) that will guarantee compliance with IACHR's findings shall be sought as a probable addition to the American Convention's existing art 73 that refers only to sanctions in general.

118 Tomuschat (n 68 above) 172 provides a more disheartening account of the IACHR's adjudication.

119 See UNCHR '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. This opinion follows art 31 para 2 of the 'Draft articles on responsibility of states for internationally wrongful acts' (n 42 above) and Commentary (n 47 above) 225.

victim.[120] The UNCC has followed this notion in its rules of procedure whereby governments exclusively, and not individual claimants, have the right to submit claims.[121] Secondly, the few exceptions under international and regional human rights law, discussed above, that grant the individual victim a limited right to financial redress for suffering fail to create a situation in which the establishment of states' civil accountability for human rights becomes automatic.

One has to conclude that in the international legal community in general, and among the respective human rights organs, in particular, a growing resolve and determination exist to establish more effective ways of holding states accountable for human rights atrocities. However, not having an international regime on civil state accountability that grants the individual victim the undisputed position of claim holder with necessary procedural and enforcing means, needs attention of the international legal community.

[120] 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) (Hereafter Report of the International Law Association Human Rights Committee) (2001) EHRR 138, 150.

[121] Art 5 of the UNCC's 'Provisional rules for claims procedure' (n 62 above).

Chapter 2

Adjudicating human rights atrocities in domestic jurisdictions

1 Introduction

Considering limitations of supranational human rights regimes – prior exhaustion of domestic legal remedies, a lack of independent forums and the non-existence of a guaranteed principle lending an individual the standing of a claim holder – measures for obtaining financial redress granted by domestic provisions are increasingly important for the individual victim of human rights atrocities. With this in mind, the following chapter summarises the present legal situation regarding the assertion of a civil human rights action in selected domestic jurisdictions.

2 Civil liability for human rights atrocities before US courts[122]

2.1 Overview

This summary starts with the US because of the country's reasonably well-developed human rights adjudication system for foreign litigants. Human rights litigation before US courts commenced in 1980 with the landmark decision of *Filartiga v Pena-Irala*,[123] when the Second Circuit Federal Court found that acts of (state) torture, committed outside US territory involving only non-US citizens, both as victims and perpetrators, 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[124]

[122] Certain themes of this chapter was discussed in Bachmann (n 32 above).
[123] (1980) 630 F 2d 876 (2d Cir).
[124] 28 USC § 1350. ATCA is sometimes referred to as the Alien Torts Statute (ATS).

(ATCA), a statute from 1789 which had been dormant for nearly 200 years.[125]

During the last 25 years more than a hundred civil liability cases for alleged gross human rights violations were brought before US federal courts under ATCA,[126] the supplementary Torture Victim Protection Act[127] (TVPA) of 1991 and the Antiterrorism and Effective Death Penalty Act[128] (AEDPA) of 1998.[129]

This form of litigation became known to the broader South African public through the *Apartheid*[130] class action proceedings now pending on appeal before the Second Circuit Court of Appeals. As early as 2002 three different groups of victims organised themselves as plaintiffs in the matter[131] and subsequently became involved in various media campaigns to solicit support for their plight and to enlighten the South African public on the possibilities that could be locked up in such trans-national proceedings. Needless to say, their legal counsel was just as excited about the prospects.

Human rights adjudication under ATCA has led to the successful suing of individuals as 'state' and 'non-state' instigators of egregious human rights atrocities, some highly politicised suits against states and an increasing number of lawsuits against multi-national corporations (MNCs) for 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) for human rights violations. Through its focus on the individual perpetrator — being a natural person or a corporate, legal person — human rights litigation under ATCA has potential for deterring potential perpetrators. Human rights litigation in the US therefore breaks with the traditional, continental common-law view, where in cases of state wrongs the claim-holder could only be a state and not an individual victim. It therefore merges different

125 ATCA was only used on a few occasions prior to *Filartiga* resulting in less than 30 court findings, See 'Symposium on corporate liability for violations of international human rights law' (Symposium hereafter) in (2001) 114 *Harvard Law Review* 2033.

126 Human rights litigation in the US is based mainly on ATCA and TVPA; consequently, the term 'ATCA' refers to an action brought before US courts under any of these statutes.

127 28 U S C § 1331 Pub L No 102-256, 106 Stat 73, which extends the scope of civil actions to US citizens for torts of torture and extrajudicial killings as well.

128 28 U S C § 1605(a)(7) (1998). Permitting actions against designed states of state sponsored international terrorism.

129 Symposium (n 125 above) 2033 *et seq*.

130 *In re South African Apartheid Litigation* (2004) 346 F Supp 2d 538 (SDNY); Apartheid class action hereafter.

131 These three groups were the Ntsebeza, the Digwamaje and the Khulumani plaintiffs, with the latter comprising 32 700 individuals, Apartheid class action (n 130 above) 545-546.

phases of legal development within the concept of state accountability. Consequently, adjudication under ATCA and its instruments could develop into a new, potentially powerful way of protecting human rights.

2.2 The laws

2.2.1 The Alien Torts Claims Act

ATCA[132] was enacted in 1789 as a domestic law which allowed for the adjudication of torts committed by an alien against an alien. ATCA confers subject matter jurisdiction on a federal court when the following conditions are met: (1) an alien plaintiff sues; (2) for tort only; (3) based on an act that was committed in violation of either the law of nations[133] or a treaty of the US.[134]

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 ATCA. In general, only human rights violations of a serious nature are actionable. During the 25 years since the *Filartiga* judgment,[135] US courts have developed certain norms and criteria that, if breached, could qualify as violations of the law of nations and therefore as torts actionable under ATCA.

In *Forti v Suarez-Mason*,[136] the 'law of nation' test[137] was developed, requiring the 'universal, definable and obligatory'[138] character of the an international norm. A violation of international human rights and international humanitarian law, as codified in several multilateral treaties and conventions, could qualify as a

[132] The terms ATCA and ATS (Alien Torts Statute) are used interchangeably in this study.

[133] 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. (1995) 70 F 3d 232 (2d Cir) 239-241.

[134] 28 USC § 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'.

[135] *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.

[136] (1987) 672 F Supp (ND Cal) 1531.

[137] This test became recognised as the so-called *Forti* test. The US Supreme Court referred to this test in its *Sosa v Alvarez-Machain* decision (2004) 542 US 692, 124 S Ct 2739 (*Sosa* hereafter). 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 & Ratner *International human rights litigation in US courts* (1996) 51-52.

[138] (1987) 672 F Supp (ND Cal) 1539-1540.

violation of the law of nations under these specific criteria and could therefore establish the legal grounds of a civil action against an alien defendant, who has to be present or otherwise represented in the US when summons is served.[139] Today, the following human rights violations may establish jurisdiction of US federal courts under 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 as well as hostage-taking.[140]

2.2.2 The Torture Victim Protection Act

The Torture Victim Protection Act (TVPA) of 1991 broadened the scope of human-rights litigation in the US by establishing civil liability for acts of torture and extra-judicial killings. Section 2(*a*) states that:

> [A]n individual who, under actual or apparent authority, or colour 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[141] 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 colour 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 rise to the claim occurred.

Unlike ATCA, the TVPA has a provision of limitation, which sets the limitations period at ten years. ATCA 'borrows' this provision of limitation from the TVPA. The TVPA can be regarded as a pendant to ATCA, explicitly focusing on adjudicating the international crime of torture before US federal courts. It is a legislative response to a particular breach of international law.

[139] The so-called personal service requirement of, eg, summons as stipulated in Fed R Civ P 4 8(e)(2).
[140] See Stephens & Ratner (n 137 above) 63-92.
[141] Ratner & Abrams (n 29 above) 207.

2.2.3 The Antiterrorism and Effective Death Penalty Act[142]

The Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted in 1996 in response to the growing threat of international terrorism against the US and limits state immunity in cases of state terrorism.[143] The AEDPA permits a claim of damages against a state sponsor of international terrorism for 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 official agent of the foreign state performed the act or provided support and this support fell within the scope of his or her duties. It therefore amends the Foreign Sovereign Immunities Act (FSIA)[144] to permit a civil suit if the following requirements are met: (1) the foreign state was designated[145] as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979[146] or section 620(a) of the Foreign Assistance Act of 1961[147] 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; and (3) the claimant was not a US national.

2.3 Limitations to US human rights litigation and their exceptions

2.3.1 The Foreign Sovereign Immunities Act

The FSIA was passed in 1976 and lays down certain exceptions to state immunity, which were regarded until then as absolute. Examples of such exceptions are cases where immunity was waived, cases of litigation involving commercial activity undertaken by the sovereign in the US and, more relevant to human rights, cases in which the sovereign is alleged to have committed a tort resulting in injury within the US.[148]

The FSIA limits the range and scope of ATCA litigation. The Supreme Court ruled in 1989 in *Argentine Republic v Amerada Hess Shipping Corp*,[149] that, in general, save for some exceptions as

142 28 USC § 1605 (a)(7) (1998).
143 Prominent examples of pre-9/11 terrorist attacks against the US were the 1993 basement bombing of the WTC, the bombing of the US Khobar Towers barracks in Saudi Arabia in 1996, the bombing of US embassies in East Africa in 1998 and the seaborne attack on the US warship Cole in Yemen in 2000.
144 28 USC §§ 1602-1605.
145 States designated by the US Department of State as state sponsors of terrorism in 2004 were Cuba, Iran, Libya, the Democratic Peoples' Republic of Korea, Sudan and Syria. Compare http://www.state.gov/s/ct/rls/pgtrpt/2004/31644.htm.
146 50 USC § 2405(j) (1994).
147 22 USC § 2371 (1994).
148 28 USC § 1605.
149 488 US 428 (S Ct 1989). The Court further laid out the requirements whereby a foreign state could waive its immunity.

contained in the FSIA, a foreign state was immune from suit.[150] This exemption 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 the 1994 decision of *Princz v Federal Republic of Germany*,[151] — 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'.[152]

The commercial activity exception of the FSIA[153] whereby a commercial activity must have been carried out by the sued state, allows for a civil action under strict conditions. In the context of human rights litigation, the third clause of section 1605(a)(2) applies according to which this activity must have occurred '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 commercial activity. This has to be done with reference to the nature of the conduct.[154] 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.[155] So far, all attempts to invoke this exception and establish jurisdiction before US courts have been unsuccessful.[156] Besides these exceptions, this bar can only be overcome by means of the 1996 AEDPA[157] for state-sponsored terrorism.

2.3.2 The head-of-state doctrine

In terms of this doctrine, an action against a foreign head of state is futile since the head of a foreign nation enjoys the same immunity from the jurisdiction of US courts as the state itself. One line of thought holds that head-of-state immunity derives from the common law and promotes 'comity among nations by ensuring that leaders can perform their duties without being subject to detention, arrest or embarrassment in a country's foreign legal

150 As above 443; the Court found that FSIA was the 'sole basis' for jurisdiction in state liability cases. The US Supreme Court overruled the Court of Appeals holding of September 1987 because a violation of international law would establish subject matter jurisdiction on the grounds of ATCA, reprinted in (1987) 26 *International Legal Materials* 1374, thus ruling that ATCA did not do away with sovereign immunity. See also Symposium (n 125 above) 2033, 2035.

151 (1994) 26 F 3d 1166 1173 (D C Cir).

152 As above 1174.

153 28 USC § 1605(a)(2)

154 28 USC § 1603 (d).

155 *Republic of Argentina v Weltover, Inc* 504 US 607 (1992) at 614.

156 See eg the cases *Saudi Arabia v Nelson* 507 US 349 (1993), *Cicippio v Islamic Republic of Iran* (1994) 30 F 3d 164 (D C Cir) and *Hwang Geum Joo, et al v Japan* (2001) Civil Action 00-02233 (HHK) (DC Cir).

157 See 2.2.3 above.

system'.[158] This kind of immunity is, however, limited since it can be waived. The Fourth Circuit, for instance, rejected the bid of former Philippines president Marcos for immunity because the new government of the Philippines had sought to waive his immunity. Granting him immunity would therefore have weakened the idea of promoting comity among nations and would have been detrimental to the interests of both states. Traditionally, the executive branch has the authority to define who should be entitled to immunity. In the US, the Department of State as part of the executive branch has more recently limited head-of-state immunity only to acts that are inherently governmental or public in nature.[159]

Another approach is based on the FSIA. Courts in the US differ on whether individuals — including heads of state — fall within the FSIA's scope. The Ninth Circuit concluded in *Chuidian v Philippine National Bank*,[160] 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 section 1603(b) of the FSIA, which defines a 'foreign state' to include 'an agency or instrumentality of a foreign state'[161] which further 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'.[162] The court explained that the terms 'organ' and 'agent' 'do not in their typical legal usage necessarily exclude individuals'.[163] The direct application of the FSIA for the purpose of individual immunity therefore eliminated the role of the Department of State to determine immunity. However, this view was challenged in *Lafontant v Aristide*,[164] where it was stated that 'immunity only extends to the person the United States government acknowledges as the official head-of-state'.[165] Recognition of a government and its officers is the exclusive function of the executive branch: '[T]he 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'.[166] Consequently, the status of head-of-state immunity still remains uncertain in light of the passage of the FSIA.[167]

158 (1987) 817 F 2d 1108 (4th Cir).
159 See George 'Head-of-state immunity in the United States courts: still confused after all these years' (1995) 64 Fordam Law Review 1055-1056.
160 (1990) 912 F 2d 1095 (9th Cir).
161 28 USC § 1603 (b).
162 *Chuidian* 912 F 2d 1100.
163 As above 1101.
164 (1994) 844 F Supp128 (E D N Y).
165 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.
166 As above 132-33.
167 Stephens & Ratner (n 137 above) 127 *et seq*.

