

JEREMY SARKIN

Senior Professor of Law and Deputy Dean, Law Faculty,
University of the Western Cape, South Africa

ABSTRACT

Reparations for human rights and humanitarian abuses are a key challenge domestically and internationally. While there have been recent developments both in the theory and the practice of reparations for abuses committed in various places around the world, many of the violations committed in Africa, and elsewhere, during colonial times remain unresolved. This article reviews these developments and contextualizes them against the background of cases being litigated by Africans for abuses perpetrated against them in the colonial and apartheid era. Thus, cases being brought by Namibians and South Africans, in the United States in terms of the Alien Torts Claims Act, and other laws, as well as in other jurisdictions are examined. This is done to determine their likelihood of success in the light of the legal problems these cases have to meet. The political contexts of the cases are also examined, as well as why multinationals rather than states are usually pursued.

THE COMING OF AGE OF CLAIMS FOR REPARATIONS FOR HUMAN RIGHTS ABUSES COMMITTED IN THE SOUTH

Jeremy Sarkin



Questions relating to accountability for human rights abuses have never been more in the news or more favourably viewed than at present.¹ Both criminal and civil processes have seen major developments over the last few years.² Criminal accountability has been established at both the international and domestic levels.³ The creation of the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) has resulted in criminal accountability for gross human rights violations becoming far more of a reality. Domestically, the way states deal with past human rights abuses is often dependent on the way in which political change has occurred and the way the state deals with the tensions between justice,⁴ truth and reconciliation.⁵

The issues of apology and reparation for violations committed during colonialism,⁶ slavery and apartheid have also never been so high on the agenda. This is seen to be a critical issue, as during the years of colonialism and apartheid untold numbers of human rights abuses occurred in the race to possess and exploit the resources of the colonized countries. The crimes committed in the process of carving out the spoils for the colonizers include crimes against humanity,⁷ war crimes,⁸ genocide (even before the word was coined),⁹ extermination, disappearances, torture, forced removals,

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slavery, racial discrimination, cruel, inhuman or degrading treatment, and more. In fact, a key issue, and a defense that has been raised by the countries or corporations that perpetrated these deeds, is that the crimes committed at that time were not then defined as crimes. It is contended that only later were they defined as such.¹⁰

Many countries where colonialism occurred are still underdeveloped¹¹ and the legacy of the colonial years is still a major feature of the landscape in these places.¹² In some countries, certain communities assert that the way in which they were exploited in the past is the reason why they now suffer economic as well as other hardships.

In this vein, the issue of compensation for victims of human rights abuses has become a critical concern for these countries and the individuals who live there. Until recently, it was believed that remedies were not available and that the only mechanism to achieve some type of redress was to get some measure of foreign aid from the former colonial masters, who could be made to feel guilty about the past and, consequently, provide such assistance.

The issue of reparations has become more important, not simply for the money that is being sought but also because reparations are seen to fulfill at least three functions. Firstly, it directly assists victims coping with financial loss they have suffered; secondly, it provides official acknowledgement of what happened in the past; and thirdly, it may act as a deterrent to the perpetration of human rights abuses in the future.¹³

One reason why reparations for these abuses have become an issue of considerable significance is that there has been a growing awareness and acceptance internationally of the need for and right to reparations for victims of human rights violations. Many international human rights instruments recognize that a victim is entitled to a remedy, which includes the means for full rehabilitation.¹⁴ In fact, the receiving of some reparation for harm suffered is a well-established principle of international law.¹⁵ Such a right is now also found in regional human rights instruments and in the jurisprudence of regional human rights courts.¹⁶ What is also developing is the notion in international human rights law that, in principle, this law governs the conduct of state actors as well as private parties, including juridical bodies such as

corporations. There is also a growing acceptance of the principles of universal jurisdiction.¹⁷

These developments have been bolstered by claims and payments made recently in a number of cases related to the Holocaust.¹⁸ These claims and their significance will be discussed later. In addition, a growing number of civil cases are being filed in relation to these types of violations. The majority of these are in the United States under the Alien Torts Claims Act.¹⁹

There are also at least three major cases against multinationals pending in the courts of the United States²⁰ for violations committed during the colonial and apartheid periods. One suit has been filed by the Herero people of Namibia, for violations committed in that country in the early twentieth century, and two claims have been filed by South African victims for violations committed during the apartheid era.

