

Civil Liability of Corporate and Non-state Aiders and Abettors of International Terrorism as an Evolving Notion under International Law*

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Abstract. Global terrorist activities require financial economic support and a way to combat terrorism is to limit access to such funding. Terrorist financing is a global problem which is closely linked to money laundering and requires a well-co-ordinated, multilateral response through international bodies, such as the United Nations Security Council, the Financial Action Task Force (FATF) of the OECD, as well as the use of civil litigation by victims against terrorist groups and their sponsors. The proactive role of corporations, such as banks (cf. the US Arab Bank case) and other entities (cf. SNCB Securities), as well as individuals play as aiders and abettors in financing international terrorism is well known and documented.¹ This article aims to outline the evolving notion of corporate responsibility for human rights violations and acts of terrorism as a legal option for the individual victim of terrorism to achieve some form of justice. This article provides an overview of the current anti terrorism litigation under international and US law and introduces the idea of a new international court for the adjudication of such international torts.

A. The Present Situation of Anti-Terrorism Litigation under International and Domestic Law

1. Introduction

The starting point of this article is the acknowledgment that there exists a notion of *Corporate Responsibility* as an accessory to terrorism related human rights violations: this observation can be linked to the growing influence that multinational corporations (MNCs) or multinational enterprises (MNEs) have developed in the context of transnational business operations over the last 50 years. The US scholar Blumberg (2002) describes the impact of such MNC/MNEs on global trade and business:

“In the modern global economy, the largest corporations conduct worldwide operations. They operate in the form of multinational corporate groups organized in “incredibly complex” multi-tiered corporate structures consisting of a dominant parent corporation, sub holding companies, and scores or hundreds of subservient subsidiaries scattered around the world. The 1999 World

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¹ UN Consolidated List established and maintained by the 1267 Committee with respect to Al-Qaida, Usama bin Laden, and the Taliban and other individuals.

Investment Report estimated that there are almost 60,000 multinational corporate groups with more than 500,000 foreign subsidiaries and affiliates”²

It was therefore only a matter of time before reports emerged on gross human rights atrocities committed by state organs of a repressive state, militia or paramilitary groups which could also be attributed to the business activities of MNCs operating in the countries³ affected. Consequently, the need for regulating such corporate (mis-) conduct has become a necessity. The notion of corporate responsibility for acts of sponsorship of international terrorism is directly linked to the evolving notion of such criminal and civil accountability.

2. Corporate criminal responsibility

An early example where the direct involvement of corporations in the commission of human rights atrocities was documented can be seen in the prosecution of German industrial officers before US Military Tribunals for their complicity in the commission of war crimes and crimes against humanity by the use of slave and forced labour during World War II.⁴ Their complicity in the Holocaust was summed up by the Nuremberg Court as

“ [they] gave [Hitler] their cooperation, they made themselves parties to the plan he had initiated. They are not deemed to be innocent [...]”⁵

In essence, these war crimes proceedings addressed the criminal responsibility of individuals as officers of a firm who acted on behalf of the respective corporation. The Nuremberg proceedings did not indict German corporations as legal persons *per se* for their involvement in the *Holocaust*, e.g. by declaring these firms as criminal organizations like the notorious SS in terms of Articles 9-11 of the Nuremberg Charter. Thus, the Nuremberg trials failed to establish a binding principle of corporate criminal responsibility for future use.⁶ The international criminal responses to the Yugoslav and Rwandese human rights disasters failed to establish corporate responsibility as an independent principle under international criminal law: neither the new International Criminal Court (ICC) nor the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), are mandated by their statutes to prosecute business entities as possible perpetrators.⁷ To date there is no recognition under international law of an independent principle of corporate criminal responsibility for the commission of gross human rights atrocities and terrorism. To make things worse, there are only a few domestic provisions for the criminal prosecution of business entities⁸.