In conclusion, it should be stated that cases brought before US courts under 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 court proceedings with its judicial construction of declaring certain human rights violations, such as summary executions and torture, as falling outside the scope of official governmental acts.[168] Recent equivocal decisions of UK civil courts on third state liability for *jus cogens* violations of international human rights and humanitarian law indicate Crown's courts' ambivalence towards addressing this difficult topic.[169]

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. In *Baker v Carr*,[170] the US Supreme Court cited matters involving foreign affairs and the exercise of executive powers that fall within the political question doctrine. The political question doctrine consequently does not abrogate the existence of federal judicial power but merely limits its exercise.[171] It has further qualified the 'political question' with two considerations: 'The appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination'.[172]

According to experienced human rights litigation lawyers, only the argument that civil action may question the conduct of the US could hold.[173] Such a situation could appear when a 'judicial resolution of a question would contradict prior decisions taken by a political branch

168 As above 131 and Tomuschat (n 68 above) for further references to US criminal and civil case law supporting this view.
169 See under 3.2 below.
170 369 US 186 (1962).
171 As above 217.
172 As above 210.
173 Stephens & Ratner (n 137 above) 141 with further references.

in those limited contexts where such contradiction would seriously interfere with important governmental interests'.[174]

2.3.4 The act of state doctrine

This doctrine defines the conditions for when the judicial branch is prohibited from examining the validity of a foreign sovereign's act, regardless of the existence of possible international law infringements.[175] It therefore constitutes quite a powerful obstacle to successful ATCA litigation. The act of state doctrine has the potential to undermine ATCA litigation in cases where human rights violations were authorised 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*,[176] the Ninth Circuit refused to apply the act of state doctrine to shield the activities of former Philippines president Marcos. It restricted the scope of applicability in cases where the conduct of a regime which is no longer in power is subject to a civil action by a 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 conduct, if challenged by his own country after his fall, may not become the subject of scrutiny in our courts.[177]

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 ground that it is not the proper forum. Whether or not to exercise jurisdiction is based on the *forum non conveniens* doctrine which allows a court to dismiss a case based on the contention that another venue under a foreign state's jurisdiction provides a more appropriate forum.[178] It is not unusual for US federal courts to dismiss

[174] *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 US has an interest in a dismissal because of possible interference with state policy, has no legal power to force courts to comply. Important recent decisions using this doctrine are the 'Holocaust slave labour' cases, see *In re: Nazi Era Cases Against German Defendants Litigation* (2000) 198 F R D 429 (D N J). See 2.4.4 below.

[175] This doctrine had been identified and elaborated on in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) 401.

[176] (1988) 862 F 2d 1355 (9th Cir).

[177] As above 1360.

[178] 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 & Ratner (n 137 above) 151-154.

ATCA-based corporate lawsuits because of this doctrine. However, many appellate courts have overturned these dismissals and restored the balance of the parties' interests in favour of the plaintiff or appellant's choice of judicial forum.[179] The courts thereby 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[180] is a further illustration. The Second Circuit Court of Appeals followed these considerations in *Wiwa*,[181] when it overturned the dismissal on grounds of *forum non conveniens* by the Southern District of New York Court, stating that the plaintiffs would put themselves in grave danger if they return to their home country to process their action there in particular, and that, in general, a US court would be a more suitable forum in matters involving human rights violations of such a grave nature.

2.3.6 Further limitations to US human rights litigation

A future obstacle to successful human rights litigation exclusively based on the US system 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 a very diverse group of critics. On the one side there are US objectors fearing a possible infringement upon US economic and political interests worldwide if the US were to become a global forum for human rights litigation, especially for corporate human rights violations. Their motivation seems to indicate an isolationist or even patriotic concern for the protection of US interests.[182] The other objection to the apparent universality of the US courts comes from outside the US. Critics fear the emergence of an omnipotent US jurisprudence that would eventually turn out to be inapplicable in civil proceedings worldwide, and that this would reverse the positive developments towards civil

[179] *Aguinda v Texaco Inc* (2002) 303 F 3d 470 (2d Cir); *Sarei et al v Rio Tinto, et al* (2002) 221 F Supp 2d 1116 (C D Cal).

[180] Extending US jurisdiction over foreign nationals for acts of torture committed outside of the US against both US citizens and non-citizens.

[181] *Wiwa v Royal Dutch Petroleum Co* 226 F d 88, 157 Oil & Gas Rep 1, 31 Environmental Law Reports (2000) 20, 166 (2d Cir) (NO 99-7223L, 99-7245XAP), reversing the District Court's prior dismissal in *Wiwa v Royal Dutch Petroleum Co et al* No 96 CIV 8386 (KMW) (SDNY 1998).

[182] Former president Reagan and the present president George Walker Bush II are two proponents of this group. The most recent attempt by politicians to limit the scope of ATCA was senator Feinstein's proposed Alien Tort Statute Reform Act, which she introduced to 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 ATCA and US human rights litigation lies outside the scope of this research.

accountability for human rights atrocities.[183] They seem to forget, however, that in 1980 it was former president Jimmy Carter who encouraged and supported the commencement of the *Filartiga* proceedings and therefore helped 'jumpstart' the US human rights litigation with its subsequent global impact on the adjudication of human rights.

The US Supreme Court's more recent *Sosa v Alvarez-Machain*,[184] decision exemplifies the present legal dispute between the US government and US human rights community.[185] The petitioner, assisted by the present administration's Justice Department, opted for a severe limitation of 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 US.[186] This opinion was vehemently challenged by the human rights community as in effect 'gutting' ATCA and denying 24 years' (since the 1980 *Filartiga* precedent), successful human rights litigation.[187] The Court rejected the petitioner's opinion and held that while ATCA is in its terminology only jurisdictional, it could 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',[188] therefore endorsing the *Forti* tests.[189] The Court consequently denied the applicability of ATCA as a statutory cause on the grounds that the abduction and subsequent 24-hour detention of Alvarez did not qualify as actionable under ATCA because this arbitrary arrest could neither qualify as a breach of any US treaty obligation nor *jus cogens*

183 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.

184 *Sosa* (n 137 above).

185 The facts of the case were briefly as follows: 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 US 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) USC) and Sosa among others for a violation of the law of nations under ATCA. Only the ATCA suit was successful with a summary judgment of $25 000 in damages. A later appeal judgment of the 9th Circuit reversed the FTCA dismissal while confirming the ATCA judgment. See *Sosa* (n 137 above) par 1 for a summary of the facts.

186 See Brief of petitioner 23 January 2004 No 03-339 at (i) under questions 1 and 2.

187 See Hermer & Day 'Helping Bush bushwack justice' *Guardian* 27 April 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.

188 *Sosa* (n 137 above).

189 As above.

of international law and was thus only actionable under domestic law.[190]

The importance of this judgment for the future of ATCA adjudication lies in the renewed confirmation that ATCA remains the appropriate forum for 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 already be actionable under other statutes.[191] This judgment keeps the scope of ATCA focused on redressing severe suffering of individual victims and does not water down the spectrum of future human rights litigation.[192]

2.4 The development of human rights litigation in the US

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

As mentioned above, the history of successful human rights suits filed under ATCA (and the TVPA) began in 1980, with the Second Circuit's decision in *Filartiga v Pena- Irala*,[193] where the relatives of a Paraguayan man, who was tortured and killed in custody of the Paraguayan police, filed suit against the former Inspector General of police while he was present in the US. The Second Circuit Court found that it had subject matter jurisdiction and that torture was a violation of the law of nations within the scope of ATCA.[194] The court's decision was important in two ways. Firstly, it was the first time that plaintiffs could litigate human rights abuses in federal courts despite the absence of a direct connection to the US (other than that of the defendant being present when served with the court summons) of either the tortuous conduct or its effect. Secondly, the court's reliance on modern customary international law paved the way for modern US adjudication of international crimes. With *Filartiga* the doors of US federal courts opened for civil litigation in cases where

190 As above.

191 As above 2741, whereas '[d]istrict courts should exercise caution in deciding to hear claims allegedly based on present-day law of nations under the Alien Tort Statute (ATS), and should require any claim based on present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms, offences against ambassadors, violations of safe conduct and piracy, that Congress had in mind when it enacted the ATS'.

192 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.

193 (1980) 630 F 2d 876 (2d Cir).

194 As above 884.

defendants had acted as individual state actors when committing human rights atrocities.

2.4.2 The non-state actor: Kadic v Karadzic

This state actor or action requirement was upheld by the US federal courts until 1995 when the Second Circuit of Appeal decided in *Kadic v Karadzic*,[195] that the applicability of 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 politically charged case,[196] two groups of Bosnian women brought claims under ATCA and the TVPA against the Serb national Karadzic before the District Court of Manhattan for 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.[197] The District Court held that there was no subject-matter jurisdiction under ATCA because Karadzic, as president of an internationally unrecognised state (Respublika Srpska),[198] had acted as a private actor and as such his acts did neither constitute violations of international law or breaches of the law of nations as required by ATCA; nor did they fulfil the requirement of governmental involvement as stipulated by the TVPA. 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 that the Republic of Srpska met the requirements of statehood[199] under international law[200] and that it had subject-matter jurisdiction under ATCA and further that certain international crimes, forming part of the *jus cogens* of international criminal law, such as 'genocide, war

195 (1995) 70 F 3d 232 (2d Cir). The case was a consolidation of two suits brought on behalf of two groups of defendants, namely a group of individuals and two organisations *Doe v Karadzic* (No 93 Civ 878) and *Kadic v Karadzic*.

196 When the cases were brought before the 2nd Circuit Court, the civil war in Bosnia and Hercegovina with its attended atrocities was at its height and became subject to UN scrutiny. Before and during the filing period of the lawsuit, Karadzic visited NY on three occasions on UN invitation.

197 n 195 above, 237.

198 In 1992 the Bosnian Serbs had declared part of the then independent former Yugoslavian Republic Bosnia and Hercegovina which was occupied by them as the independent Republic of Srpska. This Republic was, however, never recognised by the UN.

199 Territorial sovereignty, population and political leadership as the three governing criteria of statehood.

200 (1995) 70 F 3d 232 (2d Cir) 243.

crimes and crimes against humanity', could have been committed by Karadzic 'in his private capacity'.[201]

With *Kadic v Karadzic* the subject-matter jurisdiction of ATCA and the TVPA was extended to include certain acts by non-state actors because of the seriousness of violations. With the Second Circuit's ruling, *jus cogens* violations of international human rights and humanitarian law became actionable under ATCA and the TVPA.[202] But the Court went further when it found that other 'common' crimes such as rape and extrajudicial killings were actionable under ATCA as long as they were committed in furtherance of other *jus cogens* crimes which do not require 'state action'.[203]

2.4.3 States as defendants

Lawsuits against states are generally restricted by state immunity as stipulated in the FSIA. The lawsuits *Argentine Republic v Amerada Hess Shipping Corp*,[204] and *Princz v Federal Republic of Germany*,[205] are two examples of lawsuits that were unsuccessfully pursued because of state immunity.

Lawsuits against states brought under ATCA and the TVPA are more likely to be successful in cases of state-sponsored terrorism. An important case in this respect is the *Lockerbie* litigation,[206] 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. In 2001 the Libyan intelligence agent Abdelbaset Ali Mohamed (aka al Megrahi) was convicted of the bombing by the 'Lockerbie' court in the Netherlands.[207]

The first civil suit[208] 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.[209] The Second Circuit Court found, firstly, that Pan Am flight 103 was not to

201 As above 236.
202 As above 239-243.
203 As above 243-244, 'are actionable […] without regard to state action, to the extent that they were committed *in pursuit of genocide or war crimes*'.
204 (1988) 488 US 428, 429; 109 S Ct 683.
205 n 151 above, 1166.
206 See for the Lockerbie case (2001) 40 *International Legal Materials* 582 *et seq*.
207 The court was a Scottish court sitting in Camp Zeist, Netherlands. This had been a precondition set by 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 January 2001. His appeal was dismissed.
208 *Smith v Socialist People's Libyan Arab Jamahiriya* (1996) 101 F 3d 239 (2d Cir).
209 See 2.3 above for some examples of these exceptions and their position within the system of obstructing a successful US human rights civil action.

be regarded as territory of the US; secondly, the bombing did not fall within the non-commercial tort exception under the FSIA; thirdly, the UN Security Council's Resolution 748,[210] whereby Libya was obliged to pay compensation to the victims of the bombing, was not a binding treaty obligation under article 25 of the UNCHR 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 US C section 1605(2).[211] Consequently, the court dismissed the civil suits.