Another reason why the issue of reparations is now so topical is the fact that the matter of reparations for slavery and colonialism was a major and highly contested agenda item at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), held in Durban (South Africa) from August 31, until September 8, 2001.²¹ Quite a considerable part of the World Conference was devoted to these themes. A formal apology, coupled with an undertaking to effect reparations in some way, has been requested from those who were the beneficiaries of slavery and colonialism.²² The WCAR declaration²³ has many sections relevant to the issues under discussion.²⁴

This paper examines the issue of reparations for colonialism and apartheid. It does so on the understanding that, while world opinion or moral authority might be that there are very valid reasons for countries that were colonizers to pay reparations, it is unlikely that these states will acknowledge and apologize for past human rights abuses or be willing to pay reparations for these. If reparations are forthcoming in the future this will be the result of the political climate changing and agreement being reached.²⁵ For this reason, it is more likely that multinational corporations or other companies who conducted business and benefited where violations were committed, or are seen to have benefited during those years, will be sued. As has been noted by Joel Paul:

Why has international law turned its gaze to multinational corporations at this time and in this way? After all, many of the claims against multinational companies arise out of the Holocaust and the Second World War. After more than a half century, why are litigants seeking redress from these corporate giants? One simple answer to the question is that the companies may be the only tortfeasors still available to provide any compensation. The individual bad actors are often dead, missing, beyond the jurisdictional reach of domestic courts, or unable to satisfy large damage claims. The immortality of the multinational corporate entity, its size, wealth and omnipresence in a variety of jurisdictions make it uniquely attractive as a defendant.²⁶

These institutions are also pursued as it is unlikely that international courts will permit such cases before them. For a variety of reasons, these courts are not really available for victims who seek redress. This is unlikely to change. In any case, victims have difficulty in gaining access to these courts as, in the main, they do not permit non-state actors to litigate before them and private corporate entities bear almost no obligations under public international law ... The long and the short of it is that the legal status of MNCs under international law has not advanced significantly in [a] quarter century.²⁷

At the level of state liability, reparations are at present a political issue rather than a legal one.²⁸ As a consequence of the difficulties in pursuing state actors,²⁹ victims often view corporations rather than governments as easier targets for such claims.³⁰ Part of the reason for this is that multinational corporations often have assets in jurisdictions that have easier procedural rules for litigation. While claims by victims of human rights abuses have until now been relatively limited, there has been a major growth in such claims over the last five years. The precedent cases relating to World War II claims have resulted in victims, who did not see such possibilities previously, taking legal steps to seek redress. As Ellinikos has noted: “eventually as business leaders are now finding out, somebody has to take responsibility”.³¹ Thus, the case that is being made, especially in litigation, is against corporations for the role they played, and the manner in which they benefited from acts committed in particular countries in the past. While the United States system for allowing foreigners to sue in its courts, mostly under the Alien Torts Claims Act, is evaluated

in this article, it is not an extensive evaluation of those laws but rather an overview of the types of cases that have been filed and what possibilities exist for claims relating to colonialism and apartheid. The focus is, thus, rather on what we can learn, for possible cases in these areas in the future, from the cases already brought. Why the United States is the major site of such litigation is also explored to some degree, to determine whether the courts in other countries have similarities that may be applicable to these types of cases. Additionally, the lessons and possibilities raised by the US cases may be relevant for the bringing of lawsuits in either the US or other countries.

The role of multinational corporations in the committing of human rights abuses

The role of multinational corporations in their conduct of business in the Third World is very controversial. Their role, especially in the colonial era, is even more contentious than their role in many parts of the world today. As Jonathan Charney has noted: “TNC involvement, particularly with third world governments, has often resulted in substantial TNC influence on host governments, and that influence has not always served those governments’ best interests”.³²

In many instances where plaintiffs allege that corporations have been implicated in human rights abuses, the claim is not that the violations were committed by the company itself or its agents.³³ However, this is not always true of human rights abuses that occurred during colonialism or of the activities of companies that made use of slaves. While it is generally the case that the abuses were committed by local state actors and that the company’s participation was in regard to its complicity in the human rights violations,³⁴ there are cases of direct involvement.