² P Blumberg, ‘Asserting human rights against multinational corporations under United States law: Conceptual and procedural problems’ (2002) 50 *American Journal of Comparative Law*, p.493. Bachmann, ‘Human Rights and Global Business: the evolving notion of corporate civil responsibility’, 1 *Indian Yearbook of International Law and Policy*, 193-220 (2009).

³ See e.g. O. De Schutter *Transnational Corporations and Human Rights* (Hart Publishing, Oxford, Portland, OR 2006); A Ramasastry and R Thompson, ‘Commerce, crime and conflict – Legal Remedies for Private Sector Liability for Grave Breaches of International Law’, (Fafo Institute of Applied International Studies 2006), retrievable at <http://www.fafon.no/pub/rapp/536/536.pdf> (last accessed at 28-09-2010).

⁴ See e.g. *U.S. v. Friedrich Flick* in *VI Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No.10* (1952), 1217, 1222 and *U.S. v. Alfred Krupp* in *Vol. X Law Reports of Trials of War Criminals* (1949) 130-159

⁵ *The Nuremberg Trials*, 6 *F.R.D.* (1946) 69, 112.

⁶ As supplement and extension to the criminalization of certain Nazi organizations such as the Leadership of the Nazi Party and the SS under Article 9 Nuremberg Charter, see Jørgensen, *The Responsibility of States for International Crimes*, (OUP, Oxford 2003) 139.

⁷ There was, however, a futile French proposal during the 1998 Rome Conference on the ICC which called for an inclusion of legal persons as well.

⁸ See Ramasastry and R. Thompson (n 3) Appendix A, 29ff.

2.1. The evolving notion of corporate civil responsibility under International Law

The United Nations has recognized the role which multinational corporations play in the context of human rights violations and other international torts: over the last two decades, mostly “soft law” in the form of non-binding rules on good corporate conduct⁹ was developed and to a lesser extent “hard law” such as the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”¹⁰ of 2003 which constitute a future set of non-voluntary norms for corporations. Adopted by the Sub-Commission on the Promotion and Protection of Human Rights, it failed recognition by the former UN Human Rights Commission (the legal predecessor of the new Human Rights Council until 2006). The general response to these norms was controversial at least, labelling them as “exaggerated claims and conceptual ambiguities”¹¹ and/even a return to the times of long gone principles of the old “lex mercatoria”. However, the notion that corporate misconduct can lead to corporate accountability with the possibility of victims’ rights to a remedy and reparation is at least evident at the international level.¹² The Special Representative of the Secretary General, Ruggie, has been tasked to translate the rather vague policy framework of “protect, respect and remedy” into practical and binding principles.¹³

3. Establishing Corporate Human Rights Responsibility under domestic law: US human rights litigation

US human rights litigation against the individual and corporate human rights violator, aider and abettor of such violations as well as international terrorism, brought under the Alien Tort Claims Act (ATCA)¹⁴ and the subsequent Torture Victim Protection Act (TVPA)¹⁵ has developed effectively over the last 30 years. The scope of US human rights litigation is remarkably wide in the context of parties involved: individuals have the right to start legal actions against other individuals, judicial persons and in some instances, even states, as perpetrators of human rights violations. Human rights litigation under the ATCA provides one of the few opportunities for natural persons as litigants to seek redress in a country other than the one where the violation has taken place. ATCA adjudication¹⁶ includes actions against individual defendants, both as state¹⁷ and non-state¹⁸ instigators of actionable human rights and terrorism torts¹⁹ and an increasing number of lawsuits against MNCs²⁰ for their complicity in human rights atrocities committed by repressive regimes in developing countries, as well as their complicity in international terrorism.²¹

⁹ See e.g. guidelines on good corporate practice and corporate social responsibility as listed at the University of Minnesota’s Human Rights Library, retrievable at <http://www1.umn.edu/humanrts/business/codes.html>.

¹⁰ U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003). See Martin-Ortega, “Business and Human Rights in Conflict” in 22.3 *Ethics & International Affairs* 2008, 273-283.