As a consequence of pressure by families of victims and the public, the FSIA was amended in 1996 by 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.[212] The Second Circuit Court ruled in *Socialist People's Libyan Arab Jamahiriya v Smith*,[213] that families of Lockerbie victims could proceed with their claims for damages because of changes in law, therefore rejecting the appellant's (Libya's) legal view that the AEDPA resembled an impermissible *ex post facto* law.

The Lockerbie case came to an end through a different course of events. In May 2002 the Libyan government offered the impressive sum of $2.7 billion to compensate each of the 270 victims' families in exchange for the withdrawal of lawsuits and lifting 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.[214] In August 2003, this settlement was concluded by the legal and diplomatic representatives from US and Libya.[215]

In *Alejandre v Cuba*,[216] and *Flatlow v Iran*,[217] Cuba and Iran were found liable as states for acts of extra-judicial killing.[218] In the first case Cuba was found liable for shooting down 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

210 UN Doc S/RES/748 (1992).
211 Murphy (n 31 above) 35 and further annotations.
212 See eg *Rein v Socialist People's Libyan Arab Jamahiriya* (1998) 995 F Supp 325 (E D N Y).
213 Case No 98 – 7467 (1998) US App (2d Cir) retrievable at http://www.findlaw.com/2nd/987467.
214 *Mail & Guardian* 31 May 2002 'Lockerbie families offered $2.7bn' at http://archive.mg.co.za.
215 See Sebok 'Libya, Lockerbie, and the long-delayed settlement relating to Pan Am flight 103' at http://writ.news.findlaw.com/sebok/20020908.html.
216 (1997) 996 F Supp 1239 (S D Fla).
217 (1998) 999 F Supp 1 (D D C).
218 See Murphy (n 31 above) 40.

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 of severely limited state liability adjudication under the provisions of the FSIA, suits against governments have so far resulted only in out of court settlements and no final judgments. Thus far, very few actions have been successful under the AEDPA exceptions.

2.4.4 Important corporate lawsuits

2.4.4.1 The *Wiwa* and *Unocal* cases

Corporate mass tort litigation in the US commenced in 2000 with the decision of the Second Circuit Court of Appeals in *Wiwa v Royal Dutch Petroleum Company*,[219] to grant jurisdiction to US federal courts for the adjudication of foreign corporate human rights violations which were committed outside the US. The ruling renounced the earlier *forum non conveniens* approach of the District Court for the Southern District of New York[220] and remanded[221] the case back to the District Court for further proceedings. On 28 February 2002 the District Court denied the motions to dismiss on virtually all of the plaintiffs' claims and ruled that the plaintiffs' allegations met the requirements of an action under ATCA and qualified the actions of the defendant as participation in crimes against humanity, torture, summary execution, arbitrary detention, cruel, inhuman, and degrading treatment, and other violations of international law.[222] The case is still pending and its outcome unsure due to the defendants accusing the plaintiffs of perjury.[223]

[219] *Wiwa v Royal Dutch Petroleum Co et al* (n 181 above). This lawsuit was based on the alleged involvement of the Royal Dutch/Shell oil group in human rights abuses in Nigeria. The plaintiffs argued that the corporation had acted in complicity with the Nigerian army in the 1995 murders of the environmental and community leaders Ken Saro-Wiwa and John Kpuinen, the torture and detention of Owens Wiwa, and the murder of another villager.

[220] The United States District Court for the Southern District of New York had found that there was personal jurisdiction, but dismissed the lawsuit on *forum non conveniens* grounds, see *Wiwa v Royal Dutch Petroleum Co et al* (n 181 above) synopsis.

[221] As above, the Court of Appeals held that '(1) New York investor relations office of companies' subsidiary was an "agent" of the companies for purposes of New York's personal jurisdiction statute; (2) companies, through such office, were "doing business" in New York, as required to confer jurisdiction under the statute; (3) subjecting companies to personal jurisdiction in New York did not violate due process clause; and (4) district court failed to weigh all relevant considerations in its *forum non conveniens* determination'.

[222] *Wiwa v Royal Dutch Petroleum Co* 2002 WL 319887 (not reported) RICO Bus Disp Guide 10 216 (SDNY 28 February 2002) (No 96 CIV 8386 (KMW)).

[223] *Wiwa v Royal Dutch Petroleum Co* 2006 WL 870944 (S D N Y 31 Mar 2006) (No 96 CIV 8386 KMW HBP 01 CIV 1909 KMW HBP 02 CIV 7618 KMW HBP).

Corporate human rights litigation before US federal courts was taken a step further by the *Unocal* case[224] — a lawsuit brought against a US corporation for its complicity in alleged human rights violations in the context of its business activities abroad. In 1996, 15 plaintiffs[225] from Myanmar[226] 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 company oil pipeline. The *Unocal* case is important in terms of ATCA litigation because of its procedural history: The defendant's counsel exploited all the legal objections discussed above. They argued that the case was increasingly politicised within the human rights community and also argued that such corporate liability cases would impair global economic interests of the US — a view aligned with that of the political establishment.

The Ninth Circuit Court[227] refused the initial motion to dismiss the case on the grounds that the alleged (human rights) violations constituted official acts of the state of Myanmar, and were thus subject to the jurisdictional bars of act of state and/or state immunity. The defendant then argued that US courts lacked subject-matter jurisdiction on the ground that the plaintiff had failed to establish that the defendant had committed a law of nations violation. The Court followed this view and dismissed the case[228] by ruling that the plaintiff could not establish that the defendant had committed actionable law of nations violations by exercising (direct) control over Myanmar's security organs or that he had participated in the commission of these violations through knowledge and approval of the methods applied by Myanmar's security organs.[229] This 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 ATCA and the TVPA and reversed the Circuit Court's grant of summary judgment in favour of Unocal on claims for forced labour, murder and rape.[230]

224 *John Doe I v Unocal Corp* (2005) 403 F 3d 708.

225 The *Unocal* case comprises two actions brought before the District Court of Central California: *Nat'l Coalition Gov't of the Union of Burma v Unocal Inc* (1997) 176 FRD 329 334 (CD Cal) 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* (1997) 963 F Supp 880 883 (CD Cal) were brought by 14 villagers.

226 Formerly known as Burma.

227 See *Doe v Unocal Corp* (1997) 963 F Supp 880, 885-888 (CD Cal).

228 *Doe v Unocal Corp* (2000) 110 F Supp 2d 1294 (CD Cal) (No CV 96-6959 RSWL BQRX CV 96-6112 RSWL BQRX).

229 As above 1307-1310.

230 *Doe I v Unocal Corp* (2002) 395 F 3d 932 (9th Cir (Cal)) (No 00-56603, 00-57195, 00-57197, 00-56628). Four appeals brought on behalf of the plaintiffs (Nos 00-56603, 00-56628, 00-57195 & 00-57197) were consolidated.

The Court of Appeal found that Unocal's corporate liability for participation in the crime of forced labour could be established through the 'knowing practical assistance or encouragement to [the] Myanmar military that had a substantial effect on [the] military's perpetration of forced labour imposed on area residents',[231] qualifying as aiding and abetting of the crime in question. It further found that the alleged acts of murder, rape and torture occurred in furtherance of forced labour and was as such actionable under ATCA without the existence of the state action requirement.[232]

This decision sent shockwaves through the corporate world[233] and gave new hope to litigants in similar matters.[234] In a subsequent development, the *Unocal* case was admitted for a rehearing before an 11-judge *en banc* panel.[235] However, the long-awaited hearing never occurred because the parties settled out of court.[236] An unfortunate side effect of this settlement is that important legal questions concerning corporate liability for human rights atrocities remain unanswered.

2.4.4.2 The *Holocaust* lawsuits

The first Holocaust class action ('Holocaust I') concerned the corporate liability of Swiss banks for their treatment of Jewish clients and other victims of Nazi persecution during and after World War II. It raised important questions in respect of corporate business morals. During 1996 in *In re Holocaust Victim Assets Litigation*,[237] nearly 900 000 victims and victims' relatives[238] filed a class action against the three largest Swiss banks 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 in transacting the profits of slave labour'.[239]

231 As above 934.

232 As above, 'the court finds that crimes like rape, torture, and murder, which by themselves require state action for liability under the Alien Tort Claims Act (ATCA) to attach, do not require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require state action for ATCA liability to attach'.

233 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?' http://writ.findlaw.com/sebok/20050110.html.

234 *Apartheid* class action (n 130 above).

235 *Doe I v Unocal Corp* (2003) 395 F 3d 978 (9th Cir (Cal)) (No 00-56603, 00-56628).

236 See press statement 'Historic advance for universal human rights: Unocal to compensate Burmese villagers' retrievable at http://www.earthrights.org/news/press_unocal_settle.shtml and *John Doe I v Unocal Corp* (2005) 403 F 3d 708 granting the parties' motion to dismiss the case.

237 *In re Holocaust Victim Assets Litig* (2000) 105 F Supp 2d 139 (E D N Y) (No 96 CIV 4849 ERKMDG 99 CIV 5161 97 CIV 461).

238 See Boyd 'Collective rights adjudication in US courts: enforcing human rights at the corporate level' (1999) *Brigham Young University Law Review* 1155 *et seq*.

239 *Apartheid* class action (n 130 above).

The *Swiss Nazi Bank* case came to an end in August 2000 through a historic $1.25 billion settlement[240] on condition that all future litigation be terminated.

The second Holocaust case ('Holocaust II'), the *Nazi slave labour* case,[241] involved a class action against some DAX-listed[242] German corporations for the alleged use of forced 'slave' labour during World War II by the defendant corporations and/or their legal predecessors. This highly politicised case ended with a settlement in 1999 when the defendant corporations and the German government agreed to establish a jointly funded $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 German parliamentary law[243] and has been compensating the survivors ever since. In exchange, the plaintiffs agreed to provide the German industry with legal peace. Contrary to the initial suspicion that US courts would not honour this part of the settlement and proceed with adjudicating individual suits, recent developments indicate that US courts are respecting this undertaking.[244]

Positively assessed, these cases acknowledge victims' suffering and prove that accomplice firms can be called to book even years after the event. One could also say that many victims gained a personal victory in coping with their personal or their relatives' suffering through their active role as plaintiffs in two of the largest class actions in the history of the US. However, besides the intense media coverage and public attention these cases generated, inter-party settlements frustrated a final ruling that could have served as legal precedent for similar cases. This does not impress from a human rights law perspective, even less so when considering that these settlements were at least partly coerced through immense diplomatic pressure and by threat of indirect sanctions.[245] The fact that two such

240 The official negotiations came to an end in August 1998. This settlement was confirmed by the US Court for the Eastern District of New York in August 2000 and the settlement made final through confirmation by the Second Circuit in July 2001, see *In re Holocaust Victim Assets Litig* (2001) 14 Fed Appx 132 (2d Ct), unpublished.

241 *In re Nazi Era Cases Against German Defendants Litig* (2000) 198 FRD 429 (DNJ) MDL No 1337 DNJ Lead Civ No 98-4104 (WGB).

242 DAX is the acronym for *Deutsche Aktien Index* where the major German (public) corporations are listed.

243 See the German Act *Gesetz zur Errichtung einer Stiftung, Erinnerung, Verantwortung und Zukunft* of 2 August 2000 (Bundesgesetzblatt: BGBl 2000 I 1263).

244 n 240 above, where the District Court for the District of New Jersey dismissed the last of more than 50 consolidated cases brought by individuals after the 2000 settlement on the grounds that the 'plaintiff's claims present non-justiciable political questions and that the court should decline to exercise jurisdiction in the interest of international comity'.

245 For a critical description and evaluation of the proceedings and the accompanying politics of 'Holocaust' litigation, see Finkelstein *Die Holocaust industrie* (2000).

important mass litigation cases were settled out of court[246] has as consequence that ATCA was not effectively tested in court. As a result, important legal questions for future human rights mass litigation cases, such as subject matter jurisdiction over corporate conduct[247] and the political question issue, will remain controversial. It also means that the scope remains for over-optimistic expectations about the prospects of future settlements under ATCA-inspired litigation.

2.4.4.3 The apartheid lawsuit: In *Re South African Apartheid* Litigation [248]

The US District Court for the Southern District of New York dismissed the class action of three groups of plaintiffs[249] against over 30 multinational corporations that were engaged in business with apartheid South Africa. The judgment is presently on appeal.