A corporation’s awareness of ongoing human rights violations, combined with its acceptance of direct economic benefit arising from the violations, and continued partnership with a host government, could give rise to accomplice liability. Thus, it could be that such an entity may be liable directly for human rights violations as an accomplice or as a joint actor with a state actor (e.g. security forces) in a venture that violates international law.³⁵

Anita Ramasastry³⁶ considers the precedents on the issue of corporate complicity by reviewing the United States Military Tribunal (USMT) at the Nuremberg prosecution of two bankers. There the Tribunal found that: “Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint ... but the transaction can hardly be said to be a crime ... we are not prepared to state that such loans constitute a violation of [international] law”. The Tribunal, therefore, emphasized a key distinction between providing capital and active participation in Nazi crimes.

A critical question is whether corporations have the obligation to respect human rights. The debate on the duty of corporations is now very advanced, and few argue that corporations have no role.³⁷ The current question is what the duty is of corporations *vis à vis* their role and the manner in which they benefited during colonialism and apartheid. The answer could be a clear position from 1948, when the Universal Declaration of Human Rights was adopted. This instrument demands that “every individual and every organ of society ... promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance”.³⁸

In this regard, Clapham & Jerbi claim that although “companies may not be in the habit of referring to themselves as ‘organs of society,’ they are a fundamental part of society. As such, they have a moral and social obligation to respect the universal rights enshrined in the Declaration”.³⁹

Professor Louis Henkin has seized upon the same language in the UNDHR, emphasizing that: “Every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all”.⁴⁰ The International Court of Justice in the Barcelona Traction, Light and Power Co. case found that the legal personality of a transnational corporation is equal to that of a regular citizen.⁴¹ Professor Steven Ratner has approached the issue, asking: “Can decision makers transpose the primary rules of international human rights law and the secondary rules of state and individual responsibility onto corporations? If corporations are such significant actors in international relations and law, then can they not assume the obligations currently placed on states or individuals, based on those sets of responsibility?”.⁴²

Ratner argues that “the unique role for states in securing some rights ... does not preclude duties for corporations with respect to other, related rights ...”.⁴³ Thus, duties on states are not simply transferable to corporations, but the same human rights that create duties for states may impose the same or different duties upon corporate actors.⁴⁴

Ratner also explores, among other things, how corporations could or should be held responsible for acts of governments, subsidiaries or other actors in the stream of commerce.⁴⁵ In a related inquiry, Anita Ramasastry questions: “How broadly should the accomplices net be cast? ... What about the fear of deterring investment, especially in developing countries? And practically, how can corporations make decisions about moving forward with international investments, when they fear that their very presence in a country that may have a questionable government may rise to the level of complicity?”⁴⁶

As Steven Ratner has observed: “Simply extending the state’s duties with respect to human rights to the business enterprise ignores the differences between the nature and functions of states and corporations. Just as the human rights regime governing states reflects a balance between individual liberty and the interests of the state (based on its nature and function), so any regime governing corporations must reflect a balance of individual liberties and business interests”.⁴⁷

A key question, often asked in regard to colonialism and apartheid, is what duties were owed then. Other significant issues are procedural problems, such as statutes of limitations on how far back claimants are entitled to bring a claim.

The development of the notion and acceptance of reparations

Historically, claiming reparations for damages that have been suffered is not an issue of recent vintage. In fact, at the conclusion of warfare, agreements were often reached in terms of which a payment or a forfeit of land was a consequence. What is a recent phenomenon, however, is for reparations or damages to be paid to individuals. It is in the post-World War II era that such reparations began, at first negotiated and later because of the enactment of a statute or because of the decisions of courts of law. At the level of statute, various countries have made provision for reparations to be paid in the wake of human

rights abuses. Such countries include Argentina, Chile and South Africa.