¹¹ Ruggie in his initial 2006 *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc.E/CN.4/2006/97.

¹² *Ibid* and UN News “Corporate Law Firms Join UN-led Initiative on Business and Human Rights”, 28.01.2009.

¹³ See the most recent report of Ruggie *Promotion of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, , UN Doc A/HRC/11/13 of 22 April 2009

¹⁴ 28 USC § 1350, also referred to as Alien Tort Statute (ATS).

¹⁵ 28 USC § 1331 Pub L No 102-256, 106 Stat 73.

¹⁶ Human rights litigation in the USA is based mainly on the ATCA and the TVPA. Consequently, the term “ATCA” refers to any action brought before US courts under these statutes.

¹⁷ *Filartiga v Pena-Irala* 630 F 2d 876 (2d Cir 1980).

¹⁸ *Kadic v Karadzic* 70 F 3d 232 (2d Cir 1995) for an adjudication of human rights atrocities committed during the Bosnian Yugoslav War of 1991 to 1995.

¹⁹ Such as terrorism, *cf. Smith v Socialist Peoples Libyan Arab Jamahiriya* 101 F 3d 239 (2d Cir 1996) for the terrorist Lockerbie bombing of 1988.

²⁰ S.-D. Bachmann “Where do we stand with human rights litigation against corporations?” 2 *TSAR* (2007), 292-308 pp. 292-308; R Herz “The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement” in 21 *Harvard Human Rights Journal* (2008), 208–239.

²¹ See H Strydom and S-D Bachmann “Civil liability of gross human rights violations” in 3 *TSAR* (2005) 448-469 454-457 for an overview, Bachmann (n 2) and *The Independent* “Shell on trial - Oil giant in the dock over 1995 murder of activist

3.1. Some brief overview on the features of US human rights litigation

In 1980 the 2nd Circuit District Court heard with *Filartiga v Pena- Irala*²² a landmark case, when it found that acts of (state instigated) torture committed outside the territory of the USA involving only non-US citizens as both victim and perpetrator, could be brought as an action before US federal courts. The court established the necessary jurisdiction *ratione materiae* in this instance on the Alien Torts Claims Act²³ (ATCA), a statute from 1789 which had hardly been used for nearly 220 years.²⁴ This legislation was supplemented by subsequent legislation: the Torture Victim Protection Act²⁵ (TVPA) of 1991 and the Antiterrorism and Effective Death Penalty Act²⁶ (AEDPA) of 1998, which authorizes action against designated states of state sponsored international terrorism.

3.2. The applicable law

The ATCA was enacted in 1789 as part of “alien law”²⁷ and confers subject matter jurisdiction on an US federal court when: (1) an alien plaintiff sues, (2) for tort only (3) based on an act that was committed in violation of either the law of nations²⁸ or a treaty of the US.²⁹ The law of nations is defined by customary usage and clearly articulated principles of the international community. However, not all violations of international law are actionable under the ATCA: only human rights violations of a high intensity are actionable. Over the last 25 years, US courts developed from the *Filartiga* judgment³⁰ certain norms and criteria whose breaches qualify as violations of the law of nations and are therefore actionable as ATCA torts. In *Forti v. Suarez-Mason*³¹ the “law of nation” test³² was developed, requiring a “universal, definable and obligatory”³³ nature of the applicable international law nominations. A violation of international human rights and international humanitarian law may qualify as such a violation of the law of nations when these specific criteria are met. The ‘alien’ defendant has to be present or otherwise represented in the USA when the summons is served.³⁴ Today, the following human rights violations may establish the jurisdiction of US Federal Courts under the ATCA, the TVPA and the AEDPA: torture, summary execution or extrajudicial killing, genocide, war crimes and crimes against humanity, disappearances, arbitrary detention and cruel, inhuman or degrading treatment, as well as international terrorism

who opposed environmental degradation of .Niger Delta”, retrievable at <http://www.independent.co.uk/news/world/americas/shell-on-trial-1690616.html>

²² (n 17).