The defendants constitute the *crème de la crème*[250] of the international corporate world. They were listed in the lawsuit as suppliers of resources such as technology, money and oil to the South

246 Sebok even doubts whether US 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 and II) http://writ.news.findlaw.com/sebok/20000828.html and http://writ.news.findlaw.com/sebok/200008289.html However, 1990's '2 plus 4' Peace Treaty on German reunification and sovereignty did not address the topic of additional reparation claims, and thus encouraged subsequent actions of slave labourers.

247 See the findings on corporate human rights liability, above para 2.4.4.

248 *Apartheid* class action (n 130 above).

249 Three groups of plaintiffs, the Ntsebeza, the Digwamaje and the Khulumani plaintiffs, filed actions in a district court on behalf of all persons living in South Africa between 1948 and the present and who suffered damages as a result of apartheid.

250 Rheinmetall Group, Barclays National Bank Ltd., Citigroup, Commerzbank, Deutsche Bank, UBS AG, JP Morgan Chase, Ford Motor Co, Daimler Chrysler AG, Fujitsu Ltd, IBM and dozens more.

African government or to entities controlled by the South African government under apartheid. The case is based on allegations that the defendants violated international law and were therefore subject to legal suits before US federal courts under ATCA for participating in or aiding or abetting forced labour, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes and racial discrimination.[251] These actions, the arguments suggest, breached international law outlawing apartheid at the time.[252]

The plaintiffs sought *inter alia* equitable relief[253] including production of defendants' documents, creation of an international historical commission, affirmative action and educational programmes in addition to injunctive relief which would prevent the defendants from destroying documents related to their investment in apartheid South Africa. They further sought monetary relief in addition to compensatory and punitive damages in excess of $400 billion and disgorgement of all monies that could be linked to aiding, conspiring with, or benefiting from apartheid South Africa.

The Court found that the plaintiffs failed to show that the defendants engaged in state action by acting under colour of law in perpetrating the alleged acts. Citing *Bigio v Coca-Cola Co*,[254] the Court concluded that an indirect economic benefit from unlawful state action was insufficient to establish state action.[255] The Court then turned to the question of whether aiding and abetting international law violations or doing business in apartheid South Africa, qualified as violations of the law of nations. In this instance the Court was apparently guided by the ruling in *Sosa*,[256] namely, that to fit the ATCA paradigm, violations of international law must be understood as those 'accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms' such as piracy and crimes against ambassadors. It was

251 The plaintiffs argued that doing business with apartheid South Africa and aiding or abetting international law violations committed by apartheid security forces constituted violations of international law in themselves.

252 The plaintiffs argued that the acts would constitute, *inter alia*, violations of international law which were established as universal norms by the Nuremberg Trials of 1946, art 7(1) of the Statute of the International Criminal Tribunal for Rwanda, art 6(1) of the Statute of the International Criminal Tribunal for the former Yugoslavia, art 1 of the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, 1015 UNTS 243, 245 and the UN General Assembly, which called apartheid a 'crime against humanity' in GA Res 3068 UN GAOR 28th Session Supp No 21 at 75 UN Doc A/9030 (1974). The UN Security Council further declared that 'all States shall cease forthwith any provision to South Africa of arms and related material of all types.' UN SC Resolution 418 UN SCOR 32d Session UN Doc S/INF/33 (1977), *Apartheid* class action (n 130 above) 551.

253 This common-law remedy leaves granting actual relief solely to the court's discretion.

254 (2001) 239 F 3d 440 (2d Cir).

255 *Apartheid* class action (n 130 above) 539-540.

256 n 137 above.

noted in this context that the findings of the international criminal tribunals, including those of Nuremberg, did not establish clearly defined norms for ATCA purposes,[257] nor binding sources of international law.[258] The Court further observed that the Apartheid Convention, which dealt with the criminal repercussions for aiding apartheid was not ratified by the major world powers, including the United States, Great Britain, France, Canada and Japan. It concluded that '[w]ithout the backing of so many major world powers, the Apartheid Convention is not binding international law'.[259]

Consequently, in applying the *Sosa* test, the Court ruled that the plaintiffs could not rely on the UN Charter and General Assembly resolutions as these sources could not give rise to an action under ATCA since they did not resemble binding customary international law actionable under ATCA.[260] The court therefore concluded that doing business in apartheid South Africa was not a violation of international law that would support jurisdiction in federal courts under ATCA.[261]

2.4.5 Mass torts and class actions

Closely related to the legal trend of suing corporations as a substitute for states' accountability is the evolution in the 1990s of mass tort procedures, better known as class actions, within the ambit of ATCA and the TVPA. Prominent examples are the two above-mentioned Holocaust lawsuits against Swiss banks[262] and German corporations[263] and the most recent apartheid[264] class action.[265] Common to these lawsuits is their nature: A limited 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 past gross human rights violations.

257 *Apartheid* class action (n 130 above) 550.
258 As above 553.
259 As above.
260 As above.
261 As above 554.
262 *In re Holocaust Victim Assets Litig* (2000) 105 F Supp 2d (E D N Y) 139.
263 *In re Nazi Era Cases Against German Defendants Litigation* (2000) 198 F R D (D N J) 429.
264 *In re South African Apartheid Litigation* (n 130 above) See 2.4.4.3 above. The decision of the SA government to join the defendants by filing an *amicus curiae*, declaring that the case would interfere with the ongoing truth and reconciliation process and further damage present and future business investment in South Africa, seen against the background that the amount sought totals $\$400 \times 10^9$, had already sparked a controversy in South Africa, see 'It's state v. apartheid victims' *Mail & Guardian* 21 to 27 October 2005 5.
265 Prior to these cases *Hilao v Estate of Marcos* (1996) 103 F 3d 767 (9th Cir), *Kadic v Karadzic* (1995) 70 F 3d 232 (2d Cir) and *Doe I v Unocal Corp* (1997) 963 F Supp 880 (C D Cal) were cases brought as class actions before US federal courts. See Boyd (n 238 above) 1153-1157, 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 a million victims and relatives of victims.

Mass tort action in ATCA litigation follows the strict requirements of rule 23 of the Federal rules of civil procedure, as substantially revised and 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 is guaranteed. After these threshold requirements have been met the court has to determine whether the class action resembles a 'mandatory' class action which requires no further notice under paragraphs (1) and (2) of rule 23(b),[266] or whether the class action resembles the more common notice and opt out of the class action as defined under rule 23(b)(3).

In 2005 the availability and scope of class actions before state courts for corporate misconduct involving multimillion-dollar claims of plaintiffs representing thousands of affected individuals was limited by the Class-Action Fairness Act.[267] This limitation had become necessary because an increasing number of class councils filed actions in states which were known for granting often exaggerated amounts of damages. At the signing ceremony on 18 February 2005, President George W. Bush had the following to say about the Act: [268]

> The bill I'm about to sign is a model of effective, bipartisan legislation. By working together over several years, we have agreed on a practical way to begin restoring common sense and balance to America's legal system. The Class-Action Fairness Act of 2005 marks a critical step toward ending the lawsuit culture in our country. The bill will ease the needless burden of litigation on every American worker, business, and family. By beginning the important work of legal reform, we are meeting our duty to solve problems now, and not to pass them on to future generations. [...] Class-actions can serve a valuable purpose in our legal system. They allow numerous victims of the same wrongdoing to merge their claims into a single lawsuit. When used properly, class-actions make the legal system more efficient and help guarantee that injured people receive proper compensation. [...] So the bill I sign today maintain every victims right to seek justice [...] Class-actions can also be manipulated for personal gain. Lawyers who represent plaintiffs from

266 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 238 above) 1183-1189.

267 See 109th Congress 1st Session S 5 retrievable at http://thomas.loc.gov.

268 See White House press release of 18 February 2005 'President signs Class-Action Fairness Act of 2005' http://www.whitehouse.gov/news/releases/2005/02/print/20050218-11.html. In 2005 Madison county was listed with five others as a judicial hell-hole, a term reserved for courts that have become known for excessive awards that bankrupt businesses and cost jobs. See http://www.atra.org/reports/hellholes/report.pdf.

> multiple states can shop around for the state court where they expect to win the most money. [...] The number of class actions filed in Madison County has gone from two in 1998 to 82 in 2004 — even though the vast majority of the defendants named in those suits are not from Madison County. [...] Before today, trial lawyers were able to drag defendants from all over the country into sympathetic local courts, even if those businesses have done nothing wrong. Many businesses decided it was cheaper to settle the lawsuits, rather than risk a massive jury award.

Section 2 of the Act draws the Act's rationale from a number of consequences caused by the abuse of the class action device. Mention is made, for instance, of the adverse effect on interstate commerce; the undermining of public respect for the judicial system; the awarding of large legal fees while claimants are left with awards of little or no value; unjustified awards made to certain plaintiffs at others' expense; the publication of confusing notices preventing claimants from effectively exercising their rights and decisions by local and state courts to keep cases of national importance out of the federal courts.

In the latter instance, section 4 of the Act now grants federal district courts original jurisdiction in any civil action in which the amount in controversy exceeds $5 million, excluding interest and costs, and which is a class action between citizens of different federal states, or between a foreign state — or a citizen or subject of a foreign state — and a US citizen. This is based on the concept of federal diversity jurisdiction which is exercised by a federal court in cases involving parties from different states and was formerly regulated by paragraph 1332 of the US Code.[269] Under this provision an action was subject to federal jurisdiction only if the parties were completely diverse in the sense that no plaintiff was a citizen of the same state where any of the defendants was deemed to be a citizen. Secondly, each plaintiff had to assert a claim that was in excess of $75 000. However, the way in which this provision was interpreted and applied over the years allowed it to be circumvented and federal jurisdiction avoided in the case of class actions. For instance, a plaintiff could easily avoid federal jurisdiction by simply including in the class action a non-diverse plaintiff or defendant. A second measure of avoidance was that courts held that the jurisdictional amount requirement was satisfied only when the claim of each and every member of the class was separate and distinct and exceeded $75 000.[270] Section 4 wants to remedy this situation.

[269] See Title 28 USC § 1332.

[270] See further Beisner & Miller 'Civil justice report: class action magnet courts – the allure intensifies' (2002) 7 accessible at http://www.manhattan-institute.org/pdf/cjr_05.pdf. See also Petersen 'Die Änderung im Recht der US-Sammelklagen durch den Class Action Fairness Act of 2005' in (2005) *Recht der Internationalen Wirtschaft* 812-814.

Although the 2005 Act also provides for judicial scrutiny of legal fees in class actions and for the protection of claimant rights, it is debatable whether its scope of influence will also cover mass tort claims for gross human rights violations of the kind dealt with by ATCA and other legislative measures. In many of the matters under discussion, the cause of action arose outside the United States and the claimants were non-US citizens. By contrast, the 2005 Act seems to have as subject-matter actionable claims and litigants of national origin.

2.5 Conclusion

Human rights litigation in the US has produced encouraging examples of successful adjudication[271] and has contributed to 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 (albeit challenged) view that claims based on violations of international humanitarian and human rights law can only be made at inter-state level[272] and that these claims do not provide the individual victim with enforceable financial remedies.[273] The successes are dampened, however, by the fact that most of these judgments were not enforced, with the exception of some settlements in corporate actions such as the Holocaust case and, more recently, the *Unocal* case.[274] The reality of poor enforcement has to be addressed soon for US human rights litigation to powerfully deter human rights violations.

Time will eventually tell whether 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 and silence a crucial legal tool for achieving 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 humanitarian law, and the harnessing of services of allies with often

271 Stephens & Ratner (n 137 above) 239-245.

272 See BGH – III ZR 245/98 (OLG Köln) concerning claims 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.

273 See above under ch 1.3.1 for an account of the individual human rights claimant and his or her position in terms of the international legal situation.

274 Report of the International Law Association Human Rights Committee (n 120 above) 130 fn 5.

doubtful human rights records, the prospect of US human rights adjudication of a limited scope seems realistic.[275]

3 Civil liability for human rights atrocities in domestic legal systems, apart from the US

3.1 South Africa and the Truth and Reconciliation Commission[276]

The newly 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. Subsequently 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.[277] Reparations for gross human rights violations committed in South Africa during the apartheid-era conflict were originally intended to result from an intense reconciliation and nation-healing process, which combined the elements of confession by perpetrators with absolution by victims and their relatives.

The TRC followed the legal view that apartheid was a crime against humanity[278] and recognised 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

275 Sebok does not exclude future claims against the US government pertaining to torture incidents in Abu Ghraib. See 'Could suits against the US government by Iraqis subject to abuse in Abu Ghraib prison succeed?' http://writ.findlaw.com/sebok/20050221.html. The US academic and columnist Fletcher found 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 on Iraq without Security Council approval, can injured Iraqis sue the president in US courts?' http://writ.corporate.findlaw.com/commentary/20020925_fletcher.html.