For a number of years, there has also been a solid movement internationally towards recognizing a legal basis for victims of human rights and humanitarian abuses to claim reparations. There has, for example, been an ongoing effort to establish international principles on reparations. In 1989, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities selected Professor Theo Van Boven to determine whether a set of basic principles and guidelines on remedies for gross human rights violations could be drafted. A draft version of the Basic Principles and Guidelines on the Right to Reparation followed.⁴⁸ As a result of the UN Commission on Human Rights' 1998 session, Professor Cherif Bassiouni was appointed to prepare a draft for the next session so that the principles could be clarified and sent to the UN General Assembly for approval. This task is still in the process of being completed, but the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law"⁴⁹ is at an advanced stage.⁵⁰

In various regions of the world there have also been initiatives towards obtaining reparations. An example is the 1992 process in Africa where Chief Moshood Abiola of Nigeria activated the establishment of the Organization of African Unity (OAU) Group of Eminent Persons for Reparations. The OAU mandated them to press forward with ensuring that reparations for the African slave trade were made. In 1993, the group assembled the First Pan-African Conference on Reparations in Abuja, Nigeria. The Abuja Declaration further committed the OAU to attempt to obtain reparations for slavery.

What has also occurred is that the two international tribunals in the 1990s set up to adjudicate on gross human rights violations in Yugoslavia and Rwanda have come to accept reparations as a right. The governing statutes of the two tribunals,⁵¹ in fact, established such rights for victims. Indeed, the Rome Statute, which governs the International Criminal Court provides greater rights for victims to compensation than ever before.

As far as individual claims are concerned, it is the post-World War II era that defines the movement towards the

granting of reparations for violations of human rights. It was at the end of the 1940s that the German government discussed the issue of reparations with the Israeli government, and the Conference on Jewish Material Claims against Germany resulted in the Luxembourg Treaty with Israel in 1952 and the enactment in 1953 of the Final Federal Compensation Law. In terms of this agreement, Germany agreed to pay \$714 million to Israel to support the assimilation of displaced and impoverished refugees from Germany or areas formerly under German control.⁵² The treaty required individual compensation as well as payment of \$110 million to the Conference of Jewish Material Claims against Germany for victims. The process ran from 1952 until 1965. Another limited reparations scheme was agreed to in 1993 to assist some of those left out of earlier agreements.

Two other important examples of reparations occurred in the United States. The first concerns reparations paid by the US government as a result of the internment of Japanese-Americans during the Second World War.⁵³ The second concerns compensation paid to the Aleut Indians, thousands of whom were relocated from South-East Alaska during the same period as the internment of the Japanese-Americans. Both of these communities negotiated for nearly 50 years to secure compensation reparations. It was in the 1980s that the Americans passed a law – the Civil Rights Act – which permitted reparations to be given to Japanese-Americans.

What is especially relevant for claims relating to events that occurred many years ago is that the Aleut Indians obtained damages for the children of survivors as well as for the villages that were affected by the relocations even though it took almost 50 years for this to happen.

It was recognized that the problems that had been caused by the relocation not only affected the communities at the time but also that these events were still having effects four or five decades later. It was determined that those consequences would continue for the foreseeable future.

The movement towards the obtaining of reparations by individuals was assisted by two court cases in the 1980s. In the first case, *Filartiga v. Pena-Irala*,⁵⁴ the US courts recognized that aliens could sue for reparations for human rights abuses committed against them by individuals who were not citizens of the US. The court noted that the “international community

has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture”.⁵⁵ This case has had enormous consequences and it and its progeny will be examined in detail below.

The other major case was the Inter-American Court of Human Rights decision of Velásquez-Rodríguez, in which the court decided that individuals who had had human rights violations perpetrated against them would be able to pursue damages claims against perpetrators, because “under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions even when those agents act outside the sphere of their authority or violate internal law”.⁵⁶

However, there have been failures in other courts to claim damages for events that happened 50 or more years ago. It is largely the US courts that have been sympathetic to some extent to this type of litigation.

Many ex-Comfort Women from Korea and other countries have filed suit against the Japanese government in the courts in Japan.⁵⁷ Of those cases only one was successful, but it, too, was overturned later by the High Court.