²³ 28 USC § 1350 reads: “The district courts shall have original jurisdiction of 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.”

²⁴ The ATCA was only used on a few occasions prior to *Filartiga* resulting in less than 30 judgments. See *Symposium* on “Corporate liability for violations of international human rights law” in 114 *Harvard Law Review* (2001), 2033. Since the *Filartiga* judgment more than a 150 civil liability cases for serious violations of human rights were heard under the ATCA.

²⁵ 28 USC § 1331 Pub L No 102-256, 106 Stat.73, which covers US citizens as victims and possible plaintiffs for acts of state torture and extrajudicial killings.

²⁶ 28 USC § 1605 (a) (7) (1998).

²⁷ Law regulating the affairs of non citizens towards each other, thus called alien law.

²⁸ In *Kadic v. Karadzic* (n 18), the 2nd Circuit found that certain international crimes such as genocide resembled exceptions to that rule. 70 F 3d 232 (2d Cir 1995) 239-41.

²⁹ 28 U.S.C. § 1350 reads: “The district courts shall have original jurisdiction over any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.

³⁰ *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”, (n 22) 888.

³¹ 672 F Supp (ND Cal 1987) 1531.

³² Which has become recognized as the so called *Forti* test. The US Supreme Court referred to this test in its *Sosa v Alvarez-Machain* decision of 29 June 2004, 124 S Ct 2739 (2004), *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 and M Ratner, *International Human Rights Litigation In U.S. Courts* (1996) 51-52.

³³ 672 F Supp (ND Cal 1987) 1539-1540.

³⁴ The so called personal service requirement of summons etc. as stipulated in Fed.R.Civ.P 4 8(e) (2).

and hostage-taking.³⁵ With the TVPA of 1991 the scope of human rights litigation in the USA is broadened by including acts of (state) torture and/or extra-judicial killings as actionable torts. Section 2 (a) TVPA states that

“an individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action be liable for damages to that individual; or (2) subjects an individual to extra-judicial killing, shall, in a civil action, be liable for damages to the individual’s legal representative, or any person who may be a claimant in an action for wrongful death”.

The TVPA therefore also allows lawsuits for state-sponsored human rights violations of only mid-level intensity. In 1992 the US Congress enacted the Anti-Terrorism Act which makes provisions for civil lawsuits for injuries and losses sustained through an act of international terrorism. The AEDPA was enacted in 1996 and limits the defense of state immunity in cases of state sponsored terrorism and can be seen as a direct judicial response to the growing threat of international terrorism directed against the USA and her citizens.³⁶ 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 act or provision of support is engaged in by an official agent of the foreign state while acting within the scope of his or her duties.³⁷ The AEDPA effectively amended the US Foreign Sovereign Immunities Act (FSIA)³⁸ to permit a civil suit against state sponsors of terrorism.³⁹ In 2001 the Racketeer Influenced and Corrupt Organizations (RICO) Act was amended to include acts of terrorism against groups that have engaged in a pattern of racketeering activity, including murder, kidnapping, arson, robbery and fraud, as well as acts of terrorism.⁴⁰ Since 2001, RICO was used in a number of unsuccessful lawsuits against alleged ‘sponsors’ of international terrorism and Al Qaeda.⁴¹

3.3. *The corporate defendant in anti-terrorism cases*

US human rights litigation against the corporate aider and abettor has become more frequent in the past decade.⁴² It developed around a number of serious violations of international human rights law such as crimes against humanity, war crimes and torture as well as alleged violations of other human and fundamental rights protected under various civil, political, economic, social and cultural rights treaties.⁴³ The case *Doe I vs. Unocal*⁴⁴ concerned allegations of corporate complicity in forced labor and torture,⁴⁵ *Wiwa v Royal Dutch Petroleum*

³⁵ See Stephens and Ratner (n 32) 63 – 92.