276 I want to thank my LL.D supervisor, Professor Strydom of the University of Johannesburg, for his insightful help on the TRC and its role in post-apartheid South Africa. His help has enabled me to reflect on the South African situation.

277 See post-amble of the interim Constitution of the Republic of South Africa Act and the Promotion of National Unity and Reconciliation Act 34 of 1993.

278 Interesting in this context is the finding of US Sprizzo J in *re South African Apartheid Litigation* (n 130 above) that the Apartheid Convention of 1973 (1015 *UNTS* 243, 245) was not binding international law at that time due to the fact that the major states of the US, UK, Germany, France, Canada and Japan had not ratified this Convention at that time. This finding led to the dismissal of the *Apartheid* lawsuit on the ground of a lack of ATCA-based jurisdiction of US federal courts.

also responsible for gross human rights violations for which it was morally and politically accountable.[279]

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. The TRC recommended in 1998 the setting aside of R2.8 billion for the payment of final reparations to the acknowledged victims of apartheid.[280] This contribution to justice and humanity by financially redressing suffering has been severely hampered by the South African government's inability, and even unwillingness, to make the promised reparation payments. Initial disbursements of R48.37 million has been made by the Nelson Mandela's President's Fund and paid out in November 2001 in grants of R3 000 to the 17 100 applicants. Further payments and a finalisation of reparations still await the government's implementation. This unfortunate situation has already raised international concern, as the following statement of Human Rights Watch and Amnesty International illustrates: [281]

> 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 since 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 Litigation,*[282] thus creating outrage and disillusionment among the domestic human rights community and apartheid victims.

279 (2003) *Truth and Reconciliation Commission of South Africa Report* vol 6 642-643.
280 Using the benchmark of R21 700 – the median annual household income in South Africa at the time.
281 See joint statement by Amnesty International and Human Rights Watch (February 2003) 'Truth and justice: unfinished business in South Africa' 7 www.hrw.org/backgrounder/africa/truthandjustice.pdf.
282 n 130 above; see for the present stance of the SA government (n 264 above).

3.2 United Kingdom

The jurisprudence of the UK provides international law with important precedents in respect of the principle of state immunity and its exceptions. In the *Pinochet No 3* decision,[283] the House of Lords denied Pinochet, as former head of state, immunity *rationae materiae* on the grounds that torture had become a *jus cogens* crime of international law.[284]

Interestingly, other English courts thwarted civil actions against states or state officials by using the State Immunity Act of 1978 in the past.[285] In *Al-Adsani v Government of Kuwait*,[286] the court initially allowed leave to serve summons outside its jurisdiction to the government of Kuwait and three individual defendants for claims of psychological damage to a British-Kuwaiti plaintiff who allegedly suffered torture in a Kuwaiti security prison. On appeal, the Court of Appeal set aside the decision to serve and ruled that Kuwait was entitled to state immunity under section 1(1) of the State Immunity Act of 1978. This decision was taken on appeal to the ECtHR on the grounds that the Court of Appeal's decision infringed on the right to a fair trial as stipulated in article 6 of the European Convention. The ECtHR found with a majority of nine to eight that there had not been such an infringement by the Court granting Kuwait state immunity[287] because it had 'pursued a legitimate aim and was proportionate'.[288]

Considering the implications of the *Al-Adsani* case for human rights litigation, it appeared as if the door to English courts had been shut. However, in 2004, the Court of Appeal issued a decision, *Jones v Saudi Arabia*,[289] which partially overturned the *Al-Adsani* decision in respect of individual defendants sued for acts of state torture.[290] The plaintiff appealed an *a-priori* court's decision to strike out his claims[291] 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 section 1 of the State Immunity Act 1978. The Court of Appeals upheld the appeal against Aziz as an

283 *R v Bow Street Magistrate, ex parte Pinochet (No 3)* 2000 1 AC 147.
284 As above 205, 248.
285 See Report of the International Law Association Human Rights Committee (n 120 above) 150-158.
286 (1995) 100 International Law Reports 465.
287 *Al-Adsani v UK* in (2002) 34 European Human Rights Reports 11 paras 46-49.
288 As above par 50.
289 *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.
290 In *Jones v Saudi Arabia* the plaintiff, Jones, was allegedly tortured and falsely imprisoned in 2001 by the Saudi Ministry of the Interior and its agents.
291 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.

individual defendant because he was not protected by a blanket application of sovereign immunity and remitted the application for further consideration.[292] The Court thereby focused on recent jurisprudence on the matter of criminal and civil immunity for individual perpetrators of international crimes and found no grounds for granting immunity to the individual defendant.[293]

With this ruling, access to English courts for actions of human rights litigation against individual defendants is 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.[294] It is, however, too early and probably even unrealistic to speak of the commencement of US-style human rights litigation before English courts.[295] Other pre-requisites 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 responsibility for the legacy of mass human rights violations committed by its legal predecessor, the Third Reich. Since 1949 it has paid nearly €50 billion as direct financial compensation to Holocaust and related Nazi crimes' victims and their relatives and as direct financial aid to the state of Israel.[296] This compensation is made in terms of special domestic laws, such as the *Bundesentschädigungsgesetz* (BEG)[297] of 1953, and under bi-national treaties such as the 1952 Luxembourg Agreement between Germany, Israel and the Jewish Claims Conference, the so-called Israel Treaty.[298] The original aim of payments was to compensate the 'main' victims of Nazi prosecution for their suffering in concentration and extermination camps to which they were relegated because of their Jewish ethnicity. Initially, financial compensation was not

292 *Jones v Saudi Arabia* (n 289 above), paras 98-99.
293 As above, paras 54-68.
294 See Voyiakis 'Access to court v state immunity' in (2003) 52 *International and Comparative Law Quarterly* 297-332 for an overview of the recent practice in UK courts and the subsequent confirmation of this jurisprudence by the ECtHR.
295 n 292 above, 97, where Mance LJ predicts, that English courts won't become the forum of prime choice for future torture civil litigation because of specific requirements to initiate proceedings under English common law.
296 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.
297 Federal Law for the Compensation of the Victims of National Socialist Persecution of 1956.
298 Israel Vertrag.

intended for other victims of the Nazi regime such as 'slave workers'.[299] The BEG explicitly bars this group from receiving compensation. In the *Londoner Schuldenabkommen*[300] of 1953 the question concerning compensation of slave workers was postponed until the signing of a peace treaty.[301] Germany's responsibility for war crimes and other breaches of humanitarian law has been acknowledged by the German government in various multinational peace treaties. The 1999 Holocaust Slave Labour settlement[302] between the German federal government, the US government and victims' organisations led to the establishment of a DM 10 billion compensation trust — the most recent testament of German accountability for its Nazi past. This state responsibility does not, however, invoke an individual's right to redress against the German state. Only the victim's home state is entitled to redress.

Three recent court decisions support this claim. The 1996 *Arbeitsentgelt für NS-Zwangsarbeiter* decision[303] of the German *Bundesverfassungsgericht*[304] on the individual enforceability of claims[305] for the remuneration for Nazi slave labourers outlines the present view in respect of individual claims and state responsibility. The Court found that, firstly, an individual is not an individual claim holder vis-à-vis 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 their own states. This opinion of the Court finds support in the above-mentioned US *Princz*,[306] decision of 1994, which found that Germany's state sovereignty barred any direct legal action against it. The issue of com-

299 This term refers to the millions of people who were forced to work in the German armament industry during the war. In 2001 it was estimated that there were still around 1.5 million of these former slave workers alive. Stiftung (Trust) 'Erinnerung, Verantwortung und Zukunft' cit in *Aktuell 2003* 203.

300 The London Debt Agreement, in which questions concerning the German war debt were settled. This term must not be confused with the 1943 London Agreement that established the UN War Crimes Commission. See Jørgenson *The responsibility of states for international crimes* (2003) 17.

301 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 '2 plus 4' treaty which paved the way for the German reunification and resembles a *de facto* peace treaty.

302 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 para 2.4.5 above and Sebok 'Unsettling the Holocaust' (n 246 above).

303 BVerfG Beschl v 13 5 1996-2 BvL 33/93 (1996) *Neue Juristische Woche* 2717-2720.

304 The German Constitutional Court (BVerfG).

305 The claim was based on the fact that in WW II German industry had used Jewish and nationals of other countries as slave workers in factories.

306 *Princz v Federal Republic of Germany* (n 151 above).

pensating the victims of Nazi slave labour found a different end, when in 1999 in the Holocaust slave labour[307] settlement between the German federal government,[308] the US administration and victims' organisations[309] led to the establishment of a compensation trust. The agreed amount was DM 10 billion and was to be equally funded by the German federal government and a German corporate consortium.

The 2003 *Distomo* decision[310] of the German *Bundesgerichtshof*[311] rejected financial claims against the Federal Republic of Germany brought by relatives of Greek victims of 1944 war crimes. The Court found that the claims lacked any legal basis in international and domestic German law, and further, that prior Greek judgments,[312] 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 rejected on the grounds that breaches of humanitarian law did not fall under provisions on state liability and, as such, could only be subject to individual accountability and responsibility under international law provisions, which would rule out individual claims against the responsible state. The view according to which direct individual claims for breaches of humanitarian law against states are non-justiciable under international law,[313] served as basis for the 2003 *Varvarin* ruling[314] of

307 This settlement, which does not resemble a legal settlement in *strictu sensu*, was meant to end all pending lawsuits brought against German corporations before US federal courts. For a summary of the 'Holocaust' case with an evaluation of its legal and political background, see Sebok 'Un-settling the Holocaust' (n 246 above).

308 Acting on behalf of German and — to a smaller extent — US corporations.

309 eg the Jewish Claims Conference.

310 BGH Urt v 26.6.2003-III ZR 245/98 (OLG Köln) in (2003) *Neue Juristische Woche* 3488-3493.

311 The German Supreme Court for Criminal and Civil Matters, 'BGH'.

312 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* (ie *Areios Pagos*, the Greek Supreme Court) on 4 May 2000 case no 11/2000 reprinted in (2001) 95 *American Journal of International Law* 198. Compare in this context the Italian Court of Cassation's ruling of 11 March 2004 in the case *Ferrini v Germany* (Cass Sez Un 5044/04) discussed in (2005) 99 *American Journal of International Law* 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 WW II as *jus cogens* violations.

313 The Court explicitly recognises the recent developments in international law where individual claims are actionable under various international human rights instruments, eg art 2 (5) of the European Convention.

314 LG Bonn Urt v 10 12 2003 — 1 O 361/02 (nicht rechtskräftig) in (2004) *Neue Juristische Woche* 525-526. The case concerned a civil action brought by a group of 35 Serbian citizens in connection with the NATO war against the former Yugoslavia in 1999. On 30 May 1999, ten civilians were killed in an aerial bombardment of the bridge in the town of Vavarin, Yugoslavia, an incident which was labeled later as 'collateral damages'.

the *Landgericht Bonn*[315] concerning claims by victims of the 1999 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 the extent of differences in domestic jurisprudence: On the one hand the view exists that *jus cogens* violations of international law can overcome jurisdictional immunities and, on the other, the view prevails that states are still immune from civil suits by individual plaintiffs and victims.

[315] Regional High Court of Bonn (LG Bonn).

Chapter 3

Human rights litigation as a future deterrent for the commission of future human rights atrocities - the balance sheet

The preceding chapter gave a short overview of developments in human rights civil litigation as an additional means of human rights protection. It can be argued that only the ATCA adjudication in the US could constitute a possible alternative means of human rights protection. In the global arena international human rights and humanitarian law provide only inadequately for civil liability. None of the existing provisions allows for an actionable claim by the individual rights bearer adjudicated by an independent civil claims forum. Consequently, this chapter summarises some arguments in favour of developing civil responsibility for human rights atrocities and its subsequent adjudication before civil courts.

1 *Jus cogens* violations as part of 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 recognise such violations as actionable torts under their respective domestic laws applying the principles of the law of conflict within the ambit of private international law.[316] With the exception of the US' ATCA adjudication, this possibility is not recognised in any domestic jurisdiction explicitly yet.[317] Assuming a future general understanding of the justiciability of such civil actions in accordance with tort principles under private international law, the

316 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.

317 See Report of the International Law Association Human Rights Committee (n 120 above) 'Section V – The Applicable Law of Tort' 158 *et seq* with a theoretical evaluation of possible tortious human rights actions.

following section will outline the advantages of such a supplementary legal instrument.

2 The advantage of civil remedies in protecting 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 […] [r]eparation should respond to the needs and the wishes of the victim'.[318] Financial redress acknowledges the victim's suffering and may facilitate rehabilitation and present the victim with closure to a traumatic incident.[319] Secondly, civil remedies, especially of a high monetary value, could deter possible offenders because of personal financial implications. Granting punitive damages[320] in US ATCA actions punishes and deters at the same time. Because the verdict directly affects the private assets of offenders, civil liability will hurt most contemporary human rights offenders, whose private fortunes are spread across the world. As a consequence, civil liability could possibly become a deterrent more powerful than criminal prosecution would ever be.