Major developments in the move to obtain reparations occurred when the Holocaust cases were filed in the US. The first of these claims occurred in October 1996, when a class action lawsuit was filed in the federal district court of Brooklyn, New York against the Swiss banks – Credit Suisse, Union Bank of Switzerland and Swiss Bank Corporation. All the filed cases were brought together in 1997 as *In re* Holocaust Victim Assets Litigation. The consolidated claim alleged that the banks did not return assets deposited with them, the banks traded in looted assets and the banks benefited by trading in goods made by slave labor. The case was settled in 1998 with a payment by the banks of \$1.5 billion. Not only Jews benefited in terms of the settlement but also homosexuals, physically or mentally disabled or handicapped persons, the Romani (Gipsy) peoples and Jehovah’s Witnesses.⁵⁸

The Holocaust cases against the Swiss banks were followed up with suits filed against German and Austrian banks in June 1998. These cases were launched by Holocaust survivors, American citizens, who filed a class action lawsuit against Deutsche Bank and Dresdner Bank, alleging profiteering from the looting of gold and other property belonging to Jews. All

the cases were merged in March 1999 as *In re Austrian and German Bank Holocaust Litigation*.⁵⁹ French banks or banks that had branches in France during the war, such as the British bank, Barclays, were also sued. A settlement agreement was reached with them in 2001. Also sued by Holocaust survivors were more than a dozen European insurers.⁶⁰ Nor were German corporations spared. Former slave laborers also launched cases against a whole host of German companies. However, a number of these were dismissed on the basis that they were excluded by statutes of limitations or because of treaties signed by Germany and the Allied powers at the conclusion of the war. A settlement was reached, however, relating to slave labor for about \$5 billion on the condition that all other slave labor cases would be dropped. The US government also agreed to intercede in any future lawsuits filed against Germany in relation to claims arising from World War II.⁶¹

The suits filed against German companies have also resulted in cases being filed by soldiers captured by the Japanese during the war as well as by civilians against Japanese companies. During the war, thousands of American, British, Canadian, Australian and New Zealand prisoners of war were used as slave labor by Japanese companies, including Mitsubishi, Mitsui, Nippon Steel and Kawasaki Heavy Industries. Also used as slave labor were Chinese, Korean, Vietnamese and Filipino civilians.⁶²

To get around the length of time between injury and claim, the state of California enacted a law in July 1999⁶³ that permitted any action by a “prisoner-of-war of the Nazi regime, its allies or sympathizers” to “recover compensation for labor performed as a Second World War slave victim ... from any entity or successor in interest thereof, for whom that labor was performed”. The statute was enacted, when it seemed that the case against the German companies was not proceeding. It permitted such lawsuits to be filed until 2010.⁶⁴ The courts there were thus able to deal with these claims.⁶⁵ The claims by all former allied soldiers were dismissed in 2001, however, after the US government intervened in the case, on the basis that in terms of the 1951 Peace Treaty with Japan, the US and other Allied powers had relinquished all of their claims against Japan, including those against Japanese companies.

As far as the civilian claims were concerned, the court ruled later that as far as the Filipinos were concerned, they also were

excluded as the Philippines had also ratified the treaty. The court also dismissed the other claims and declared the California statute unconstitutional as it was held to be an encroachment on the powers of the federal government to perform foreign policy.⁶⁶

A number of other cases were also filed before the US courts. One case saw foreign civilians sue Japanese companies for having used them as slave labor, and another saw former comfort women sue. Both were dismissed in 2001 and are being appealed.

A case that goes further back in time is one which saw a number of descendants of Armenians (mostly US citizens), who died in the Armenian genocide that occurred around World War I, and who had purchased insurance policies from European and American insurance companies, sue the New York Life Insurance Company.⁶⁷

In *Marootian v. New York Life Insurance Company* it was argued that time barred the proceedings and that the policies had clauses stating that the French or English courts had jurisdiction in the event of litigation. Once again, California enacted a statute permitting suits relating to Armenian genocide-era policies and extended the time limit to 2010. This case was then settled. The lessons from the case are, nevertheless, important as the time limit for claims was shifted to almost 100 years ago. In addition, the beneficiaries were not those who had taken out the policies.⁶⁸

Recently tens of thousands of Russians who were forced into Nazi slave labor camps during World War II were able to share in a 427 million Euro payout. Almost 500,000 people applied to the foundation, while the relevant authorities had planned for just 57,000 claims.

Thus, it does seem as though there are possibilities for litigation for claims going back to the beginning of the twentieth century or possibly earlier.⁶⁹ This is a key issue as it is a potential obstacle for possible claims that relate to events during colonialism, as 1885 is an important point, marking the carving up of Africa by the various European powers. Although colonial occupation occurred before this time, it was the Berlin Conference of 1884-1885 that saw clarity as to which European country would occupy which part of Africa.⁷⁰ The General Act of the Berlin Conference on Africa in Chapter I noted: "All the powers exercising sovereign rights or influence

in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being and to help in suppressing slavery, and especially the Slave Trade”.