³⁶ See e.g. *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 28 (D.D.C. 1999) and for a general overview *Lawsuits Against State Supporters of Terrorism: An Overview CRS Report for Congress*, retrievable at www.fas.org/sfp/crs/terror/RS22094.pdf.

³⁷ The AEDPA therefore amends the Foreign States Immunity Act to permit a civil suit under the following requirements: (1) The foreign state was designated as a state sponsor of terrorism under section 6 (j) of the Export Administration Act of 1979 (50 U.S.C § 2405 (j)(1994)) or section 620 (a) of the Foreign Assistance Act of 1961 (22 U.S.C. § 2371 (1994)) at the time of the commission of the act; (2) The act was committed within the designated state and there was a reasonable opportunity for the state to arbitrate the claim; or (3) The claimant was not a US national.

³⁸ 28 U. S. C. §§ 1602 – 1605.

³⁹ Currently there are four countries designated under these authorities: Cuba, Iran, Sudan and Syria., see <http://www.state.gov/s/ct/c14151.htm>.

⁴⁰ As amended under the 2001 PATRIOT ACT

⁴¹ *Rux v. Republic of Sudan*, 2007 WL 2127210 (E.D.Va.), for alleged support in the Al Qaeda attack on the US warship in Sudan in 2000.

⁴² See Symposium (n 24) 2025- 2049; S.-D. Bachmann (n 3) 292-308.

⁴³ *Ibid*, Symposium 2027. Herz (n 20).

⁴⁴ *John Doe I v. Unocal Corp.*, 403 F.3d 708 (Apr 13, 2005).

⁴⁵ The case was settled out of court in 2006, 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

*Company*⁴⁶ was based on the alleged involvement of the Royal Dutch/Shell oil group in human rights abuses in Nigeria, leading to the 1995 tortures and murders of the environmental and community leaders Ken Saro-Wiwa and John Kpuien and, more recently, the allegations of corporate complicity in the commission of war crimes committed by Papua New Guinean Security Forces in *Sarei v Rio Tinto*.⁴⁷ In ATCA litigation against corporations, it has to be established that the alleged tortuous acts of the defendant qualify either as “non-state actor” exceptions under the rule in *Kadic v Karadzic*⁴⁸ i. e. that the MNC has committed the law of nations violation directly, thus overriding the state action requirement. In the case of liability based on the MNC’s complicity in acts committed by a foreign sovereign government, the plaintiff has to prove that the violation was caused by the MNC’s exercise of some form of control over the acting government’s officials or agents.⁴⁹ A MNC’s action of “aiding and abetting” of the host state’s organs in the commission of the alleged human rights violations by financing and supporting such violations knowingly is sufficient for the purpose of such a litigation.⁵⁰ This “control” requirement does not require the existence of actions falling under the strict “overall control”- and “effective control” test requirements under international law.⁵¹ In the particular context of anti terrorism litigation, there are basically three type of possible defendants: (1) the state sponsor of terrorism under the FSIA, the so called FSIA state defendant, such as Iran, Sudan and North Korea, (2) the non FSIA state defendant, an individual perpetrator or sponsor of terrorism who acts under the colour of law in terms of the Kadic - Karadzic rule and who does not fall under the protective scope of the FSIA⁵² and (3) pure non state actors who do not act under the colour of law nor fall under scope of FSIA⁵³ and who basically commit or collaborate in acts of terrorism in their own name, as for example Al Qaeda.

3.4. The impact of US human rights litigation as a precursor of future antiterrorism cases

Human rights litigation in the US has produced some examples of a successful adjudication⁵⁴ of human rights violations and has contributed to further legal development of the idea of human rights litigation as a separate notion of civil individual accountability. Prominent examples are the two Holocaust lawsuits against Swiss banks⁵⁵ and German corporations,⁵⁶ as well as the more recent Apartheid⁵⁷ class action.⁵⁸ These legal mass tort actions

⁴⁶ *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 157 *Oil & Gas Rep.* 1, 31 *Envtl. L. Rep.* 20,166 (2d Cir 2000) (NO. 99-7223L, 99-7245XAP), the case was settled out of court in 2009, see *The Independent* (n 106).