3 The benefits of human rights litigation

Criminal proceedings under domestic and international jurisdictions always require the will to actually prosecute. It is seldom up to the victim alone to instigate such proceedings[321] and to initiate events that will lead to a court hearing. Political reasons, such as diplomatic restraints, amnesty laws and plain unwillingness and inability of respective judicial forums to prosecute, limit victims in their pursuit of justice. In civil human rights litigation the victim has a more active role in establishing accountability.[322] The victim does not have to wait for justice to take its slow course through lengthy criminal procedures before the ICC or a similar forum. The position of the victim seeking justice is improved by active participation. A further consequence of such a private action would be that the existence of

318 Fernandez 'Reparations policy in South Africa for the victims of apartheid' (1999) 3 *Law, Democracy and Development* 210.
319 *Jones v Saudi Arabia* (n 289 above) par 80.
320 Punitive damages in US civil law are damages which are granted in addition to the individual damages for the victim's loss or harm. This class of damages sets out to punish the defendant for his or her actions.
321 See Introduction above on such obstacles for criminal prosecution.
322 *Jones v Saudi Arabia* (n 289 above) par 80.

gross human rights violations and the involvement of individuals would be brought to a wider international audience leading to more accurate accounts of atrocities. This is of great importance in cases involving MNCs, since they depend on a good corporate image and therefore fear bad publicity even more than individuals do.[323] Some commentators hold that civil suits may be more effective than criminal prosecution to establish the full facts of violations.[324] Standards of proof, higher than those of civil law actions, and difficulties in gathering evidence apply to criminal proceedings to the detriment of ascertaining all facts.[325] Another advantage of civil proceedings is that the presence of the defendant in court is unnecessary[326] and obtaining a default judgment is possible.[327]

It is worth remembering the advantage of a civil liability action to transitional justice: The financial compensation of the victim recognises suffering and by doing so restores honour and dignity to the victim. Such an acknowledgment enables a government to grant amnesty for human rights violations committed during a previous regime and could therefore reconcile a torn community.[328] Civil liability can be a tool of reconciliation when public policy and the national interest demand amnesty[329] and victims' rights are not denied.[330]

Civil liability can overcome some of the main obstacles to effective criminal prosecution. In the case of immunity for acts committed by individuals in official capacity,[331] this protection could be pierced. The practice of civil courts on the domestic level is, however, not coherent and far from resembling a *consuetudo*.[332] Considering that the recent 'Draft United Nations Convention on Jurisdictional Immunities of States and Their Property'[333] practically exempts the property of a state from the jurisdiction of other states'

323 See 2.4.4. on corporate lawsuits.
324 Jose E Alvarez 'Lessons of the Tadic judgment' (1998) 96 *Michigan Law Review* 203.
325 *Jones v Saudi Arabia* (n 289 above) par 80.
326 As above par 81.
327 See Stephens & Ratner (n 137 above) 174-178 about the use of default judgments in US human rights litigation under ATCA.
328 Such as the Republic of Congo, Burundi, Sierra Leone and Rwanda.
329 Such amnesty, however, can, in respect of the ICC Statute, only be granted in cases which do not resemble core crimes in the sense of art 5(1) lit a-d.
330 Another example of using the means of civil liability as a corrective for suffering can be found in the Islamic law of Shari'a where in the case of murder the head of the family clan has got the right to accept a sum of money for his dead kin and by doing so spare the offender from prosecution and eventual execution.
331 *Jones v Saudi Arabia* (n 289 above) par 98 where the Court rejected the Kingdom of Saudi Arabia's blanket claim to state immunity for individual defendants.
332 See Dugard 'Immunity, human rights and international crimes' (2005) 3 *Tydskrif vir Suid-Afrikaanse Reg* 482-489 on the present restrictive court practice in civil proceedings.
333 UN Doc A/59/22.

courts,[334] civil remedies against individual perpetrators could be the only feasible way to claim financial damages for human rights atrocities.

Conclusion Part A

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

The impressive record of nearly 100 human rights litigation cases before US federal courts, to date, hardly finds reflection in other domestic law systems. So far there has not been one case outside the US with a legacy comparable to *Filartiga*. This lack of a uniform state practice prevents human rights litigation from becoming part of customary international law and thus impedes the further development of a universal civil jurisdiction of domestic courts.[335] Nonetheless, civil actions in US human rights litigation have contributed to the development of international law in domestic courts of other states. One example is English courts quoting ATCA adjudication as legal precedent.[336]

All other systems and means available under international and domestic law that are suitable to establish civil liability for human rights atrocities remain in an underdeveloped state, go unapplied or is not enforced. But even the advanced US system has 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 existing means of international criminal and human rights law.

[334] Art 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'.

[335] See Rau 'Domestic adjudication of international human rights abuses and the doctrine of forum non conveniens' in (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht ZaöRV* 177, 194.

[336] *Jones v Saudi Arabia* (n 289 above) paras 61-68.

Part B

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 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 a convicted perpetrator. In this regard the draft follows the precedents and examples of US human rights litigation under ATCA and subsequent human rights litigation legislation.

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 ICJ. Its jurisdiction,[338] organs[339] and procedure follow the working procedures of forums of criminal justice such as the ICC, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the SCSL. Breaches of customary international humanitarian and human rights law will constitute 'international crimes'[340] and tortious behaviour,[341] This could result in civil liability under the prescriptions of the law of tort or delict in international and domestic law.[342] Consequently, the link between individual civil liability for serious breaches of international human rights and humanitarian law and individual criminal responsibility[343] for the same type of offences implies a court structure and organisation that follow the example of criminal adjudication. It therefore seems logical to establish the

338 The Court has jurisdiction over international torts arising from serious breaches of international human rights and humanitarian law.

339 The office of the Trial Advocate, established by art 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. The Trial Advocate's investigative rights in regard to discovery and fact finding are similar to that of a criminal prosecutor.

340 n 31 above.

341 The draft articles of the ILC on responsibility of states for internationally wrongful acts do not recognise 'any distinction between State "crimes" and "delicts"'. See 'Commentaries to the draft articles on responsibility of states for internationally wrongful acts' (n 47 above).

342 See above part A for the present legal situation regarding civil liability for human rights violations. Note that the present situation generally still does not recognise the individual victim, with the exception of US human rights litigation, which views the individual victim as a claim holder against a perpetrating state.

343 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' (2002) 96 *American Journal of International Law* 833. Bassiouni describes reparations as 'a hybrid between criminal penalty and civil damages' and thereby explains the interrelation between criminal and delictual law. Cited in Laplante (n 116 above) 382.

Court as an annex to one of the existing criminal forums and supplement its 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 be the ICC as a permanent court. The Court, as a separate chamber to the ICC would then be responsible for adjudication on reparations for victims, which is pre-emptively addressed in article 75 of the ICC Statute.[344]

This draft opts for a fresh approach by establishing a new International Court of Human Rights Litigation that will form an independent and separate chamber annexed to the ICJ and not to the ICC.[345] This is mainly based on two considerations. Firstly, the ICJ[346] 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.[347] Secondly, choosing the ICJ as the main forum acknowledges 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.[348] In addition, the ICC 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.[349] The fact that the US has over the last 25 years become familiar with civil human rights adjudication under ATCA and that this form of recourse was recently reaffirmed in principle by the US Supreme Court,[350] suggest that the US will be more supportive of the International Court of Human Rights Litigation in the form proposed here.

344 Art 75 of the ICC Statute imposes on the ICC the obligation to develop principles for reparations for victims.

345 Given that the ICC seems like the more suitable forum given the above-stated considerations.

346 And to a lesser extent its predecessor, the Permanent Court of International Justice.

347 Even the fact that some UN members sometimes disregard the ICJ's authority 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 resemble 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 eg the *Nicaragua* case and the opposition of the US to ICJ proceedings (n 39-40 above).

348 See part A ch 1 above on state responsibility with legal authorities.

349 The US, after a short period of initial support for the ICC under the Clinton administration, has become the fiercest opponent of the Court. A prominent example of the US's policy of opposition and obstruction towards the ICC is the US American Service members' Protection Act (ASPA) of August 2002 *Pub L No* 107-206 §§ 2001-2015 116 Stat 820 (2002). ASPA authorises the president of the US to use all necessary and appropriate (even military) means to free US or allied personnel detained by or on behalf of the ICC.

350 *Sosa* (n 137 above) where the Supreme Court basically reconfirmed the role of future ATCA litigation.

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.[351]

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.

Article4
Organisation 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.

Commentary

One of the novelties of the draft Statute is 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 the subject matter bears close resemblance to criminal proceedings. This

[351] See arts 1 and 17 of the Rome Statute.

demands strong standards with regard to immunity and powers in respect of discovery of documents and fact-finding missions *in situ*.[352]

The Trial Advocate's further role is that of main counsel for the victim-plaintiff and is comparable to 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 the unfortunate trend of the 'billing lawyer' and shows how US legislation is trying to stifle this phenomenon.[353] 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,[354] which was made during a 2001 symposium on developments in international criminal law, reflects growing acceptance of the establishment of such institutionalised (semi-organs of the Court.[355]

The Court has a structure partly adversarial, partly inquisitorial. The draft combines the structural and procedural elements of common-law adversarial trial proceedings with the inquisitorial powers of judges in civil-law jurisdictions. The role of judges follows common-law principle, limiting them to supervise fairness of the trial and procedure as opposed to more active participation in the trial through their own, independent inquisitorial acts, as is the case in (continental) civil-law jurisdictions.

In this regard the role of the Trial Advocate differs. He or she plays an active role in the trial proceedings through investigations and fact-finding missions and through the right to cross-examine witnesses. The Trial Advocate's active role in the proceedings coupled with quasi-inquisitorial powers strengthen the position of the victim-plaintiff in otherwise adversarial court proceedings. The concept of the Trial Advocate will render additional victim empowerment rights obsolete. A practical example of such an empowerment right would be the inclusion of rules which explicitly shift the *onus* of proof to the

352 In the US ATCA case of *Paul v Avril* (1994) 901 F Supp 330 (S D Fla), the plaintiff's lawyer was murdered in Haiti while trying to gather evidence. See Stephens & Ratner (n 137 above) 179.

353 The newly enacted US Class Action Fairness Act of 2005 refers in sec 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 has even been accused of breaching fiduciary duties regarding clients and faces disbarment, see 'Schwere Vorwürfe gegen Star-Awalt Fagan' *Der Spiegel Online* 18 September 2005 at http://www.spiegel.de/panorama/0,1518,342396,00.html. See part A ch 2 for more details.

354 ICTY Statute and ICTR Statute.

355 See the authoritative report on international criminal law 'Developments in the law – international criminal law' (2001) 114 *Harvard Law Review* 1947-2071, 2005.

corporate defendant, thus favouring the plaintiff. Such burden-shifting finds its precedent in law governing domestic and international product liability[356] 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 legal procedures. One example of such a 'mixed' organ can be found 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 or her counsel's investigative powers and other procedural rights would be similar to those of the prosecutor.[357] The investigative judge of the Iraqi Special Tribunal (IST) has a similar role.[358]

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 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

356 Compare § 1(4) of the German *Produkthaftungsgesetz* (Product Liability Statute) of 1989 in its amended form of 19 July 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 subsecs 2 and 3 of § 1.

357 §§ 395 *et seq* of the German Criminal Procedure Code (*Strafprozeßordnung*, StPO) gives the victim and his or her relatives the right to start a joint (criminal) action incidental to criminal proceedings. The victim or his or her 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.

358 See art 3 Zif a) lit 3 of the Statute of the Iraqi Special Tribunal of December 2003 of the Coalition Provisional Authority (CPA) (2004) 43 *International Legal Materials* 231.

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.[359] 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. The Trial Advocate's 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.

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.

[359] See eg arts 2-4 of the ICC Statute.

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 'guardian' of the victim-plaintiff's interests. Consequently, the Trial Advocate's 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 remains unaffected by such limitations.

The Trial Advocate's powers in respect of the investigation of alleged tortious behaviour and collecting necessary evidence are regulated in the third paragraph. The Trial Advocate's strong, independent position as the primary organ for the investigation of cases is safeguarded by the explicit obligation placed on member states to support him or her in carrying out tasks. The direct appointment of the Trial Advocate by the General Secretary, as stipulated in the fourth paragraph, makes the position comparable to that of an international prosecutor in criminal forums.[360] These provisions are necessary for the Trial Advocate to carry out 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 unearthing documents: Judicial requests are often not honoured and local authorities can even actively prevent successful evidence collection. The position of the Trial Advocate as a quasi-prosecutorial organ of the Court should protect his or her work from such difficulties and probable interference and enable him or her to work in a manner as effective as that of, for example, the chief prosecutor of the ICTY (and formerly the ICTR), Carla Del Ponte.[361]

[360] Compare art 18 of the IST Statute which established the Tribunal Investigative Judge. See 'Coalition Provisional Authority Order Number 48: Delegation of Authority Regarding an Iraqi Tribunal' CPA/ORD/9 Dec 2003/48 (2003). This order became the IST Statute, reprinted in (2004) 43 *International Legal Materials* 231. Iraq's transitional National Assembly and the Iraqi transitional government abolished the IST and its Statute in October 2005 by enacting Iraqi law no 10 of November 2005. This Act essentially re-established the IST as the Supreme Iraqi Criminal Tribunal (SICT) and serves as its Statute. Art 15 of the SCSL Statute of 16 January 2002. The Statute can be retrieved from http://www.sc-sl.org/scsl-statute.html.