The issue of reparations or damages for slavery is much more difficult.⁷¹ Such an action would be for events that occurred much earlier, and also for individuals where there may not even be direct descent. These problems were seen to be critical when a 1995 case filed by African American plaintiffs was dismissed.⁷² The Ninth Circuit, affirming this, noted that the United States had sovereign immunity, the claims were too long ago and the plaintiffs themselves could not claim as they themselves were never slaves. The court stated: Discrimination and bigotry of any type is intolerable, and the enslavement of Africans by this country is inexcusable. This Court, however, is unable to identify legally any cognizable basis upon which plaintiff’s claims may proceed against the United States. While plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this Court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff’s grievances.⁷³

It is therefore clear that it cannot be the courts only where such claims ought to be brought for resolution. Clearly, many of these issues are political rather than legal. The courts are not the only avenue where these claims can be, and should be, pursued. It is at the political level, in the legislatures and in other fora (including the forum of national and international public opinion) that efforts can be made.

In this regard, there have been attempts, each year since 1989, to introduce legislation in the US Congress to deal with the legacy of slavery. The bill, H.R. 40 “The Commission to Study Reparations Proposals for African Americans Act”, seeks the establishment of “a commission to examine the institution of slavery, subsequent *de jure* and *de facto* racial and economic discrimination against African Americans, and the impact of these forces on living African Americans, to make recommendations to the Congress on appropriate remedies ...”.⁷⁴ Other efforts have also been made in various individual US states, and there has been an attempt in the US Congress to make an apology for slavery.

Using the courts as a means to obtain reparations or damages

Using the courts as a means to obtain damages or reparations for these types of claims is a relatively recent phenomenon. It mostly emerges out of the US *Filartiga* decision in 1980.⁷⁵ In fact, almost all of the relevant litigation has occurred in common law, rather than civil law, jurisdictions.⁷⁶ As one commentator has explained:

With the exception of one action brought in Quebec against a Canadian corporation registered in Montreal, all of the claims so far have been brought in common law jurisdictions. The established legal cultural links between Anglo-Saxon lawyers and procedural rules, such as those that determine what defendants have to disclose in litigation, may be contributory factors. But for the longer term it is not unlikely, as legal practitioners' understanding of the relevant principles of law evolves, that cases will emerge in the civil law systems of European Union (EU) member states such as the Netherlands or France.⁷⁷

However, by far and away the majority of these types of cases are being brought in the United States under the Aliens Torts Claims Act (ATCA).⁷⁸ As Beth Stephens explains: “Civil human rights litigation in the United States is the natural product of a legal culture that relies on private lawsuits both as a means to obtain compensation for injuries and also as a tool to address societal problems”.⁷⁹ Pointing out that the *Filartiga* decision⁸⁰ “has been called the *Brown v. Board of Education* of transnational law litigation, invoking the legacy of the great civil rights cases that dismantled legal segregation across the United States”,⁸¹ Stephens notes an “absence of core *Filartiga* cases” elsewhere.⁸² “Indeed”, Stephens writes, “despite a great deal of interest in the *Filartiga* doctrine in England, a British international law study group recently concluded that the likelihood of such litigation in Britain was slim”.⁸³ In an attempt to explain this phenomenon, Stephens offers a list of five factors that render US courts the most attractive arena for international human rights litigation. These include:

- no penalty for losing;
- contingency fees;

- punitive damages;
- default judgments; and
- broad discovery rules.⁸⁴

Stephens has also noted that the “the use of civil litigation as a means of impacting human rights policies is a natural development in the US legal system”.⁸⁵ The fact that the system of jury trials is advantageous to litigants in these types of cases should also be noted. The nature of the US legal system is thus a critical determinant as to why so many of these cases have been brought before the courts in that country. As Lord Denning observed: “As a moth is drawn to light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune”.⁸⁶

Using the courts in the United States of America to pursue perpetrators

While the United States has various laws⁸⁷ that permit victims of human rights abuses committed outside the US to be sued, it is the Alien Torts Claims Act that has been used the most.