⁴⁷ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1198 (9th Cir. 2007).

⁴⁸ 70 F3d 232 (2d Cir 1995).

⁴⁹ Symposium (n 24) 2039.

⁵⁰ (n 44).

⁵¹ See *Prosecutor v. Dusko Tadic, Judgment Appeals Chamber* (ICTY), 38 *ILM* 1518, 1549, outlining the “overall control” test requirements for the “internationalizing” of the Bosnian conflict of 1992-1995. The ICTY decision overcame the much stricter “effective control” test of the ICJ’s *Nicaragua v. USA* decision in *Military and Paramilitary Activities in and against Nicaragua*, *ICJ Rep* 1986, 62 *et seq.*

⁵² *Flatow v. Islamic Republic of Iran*, (n 36) Iranian Ministry of Information and Security-defendant’s daughter was killed while travelling in Israel by suicide bomber who had received support and training from agents of Iran

⁵³ *Boim v. Quranic Literacy Institute* Dist. Court, ND Illinois, Eastern Div., 2005 - US defendant’s son was killed in Israel by Hamas and the suit was directed against financial supporters of Hamas

⁵⁴ B Stephens and Ratner, (n. 32), 239-245. The total of cases where US jurisdiction under the ATCA was granted and upheld in dozens of cases, see B Stephens, ‘Judicial Deference and the Unreasonable Views of the Bush Administration’, 33 *Brooklyn J. Int’l L.* 773, 813 (2008).

⁵⁵ *In re Holocaust Victim Assets Litigation* 105 F Supp 2d 139 (EDNY 2000); nearly 900,000 victims and relatives filed a class action suit against the three largest Swiss banks in 1996, alleging that Swiss banks had breached international and national law by “knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labour.”

⁵⁶ The case *In re Nazi Era Cases Against German Defendants Litigation* 198 FRD 429 (DNJ 2000) was a mass class action against a better part of “DAX”56-listed German corporations for the alleged use of forced “slave” labour during WW II by the defendant corporations and/or their legal predecessors.

⁵⁷ See *In re South African Apartheid Litigation*, 02 MDL 1499 (S.D.N.Y. 2009) which continues the original 2004 case of *In re South African Apartheid Litigation; Ntsebeza et al. v. Citigroup et al.* (November 29, 2004) (EDNY), 346 F. Supp. 2d 538, which was originally unsuccessful.

⁵⁸ Prior thereto *Hilao v Estate of Marcos* 103 F3d 767 (9th Cir 1996); *Kadic v Karadzic* (n 18) and *Doe I v Unocal Corp* 963 F.Supp 880 (CD Cal 1997) resemble cases brought as class actions before US federal courts. See K Boyd “Collective rights

involved multi-billion dollar claims by thousands of individual victims for the alleged corporate complicity in mass human rights violations such as forced labour, the financing and exploitation of such activities, and/or as in the Swiss case the unjust enrichment of banking institutions as a result of human rights atrocities committed within the context of the Shoah/Holocaust. US human rights adjudication breaks with the traditional (albeit changing) view that claims directed against state officials for violations of international humanitarian and human rights law can only be made at inter-state level⁵⁹ and that such claims can't be made by the individual victim in his/her own name. Outside the US, the absence of a *Filartiga* styled human rights litigation is apparent and unfortunate; thus limiting the further development of a universal civil jurisdiction of domestic courts.⁶⁰ Nonetheless, civil actions in US human rights litigation have contributed to the recognition of international human rights law in other domestic court fora.⁶¹ Its overall impact on the protection of human rights can be best described with the *Filartiga* dictum:

"[...] human rights litigation contributes to an important long-term objective: working toward a world in which those who commit gross violations of human rights are brought to justice swiftly, in whatever country they try to hide."⁶²

In the context of combating international terrorism, rationale and key features of US human rights styled litigation should be used and developed further into a possible global judicial deterrent. Corporate and individual sponsors of terrorist activities such as suicide bombings, extrajudicial killings and hostage taking are aiders and abettors of international terrorism who should be held accountable.