[361] Carla Del Ponte's nickname (the new Gestapo) is a measure of her success in prosecuting war criminals of the civil wars in the former Yugoslavia. See 'Profile: Carla Del Ponte' BBC News 28 August 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 SCSL and provides in its fourth paragraph special protective measures for victims and witnesses as already established in other procedures before international criminal forums.[362] What is important, however, is that, unlike procedures in criminal matters, these protective measures only get underway when the trial procedures commence, thus taking into account the nature of the court as being primarily a civil and not a criminal forum. Without such differentiation, the procedures of the court would become semi-prosecutorial in nature and scope and eventually neglect the principle of party autonomy, which is a crucial feature of civil proceedings and which applies here, albeit in a reduced form.

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

[362] Art 16(4) of the SCSL Statute, art 43(6) of the ICC Statute, arts 21-22 of the ICTR Statute and ICTY Statute.

Trial Advocate and his or her staff, and the Registrar and his or 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.

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 (such as counsel and witnesses) required at the seat of the Court follow the example of provisions applicable to the ICJ and other international criminal tribunals.[363] 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.[364]

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 or she 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.

[363] See arts 30 and 29 of ICTY Statute and ICTR Statute, art 48 ICC Statute and art 19 ICJ Statute.
[364] Convention on the Privileges and Immunities of the United Nations 1 *UNTS* 15, 13 February 1946.

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 of the ICJ Statute and article 40 of the ICC Statute contain similar provisions in respect of the independence of judges. The draft follows the wording of these authoritative instruments because of their conclusiveness and effectiveness, as demonstrated in the ICJ's decade-long jurisprudence.

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'):[365]

(a) the crime of genocide;
(b) crimes against humanity;
(c) war crimes;
(d) the crime of torture;
(e) the crime of terrorism; and
(f) other systematic and gross violations of human rights.

[365] The terminus international human rights torts refers, as stated in art 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.

Commentary

The selection and wording of international torts that fall under the jurisdiction of the Court, follow the prescriptions of international criminal and human rights law and merge these fields of law. The actionable torts mentioned find their corresponding provisions in international criminal law where such offences would qualify as so-called core crimes[366] and as such would constitute 'the most serious crimes of concern to the international community as a whole',[367] or 'serious international crimes'.[368] This terminology follows closely the definition in human rights law of 'gross violations' and evokes the grave character of offences, which constitute in their intensity and impact a violation of the principles of international law.[369] The second paragraph of article 7 of the European Convention qualifies these as acts that grossly violate the laws of civilised nations and as behaviour that 'when it was committed, was criminal according to the general principles of law recognised by civilised nations'.[370] Common to this selection of serious breaches of international human rights and humanitarian law is their status as *jus cogens* norms of international public and criminal law.[371]

The tort of 'other systematic and gross violations of human rights' under item (f) refers to tortious behaviour that does not constitute 'international crimes' *strictu sensu* because of not meeting the threshold requirement of resembling a core crime or *jus cogens* of international law. Instead it suggests 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.[372] Such tortious behaviour can furthermore consist of any systematic, serious and ongoing violation of certain rights contained in the domestic constitution or laws of a state party to the Statute.

366 See Murphy (n 31 above) 6.

367 As codified in art 5(1) of the ICC Statute and arts 16-18 and 20 of the 1996 ILC's draft code. Note that the crime of aggression, as the offence most recently codified under international criminal law, still remains an undefined concept.

368 'Princeton principles on universal jurisdiction' (2001) retrievable at http://www1.umn.edu/humarts.instree/princeton.html (hereinafter, Princeton principles) refers to this category of crimes as 'serious crimes under international law' in principle 2(1) and adds to the four above-listed crimes piracy, slavery and torture. See further Ratner & Abrams (n 29 above) 162 with additional sources.

369 See Commentaries on the 'Draft articles on responsibility of states for internationally wrongful acts' (n 47 above) 285.

370 Art 7 II of the European Convention.

371 n 31 above.

372 As codified in international human rights instruments, eg ICCPR, International Covenant on Economic, Social and Cultural Rights (CESCR), and aligned with the Committee for the Elimination of Racial Discrimination (CERD). An example hereof is an individual act of racial discrimination by a state official, which itself constitutes an internationally wrongful act even if it lacks the practice requirement that would be clearly evident of such a wrongful behaviour.

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.

Commentary

Paragraph 1 establishes civil liability for the tortious behaviour of natural and legal persons. The draft Statute 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 criminal and tortious behaviour of this nature.[373]

The Statute's regulations on corporate existence, organisation and group structure of a legal person involved in proceedings before the Court follow the regulations on corporate entities found in international and domestic law. In this respect, domestic law refers to the laws of state parties in whose jurisdiction the legal persons fall. Unlike the victim's right to choose the applicable domestic law — as set out in the commentary to article 11 — the law on legal persons is not subject to the victim-plaintiff's discretion because of the wide and diverging range of law applicable to 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 clear. The *prima facie* rule of the second paragraph accounts for the plaintiff's interest in obtaining an economically strong defendant, for example a corporation whose assets 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. 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 when individuals use

[373] See part A on the aspects of corporate civil liability with the US context.

the corporate screen of a simple and informal corporate structure to reduce their financial risk and shift risk to a legal person.[374]

It is important to understand that the Court does not distinguish between state and non-state actions in establishing individual financial responsibility for committed acts. Legal difficulties with regard to the applicable norms and their breaches, as seen in US human rights litigation, therefore do not arise.[375]

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 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 or 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 or her superior or the entity's holding company of civil responsibility if the superior or holding company 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 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 or her of civil responsibility, but may be considered in mitigation of the later award of damages if the Court determines that justice so requires.

374 The close corporation in SA law, given effect to by the Close Corporation Act 69 of 1984, is an example where a legal framework provides only basic rules for corporate personality for small business enterprises without setting out financial means and the scope of business activities. This situation can be found to a lesser extent in the German *Gesellschaft mit beschränkter Haftung* (GmbH), which is regulated in the *GmbH Gesetz* and bears close resemblance to the close corporation entity.

375 See part A ch 2 on the complexity of adjudicating private, non-state actor breaches of the 'law of nations' with reference to *Kadic v Karadzic* (1995) 70 F 3d 232 (2d Cir) and *Doe v Unocal Corp* (2000) 110 F Supp 2d 1294 (C D Cal) (NO CV 96-6959 RSWL BQRX, CV 96-6112 RSWL BQRX) decisions of US federal courts.

Commentary

The Statute's provisions on individual civil responsibility follow the definition of criminal responsibility in the statutes of existing criminal courts.[376] Paragraph 1 confirms the autonomous nature of procedures before the Court. The fact that the Court has civil jurisdiction over tortious behaviour, which otherwise might qualify as criminal, might prove instrumental in its jurisdiction being recognised by states that are otherwise hostile towards criminal courts with universal jurisdiction because of their fear of infringement of sovereignty of the state or state organs.

Paragraphs 2 to 4 deals with possible defences in criminal procedures that are not presently recognised under international criminal law.[377] By including these, the draft Statute is more progressive in this regard than many domestic jurisdictions.[378] Paragraph 3 imposes the principle of strict liability on defendants who hold the power of command because of their position. This refers to command structures in both classical military and security structures and 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 to the defendant.[379]

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;

376 See eg arts 6 and 7 ICTY Statute, art 25 ICC Statute.
377 See eg art 7 ICC Statute.
378 Part A ch 2.
379 In legal terms there is a distinction between legal and evidential burden of proof. The former, also known as persuasive burden, places the burden to prove innocence in criminal matters *in toto* on the accused while in terms of the latter, the evidential burden is placed on the accused to introduce evidence in support of his or her innocence. This leads to the obligation of the prosecution to prove guilt beyond reasonable doubt. Considering this distinction and the civil trial nature of 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 concerning corporate (criminal) behaviour, Pinto & Evans *Corporate criminal liability* (2003) 168-170.

(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 highly regarded experts 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 recognised human rights, and be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Commentary

The Court has a wide discretion in its choice of applicable law under article 14. In general, the structure follows article 38 of the 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 judging an act as tortious and actionable before the Court is 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 has the privilege of choosing the law. The other sources of law follow the definition of applicable law as stipulated in article 38 of the ICJ Statute, providing the court and the victim, assisted by the Trial Advocate, with a further discretion concerning the law which is to be applied. Paragraph 2 authorises the court to refer to its own jurisprudence without establishing a *stare decisis* doctrine. Article 21(2) of the ICC Statute gives the same discretion to that court. The choice and applicability of law is limited through the 'anti-discriminatory' clause in paragraph 3 which ensures that the same standards are always applied in 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 ten years after the tortious act had been 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 or her home state from pursuing claims arising from the same tortious acts against him or her before domestic courts shall also exclude any period from being taken into consideration for purposes of this article.

Commentary

The draft Statute imposes a time limit of ten years after the tort was commissioned. Therein it follows the US TVPA,[380] which contains in its section 2(*c*) a ten-year statute of limitation. The German BGB, by contrast, provides in its section 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.[381]

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 ten-year statute of limitation 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 arises. However, considering that all relevant international torts 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,[382] is negligible. This line of argumentation finds its support in US federal jurisprudence, where the US Supreme Court ruled in *Landgraf v USI Film Products*,[383] 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'.[384] Considering that the nature of the civil liability for the commission of international torts established 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[385] — this Statute does not create a genuinely retroactive effect.[386]

380 28 U S C § 1331 Pub L No 102-256 106 Stat 73 (TVPA).
381 'Schadensersatzansprüche, die auf der Verletzung des Lebens, des Körpers, der Gesundheit oder der Freiheit beruhen ...'. Translation by the author.
382 Also note that the threshold in civil proceedings is lower than that of criminal proceedings.
383 (1994) 114 S Ct 1483.
384 As above 1505.
385 See part A on the different, already available forms of civil liability.
386 n 383 above, 1503.

The tolling grounds of paragraph 2 account for a variety of probable scenarios which could otherwise have jeopardised a future action. A major one is non-accessibility of jurisdiction of the court for the plaintiff as a ground for tolling. This could have the effect that the plaintiff does not enjoy the necessary personal or factual freedom to access the court for initiating a human rights action. The reasons for this could be the existence of legal or factual reasons that deny the plaintiff such rights. An example is the former Eastern European slave labourers of the German Nazi holocaust, who were barred from approaching US federal courts to initiate an ATCA action against German defendants because of the East-West conflict. Their 'permanent' inability to access US courts lasted until 1991 with the downfall of the Warsaw pact and amounted to a *de facto* absence of possible plaintiffs from jurisdiction. The second tolling ground — incapacity to start an action — refers to a variety of temporary obstacles to approach the Court's jurisdiction. Some examples are imprisonment, severe or chronic illness of the victim-plaintiff and other forms of incapacity which prohibit the plaintiff from proceeding with the action.

The immunity tolling acknowledges the new Court's complementary nature[387] in respect of domestic civil procedures before the judicial forums of other member states. It accounts for the possibility that initial proceedings before domestic courts could have failed because the defendant invoked immunity from civil proceedings.[388] The immunity tolling leaves the door open for eventual 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.

[387] As formulated in art 1 of the Statute.
[388] See in that respect the cases *Al-Adsani v United Kingdom*; *Fogarty v United Kingdom* and *McElhinney v Ireland*, before the ECtHR in which the principle of civil immunity of states was upheld; see part A ch 2.3.2.

Commentary

The definition of the term 'victim' follows 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 UNCHR in 2005.[389] Paragraph 1 defines the individual and collective victim status of an international human rights tort. The definition of collective victim has particular practical relevance in respect of class action proceedings as ATCA mass tort actions have demonstrated.[390]

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 victimised because of their voluntary attempt to intervene or prevent these crimes and accounts for forms of collateral damages. The notion that a person who suffers damages because of courageous engagement for the sake of third parties has 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 authorisation but with the intent to protect the third party from imminent dangers.[391]

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.

3. The Court should ensure that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid

389 UN Doc E/CN 4/2000/62. This draft was adopted by the UNCHR 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 A ch 1 for an overview of the drafting process.