This law was enacted in 1789 as part of the Judiciary Act and has since generated a considerable number of suits alleging violations of human rights committed in countries outside America by state and non-state agents. The key provision that has elicited increasing international attention stipulates that: “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”.

While there have been many successes since the 1980 case of *Filartiga v. Pena-Irala*⁸⁸ for claims in terms of the ATCA, Ramsey⁸⁹ provides a useful overview of some of the issues and critiques related to the application of the ATCA. Ramsey argues that “the sheer number of controversial points upon which corporate ATCA litigation rests may suggest that expansive application of ATCA liability is a project requiring much judicial sympathy for its success”.⁹⁰ While Ramsey does not suggest that this is a reason to reject ATCA litigation, he does advise caution in the area of expansive ATCA litigation, as there is a whole host of doctrines⁹¹ that permit judges to dismiss ATCA claims even if subject-matter and personal jurisdiction have been established.⁹² These include the international comity

doctrine, which is premised on respecting the legislative, executive or judicial acts of another nation,⁹³ as well as the doctrines relating to political questions, *forum non conveniens*⁹⁴ and acts of state, which prohibit US courts from reviewing the validity of the public acts of a recognized foreign sovereign that are carried out in the foreign territory.

However, the courts are not applying these doctrines strictly, as can be seen in *Kadic v. Karadzic*.⁹⁵ Here the court stated that while the act of state doctrine might be applicable to some cases brought under the ATCA, it doubted “that the acts of even a state official, taken in violation of a nation’s fundamental law and wholly unratified by that nation’s government, could properly be characterized as an act of state”.⁹⁶

This case also has relevance for the question of whether private actors could fall under the ATCA provisions. *Kadic v. Karadzic* expanded the scope of the Act by holding that acts committed by non-state actors also fell squarely within its ambit. The Court of Appeals observed that: “the law of nations as understood in the modern era does not confine its reach to state action. Instead, certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals”.⁹⁷ The court found that certain violations of the law of nations provided for by the Act, such as piracy, slave trade, slavery and forced labor, genocide, war crimes and other offences of ‘universal concern’, did not require state involvement. Thus, private actors could be held liable for such activities as well as other gross human rights violations.

In *Doe v. Unocal*,⁹⁸ a case involving farmers from Myanmar/Burma, suing the oil companies, Unocal and Total SA, operating in Burma/Myanmar, it was argued that these companies were engaged in a joint venture of gas exploitation with the military government of the country. To clear the way for a pipeline, the government had forcibly relocated villages, displaced local inhabitants from their homelands, and tortured and forced people to work on the project.⁹⁹ It was argued, therefore, that the corporations were liable for these violations since they funded the repressive regime and the project with full knowledge of the abuses, and derived benefit from them.¹⁰⁰ It was alleged that “in the course of its actions on behalf of a joint venture ... the regime carried out a program of violence and intimidation against area villagers”. It was further alleged

that “women and girls in the ... region have been targets of rape and other sexual abuse by regime officials, both when left behind after male family members have been taken away to perform forced labor and when they themselves have been subjected to forced labor”.¹⁰¹ In its decision in September 2002,¹⁰² the court declared that “forced labor is a modern variant of slavery to which the law of nations attributes individual liability such that state action is not required”. Making a finding on a question of material fact regarding Unocal’s liability under the ATCA for aiding and abetting the Burma/Myanmar military regime in subjecting plaintiffs to forced labor,¹⁰³ the 2002 Unocal decision reversed the earlier summary judgment previously won by Unocal, holding that “the standard for aiding and abetting under the ATCA is ... knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime”.¹⁰⁴

The court in *Iwanova v. Ford Motor Co.* examined circumstances where the company acted in close co-operation with Nazi officials in compelling civilians to perform forced labor. The court found that the fact that the company pursued its own economic interests did not preclude a determination that Ford Motor Co. acted as an agent of, or in concert with, the German government, and that no logical reason existed for not allowing private individuals and corporations to be sued for universally condemned violations of international law even if they were not acting “under color of law”.¹⁰⁵