B. DRAFT ON A CONVENTION ON CORPORATE LIABILITY FOR INTERNATIONAL WRONGS

The following part will introduce the reader to a new concept of a possible corporate responsibility regime consisting of a court for the adjudication of international torts, a catalogue of possible international torts as well as a description of possible defendants. This part is based on prior published research undertaken by the author⁶³ and reflects on some key provisions of a suggested draft convention on individual civil liability for human rights violations.

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.

adjudication in US courts: enforcing human rights at the corporate level" in 1999 *Brigham Young University Law Review* 1153-57 for a conclusive summary of examples of class action litigation. These three cases included class representation of up to 10,000 victims (*Marcos*).

⁵⁹ See BGH – III ZR 245/98 (OLG Köln) concerning claims of Greek citizens whose relatives were murdered by German security forces in 1944. The growing number of human rights cases before the European Court of Human Rights resulting in financial compensation awards for the victim plaintiff does exemplify the above mentioned change of this traditional view.

⁶⁰ See M Rau 'Domestic adjudication of international human rights abuses and the doctrine of forum non conveniens' in 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001) 177, 194.

⁶¹ *Ibid* and *Ronald Grant Jones v The Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia) & Anor.* in [2004] EWCA Civil 1394 et seq paras 61-68.

⁶² See B Stephens, et al. *International Human Rights Litigation in U.S. Courts* (Martinus Nijhoff Publishers, The Hague 2008).

⁶³ *cf* S-D Bachmann *Civil Responsibility for Gross Human Rights Violations – The Need For A Global Instrument* (Pretoria University Press (PULP) 2008). The author wants to thank PULP for the permission to publish this (revised) extract.

Commentary

The new Court will be established as an additional but separate chamber to the International Court of Justice (ICJ). Its jurisdiction,⁶⁴ organs 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 Special Court for Sierra Leone (SCSL). Breaches of customary international humanitarian and human rights law, as well as acts of international terrorism, will constitute 'international crimes' and tortuous behaviour.⁶⁵ This results in civil liability under the prescriptions of the law of tort or delict under international and domestic law. Consequently, the link between individual civil liability for serious breaches of international human rights and humanitarian law and individual criminal responsibility for the same type of offences implies a court structure and organisation that follow the example of criminal adjudication. The law of international delict and international criminal law has 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 torts with a duty to compensate.⁶⁶ It would therefore seem adequate to establish the Court as a physical annex to one of the existing criminal *fora*. However, considering the temporary nature of jurisdiction of the present ad hoc tribunals, the only suitable forum 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.⁶⁷ 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. This decision is mainly based on two considerations. Firstly, the ICJ 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. 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. Additionally, the ICC would be the wrong forum to choose given that its existence is seriously questioned by powerful states (and permanent Security Council members of the UN) such as the USA, Russia and China. It is the above described US example of human rights litigation under the ATCA as well as the observation that such recourse was recently reaffirmed in principle by the US Supreme Court, which gives rise to the hope that the USA will be more accommodating when setting up such a forum for the adjudication of civil claims. 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.⁶⁸

Article 2

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 torts'). The Court has

⁶⁴ The Court has jurisdiction over international torts arising from serious breaches of international human rights and humanitarian law as well as selected international wrongs, see the next draft article.

⁶⁵ The draft articles of the ILC on responsibility of states for internationally wrongful acts do not recognise 'any distinction between State "crimes" and "delict"'. See 'Commentaries to the draft articles on responsibility of states for internationally wrongful acts', *Yearbook of the International Law Commission*, 2001, vol. II, Part Two.

⁶⁶ 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 tort law. Cited in Laplante 'Bringing effective remedies home: the Inter-American human rights system, reparations, and the duty of preventions' 22 *Netherlands Quarterly of Human Rights* (2004) 382.