390 See part A ch 2 for a brief summary on the mass tort cases under the ATCA.

391 See §§ 683, 680, 677 BGB, the so called *Geschäftsführung ohne Auftrag*.

his or her retraumatisation in the course of the legal procedures designed to provide justice and reparation.

Commentary

With regards to the definition of a victim and prescribing his or her treatment, the draft Statute follows recent developments in international law.[392] Both steps are important for the eventual legal standing as a plaintiff or the option of asserting a class action.

Article 18
Locus standi

1. The individual victim or his or her 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 their behalf by a 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; and
(d) adequacy of class representation,

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

[392] See eg art 22 of the ICTY Statute, paras 8 and 10 ECOSOC's 'Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law' E/CN 4/2000/62.

Commentary

The mandatory representation through counsel is stipulated in article 19 below and discussed in the commentary on that article. The standing of minors follows acknowledged principles of domestic procedural law.[393] Paragraph 2 sets the age for majority at 18 and thus follows the rules on majority in most civil-law jurisdictions.[394]

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.[395] In cases of a necessary joinder, the court has the right and duty to exclude non-complying parties permanently from further proceedings.[396] The term 'party' refers only to a person who has already been named as a party to the actual court proceedings unlike the terminology in civil jurisprudence which extends to a person beyond the scope of proceedings. The reason for this limitation lies in the nature of the proceedings before the International Court of Human Rights Litigation. It contains elements of civil and criminal procedure. By following the rules of civil procedure, every future party could block court proceedings passively by not joining[397] proceedings in progress. The limitation in the draft 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 because it opens the way to class action lawsuits resembling the US example of mass tort actions under rule 23(a) of the Federal rules of civil procedure (as amended in 1966).[398] This procedural device permits the asserting of

393 See s 1 of the SA Age of Majority Act 57 of 1972, read with the Guardianship Act 192 of 1993. South Africa followed this international trend and lowered the age of majority from 21 to 18 years of age. See section 17 of Children's Act 63 of 2005. On the topic of appointing a curator, see *Van der Merwe v Die Meester, Hooggeregshof & Andere* 1966 1 SA 301 (SWA) at 303E-H. See *Ex parte Goldman* 1960 1 SA 8 (D) on the possibility of a court granting a minor the right to instigate proceedings. Whilst 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.

394 See eg §§ 25 *et seq* 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 or she possesses unlimited legal capacity, which sets the age of majority at 18.

395 See rules 10 and 12 of s 27 of the Supreme Court Act 59 of 1959 and §§ 50 *et seq* ZPO of Germany which knows a similar distinction between necessary and convenient joinder.

396 See on the topic of necessary joinder the SA case *Hartland Implemente (Edms) Bpk v Enal Eiendomme BK & Andere* 2002 3 SA 653 (NC).

397 Compare the consequences of rule 12 of s 27 of the Supreme Court Act where a party does not join and the court does not adjudicate the matter further.

398 Fed R Civ P 23 (amended in 1966) of the US.

class actions under certain defined conditions.[399] The wording of paragraph 4 follows that 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) ought not to apply. The admissibility of such action remains within the sole discretion of the Court.

Under US law and jurisprudence, class actions have been successfully used in legal actions against the corporate world in health hazard tort actions and race discrimination labour actions.[400] 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 frequently used in human rights litigation before US federal courts with their impact best documented in enormous settlements of *Holocaust I* and *II*.[401] Reasons for the power of a mass action are its direct financial impact on the defendant with further implications pertaining to public observers. Especially in the case of corporate defendants mass tort actions involving numerous beneficiaries tend to create pervasive media attention, which most commonly add pressure. The dual effects of financial deterrence and negative public attention are effective in 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, preclude this important procedural principle from the draft Statute.[402]

Article 19
Representation of parties

1. The parties have the right to appear in person 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.

399 See ch 3 of part A for a detailed discussion. In brief, class actions are legal actions where a small group of plaintiffs can represent the interests of possibly thousands of other victims in court. The relevance for international tort litigation is obvious through its financial impact and additional consequences such as media and public attention.

400 An example of a health hazard case is asbestos litigation, which has so far seen over 500 000 individual claims and around 40 corporate defendants filing for insolvency because of the anticipated damages and other costs, see eg *In re Joint Eastern and Southern Districts Asbestos Litigation* (1995) 878 F Supp 473 (E D N Y) 78, (1996) F 3d 764. The ongoing lawsuit *In re South African Apartheid Litigation* (n 130 above) is an impressive example for such human rights litigation.

401 See part A ch 2 for a discussion of the *Holocaust I* and *II* and the *Apartheid* class actions.

402 See above for more information on recent legislative amendments limiting the availability of class actions in state court cases.

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 or her 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.

Commentary

The structure and wording of this article follow article 42 of the ICJ Statute and other principles of procedure for international and domestic criminal and administrative forums.[403] 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. The Trial Advocate's 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 or she is privileged in action and standing vis-à-vis 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 in itself shall take place as an oral proceeding.

[403] See eg 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 a private party through a counsel.

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.

5. These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

6. A certified copy of every document produced by one party shall be communicated to the other party.

7. 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.

8. The trial concludes with the closing of the hearing by the President.

Commentary

The trial procedure follows the principles of procedure used in common-law and civil-law jurisdictions[404] and accounts for the fact that the nature of the proceedings before the court resembles civil procedures most closely. The court should offer the parties the possibility of a settlement without prejudice.[405] This option stresses the notion that the procedure before the court is in principle a civil procedure where parties have the right 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.[406]

404 The three-part division of a trial is identical to the SA action procedure but finds its counterpart in civil-law jurisdictions as well. The German procedures in civil law, administrative and criminal law know the tripartite trial structure: the *Vorverfahren* (preliminary (preparatory) proceedings) serve as the stage where legal action is initiated 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, et cetera and finally the hearing takes place in the *Hauptverfahren* (trial) stage.

405 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.

406 The German Civil Procedure Code, ZPO, stipulates in § 278(1) that the court must 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 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 paragraphs (2) and (7) of article 64 of the ICC Statute. 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 provides for the public's interest in having access to information without limiting the court's options regarding confidential procedures.

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. A refusal shall be formally noted.

2. The Court may, at any time, entrust any individual, body, bureau, commission, or other organisation that it selects 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 the Trial Advocate 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 him- or herself 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-law and civil-law jurisdictions.[407] Article 53, paragraph 1 of the ICJ Statute acknowledges this procedure when it calls on the Court to rule 'in favour' of the party who is present.

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 granting a default judgment. Given that the proceedings before the Court are quasi-criminal in nature and effect, US ATCA adjudication serves as an example of how powerful such default judgments could be with the majority of defendants defaulting at one stage or another during the trial proceedings.[408]

[407] See §§ 331, 330 of the German Civil Procedure Code (ZPO); rules 26, 31 and 39 of the SA Supreme Court Act 59 of 1959; rule 55 of the US Federal rules of civil procedure.

[408] See Stephens & Ratner (n 137 above) 239 *et seq* for an overview of case law where the defendants defaulted.

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 or 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 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 seems 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 one 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;
(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 appeals 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, one of the most compelling 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 appeal. The reference to other rules of the Court clarifies

that the extensive role of the Trial Advocate persists in appeal proceedings.

The relatively lengthy appellation period as set forth in paragraph 2 follows the continental example which grants a one-month period to appeal a decision.[409] The complexity of the proceedings before the Court, which include a huge variety of legal questions and standards, justify the granting of such a lengthy period. Unlike common-law proceedings, the draft Statute does not impose on the parties a further obligation to apply for leave to appeal the Court's judgment.[410] 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. It is important to note that there is no pre-appeal stage where the trial chamber decides 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 judgments. A non-detriment[411] clause as known from 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.

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

Reparation by means of financial compensation explicitly recognises the victim's suffering. The right to adequate reparation restores the victim's honour and dignity in the private and public domain.[412] This notion follows human rights theory's basic principle that a right has to

409 See eg § 517 ZPO for the German *Berufung* (appeal).
410 See eg s 20 of the SA Supreme Court Act 59 of 1959.
411 Such a clause can be found in art 83 par 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 or her behalf.
412 Part A ch 1.

be supplemented by an enforceable remedy, the absence of which questions the existence of the correlative right itself.[413]

Acknowledging this principle, the draft Statute follows the wording of ECOSOC's 'Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and humanitarian law'[414] 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 had been 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;
(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

[413] Boyd (n 238 above) 1182.
[414] Art 5 par 15.

(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

Importantly, civil remedies punish and possibly deter because they impair the offender financially. Awarding punitive damages is well established in US ATCA adjudication having the explicit motive of punishing a perpetrator and simultaneously detering a potential perpetrator.[415] The legal concept of punitive damages is specific to the US with nearly no corresponding principles in other legal jurisdictions.[416] 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 inherent penal component. The German Federal Court of Justice[417] and French higher courts[418] have recognised 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 for punitive damages when certain requirements were met.[419] Punitive damages are as a concept also fairly unrecognised in international law.[420]

415 See *Filartiga* decision. See part A ch 2.
416 See Stephens & Ratner (n 137 above) 215 for a summary. Nater-Bass 'US-style punitive damages awards and their recognition and enforcement in Switzerland and other civil-law countries' (2003) 4 *DAJV-Newsletter* 154-160 for a civil-law perspective.
417 The German Federal Court of Justice found in 1993 that punitive damages awards should be recognised on a case-by-case basis, see judgment of 4 June 1992 IX ZR 149/91 (1992) *Neue Juristische Woche* 3096 *et seq*.
418 Nater-Bass (n 416 above) 156.
419 As above 157.
420 See eg *Velasquez Rodriguez* case (compensation) where the IACtHR held that international law did not recognise the concept of punitive or exemplary damages, (1987) 7 IACHR *Series* 52 and judgment par 38 in 28 *International Legal Materials* (1989) 291; Laplante (n 116 above) 379-388 for a discussion on punitive damages as a remedy in international law and its implications.

Considering punitive damages' well-proven deterrent effect, the draft Statute follows the US ATCA example of combining personal damage awards with punitive damages. Cognisant of the ILC's 'Commentaries to the draft articles on responsibility of states for internationally wrongful acts'[421] which rules out the applicability of exemplary — which is punitive damages — this draft Statute nevertheless adopts the concept from US civil law, arguing that (a) the nature of the torts constitutes severe breaches of international humanitarian and human rights law; (b) future defendants will often be individuals or legal entities with sufficient assets acquired directly from tortious acts; and (c) it is necessary to use such exemplary damage awards for financial punishment and deterrence. These points support the inclusion of punitive damages as damages available under the draft Statute. It should, however, be noted that this type of remedy could deter states from joining this Convention.[422]

Paragraph 3 sets out the conditions for awarding punitive damages. It places a two-fold condition upon the court's discretion. Either the heinous nature of the tortious conduct or the personal circumstances of the defendant calls for 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 tortious conduct. Unlike cases in which the first standard is applicable, the latter is receptive to other more ordinary international torts as stipulated in article 11(f) above. It would most likely apply to defendants who are legal persons.

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 serves as 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

421 n 47 above, 245.
422 See Laplante (n 116 above) 381, outlining the negative consequences of choosing punitive damages as a remedy.

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 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 organisations to ensure wide compliance with the Court's judgments.

Commentary

Enforcing the Court's judgments is key to its success. The provisions of this article borrow from article 8 of the International Convention for the Suppression of the Financing of Terrorism of 1999,[423] as the most conclusive and modern example of a provision on the subject of tracing and attaching financial assets globally. Given that defendants would include individuals and corporations with significant assets which could directly have resulted from tortious acts, makes detection, freezing and forfeiture of resources extremely important for civil remedies to be effective.

The Court's powers of review and reporting in terms of paragraph 4 follow the procedures on compliance of the major human rights treaty system of the UN.[424] This procedure should be able to safeguard the Court's efficiency.

Paragraph 5 empowers the Court to extend its jurisdiction for enforcing its judgments beyond the limitations of the draft Statute. The possibility of including enforcement mechanisms for the execution of the Court's judgments in international organisations' agreements will empower the court's impact on the international community. For example, enforcement clauses could be included in multilateral agreements of powerful economic organisations such as the International Trade Organisation (WTO) and the European Union

[423] As adopted by the General Assembly 9 December 1999. UN Doc A/C 6/54/L 2 Annex I. See Bachmann (n 32 above).

[424] See above part A.

(EU), thus following already existent human rights clauses in trade agreements.[425]

Article 30
Entry into force

1. This Convention shall enter into force on the 60th day following the date of the deposit of the 15th 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 15th instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the 60th day after deposit by such state of its instrument of ratification, acceptance, approval or accession.

[425] Signatory states will enforce it themselves and other international agreements under the supervision and jurisdiction, authority, respectively, of international trade organisations and institutions such as NAFTA, the WTO and EU which incorporate a so-called human rights enforcement clause in their treaties. The UN's response to the threat of financed terror in the wake of 11 September 2001 and the 'War on Terror' will be used for tracing and freezing assets of alleged and convicted human rights violators.

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