⁶⁷ Art 75 of the ICC Statute imposes on the ICC the obligation to develop principles for reparations for victims.

⁶⁸ See Article 17 of the ICC Statute whereas the ICC's jurisdiction is subsidiary to domestic jurisdiction under the principle of subsidiary.

jurisdiction in accordance with this Statute with respect to international torts arising out of the following gross violations of international law ('crimes'): ⁶⁹

- (a) the crime of genocide;
- (b) crimes against humanity;
- (c) war crimes;
- (d) the crime of torture;
- (e) the crime of international terrorism

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 crimes⁷⁰ and as such would constitute 'the most serious crimes of concern to the international community as a whole',⁷¹ or 'serious international crimes'.⁷² 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.⁷³ 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'.⁷⁴ 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.⁷⁵

Article 3

Personal jurisdiction

The Court shall have jurisdiction over natural and legal persons pursuant to the provisions of the present Statute.

The status of a legal person is determined through the applicable law as stipulated in article 20 of this draft statute. 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.

The natural persons representing the legal person as directors or in a similar leading role are separately and jointly liable for the tortuous acts committed by the legal person.

⁶⁹ The terminus international torts refer to the 'most serious breaches of international human rights and humanitarian law of concern'.

⁷⁰ J.F.Murphy 'Civil liability for the commission of international crimes as an alternative to criminal prosecution' (1999) 12 *Harvard Human Rights Journal* 6.

⁷¹ 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.

⁷² 'Princeton principles on universal jurisdiction' (2001) retrievable at <http://www.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 *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy* (2001) 162 with additional sources.

⁷³ See Commentaries (n 65) 285.

⁷⁴ Art 7 II of the European Convention on Human Rights

⁷⁵ These crimes are also referred to as so-called core crimes and 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) *International Court of Justice Reports* 3 as an exemplary Judicial example on state responsibility for jus cogens violations and Murphy (n 70), 6.

Commentary

Paragraph 1 establishes civil liability for the tortuous 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 tortuous behaviour of this nature. The Statute's regulations on corporate existence, organisation and group structure of a legal person involved in proceedings before the Court in paragraph 2 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 forum law, 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 tortuous 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 the corporate screen of a simple and informal corporate structure to reduce their financial risk and shift risk to a legal person.⁷⁶ It is important to understand that this statute 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.⁷⁷

Article 4

Individual civil responsibility

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 2 of the present Statute, shall be individually responsible for this tort.

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.

The fact that any of the acts referred to in article 2 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.

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.

Commentary

These provisions on individual civil responsibility follow the definition of criminal responsibility in the statutes of existing criminal courts. Paragraph 1 confirms the autonomous nature of procedures before the Court. The fact that the Court has civil jurisdiction over tortuous 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 deal with possible defences in criminal procedures that are not presently recognised under

⁷⁶ 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).

⁷⁷ Cf the cases of *Kadic v Karadzic* (n 18), *John Doe I v. Unocal Corp* (n 44) and *Wiwa* (n 46).

international criminal law. 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.

4. Conclusion

The role and impact of both corporate and individual financial aiders and abettors of international terrorism requires a resolute legal response: regulating the activities of these non state actors by means of domestic and transnational human rights litigation can help to curb the threat of international and domestic terrorism. Such a response would have to distinguish between "funding" activities and other forms of aiding and abetting (e.g. direct payments to paramilitaries, sale of goods, etc.). Following the horrific 9/11 terror attacks against the USA as well as the London 7/7 attacks, the application of criminal sanctions against the purveyors of terror, as well as the use of military force against state and non state actors have once more showed that such measures have their limitations: consequently the potential use of civil litigation, with possibly large damage awards against non state actors such as terror groups and their supporters, constitutes a supplementary means of fighting terrorism. The future task is to develop the notion of international responsibility for acts of aiding and abetting terrorist activities into some sort of universal civil accountability regime accessible for the individual victim of terrorism and other human rights abuses.