In *Wiwa v. Royal Dutch Petroleum Co.*¹⁰⁶ the plaintiffs alleged that Royal Dutch Shell was complicit in acts of torture, arbitrary arrest, detention and killing in the Ogoni region of Nigeria. The plaintiffs claimed that they and their next of kin “were imprisoned, tortured and killed by the Nigerian government in violation of the law of nations at the instigation of [defendant Shell companies], in reprisal for their political opposition to the defendant’s oil exploration activities”. It was further claimed that Royal Dutch Shell “provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on villages, procured at least some of these attacks, participated in the fabrication of murder charges ..., bribed witnesses to give false testimony against them”.¹⁰⁷ The Second Circuit’s ruling in this case has had a major effect on the *forum non conveniens* principle, making it easier to bring an action based

on a foreign human rights violation despite the availability of an alternative forum.¹⁰⁸ The court's reasoning stresses the concern of the United States in supporting human rights abroad, and that this principle imposes a different standard of inconvenience on wealthy parties than on poorer ones.¹⁰⁹

In *Beanal v. Freeport-McMoran, Inc.*¹¹⁰ it was alleged that Freeport-McMoran committed human rights violations, environmental torts, genocide and cultural genocide while conducting mining activities in Indonesia. Plaintiffs alleged that Freeport companies: "systematically engaged in a corporate policy both directly and indirectly through third parties that has resulted in human rights violations against the Amungme tribe and other Indigenous tribal people. Said actions include extra-judicial killing, torture, surveillance and threats of death, severe physical pain and suffering by and through its security personnel employed in connection with its operation at the Grasberg mine". The case was dismissed, however, as the court found that there were insufficient facts concerning abuses to make out a cause of action.

Also relevant to possible claims in the US for events that occurred during colonialism and apartheid are issues in the Foreign Sovereign Immunities Act (FSIA). This Act contains the rules governing whether and how states can be sued. It is relevant as far as the present discussion is concerned in that there is one exception to an immunity given to a state or its officials: this is the commercial activity exception. The FSIA provides that sovereign immunity shall not be granted when "the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States".

The United States Supreme Court in *Saudi Arabia v. Nelson*¹¹¹ that a state conducts commercial activity within the definition of FSIA when it acts as though it is a private citizen in the marketplace; in this regard, it is important to look at the activity performed rather than its purpose.

The court in *Adler v. Federal Republic of Nigeria*,¹¹² however, considered the meaning of "in connection with a commercial activity", in contrast to the finding in *Saudi Arabia v. Nelson*, which looked at the issues by examining the phrase "commercial activity". Thus, states in Africa, for example, could sue where there is a connection to commercial activity.

However, it must have had a direct effect on the US. In some cases, for example slavery, this is clear; in others, it would be more difficult to establish.

From the above discussion of the various cases brought under the ATCA, it does seem that the US courts could be sympathetic to the types of claims that arise out of colonialism and apartheid.¹¹³

Time limits

A major issue for cases concerning human rights abuses committed during colonialism, as well as those committed during apartheid, is the time-line factor. This issue of the length of time between injury and claim is crucial, as often such procedural questions prevent a claim from getting past even the first hurdle.¹¹⁴

The ATCA has no inherent statute of limitations,¹¹⁵ but the Torture Victim Protection Act does. In this regard, the report of the US Senate that accompanied the Torture Victim Protection Act stated that: “A ten year statute of limitations insures that the Federal Courts will not have to hear stale claims. In some instances, such as where a defendant fraudulently conceals his or her identification or whereabouts from the claimant, equitable tolling remedies may apply to preserve a claimant’s rights.¹¹⁶ ... The ten-year statute is subject to equitable tolling, including for periods in which the defendant is absent from the jurisdiction or immune from lawsuits and for periods in which the plaintiff is imprisoned or incapacitated”.¹¹⁷

Under federal law, a cause of action, in terms of the time limit to bring such an action, starts running from the time the damage occurs.¹¹⁸ In *Bussineau v. President & Dirs. of Georgetown College*¹¹⁹ the court found that a “cause of action is said to accrue at the time injury occurs”. The court in *Xuncax v. Gramajo*¹²⁰ applied the TVPA period to an ATCA claim.

However, for years the courts have been willing to extend the time limit. In 1947 in *Osbourne v. United States*,¹²¹ the plaintiff had been interned by Japan during WWII and claimed that the statute of limitations did not apply because of “extraordinary circumstance that throughout the period when he ought to have brought suit the courts were unavailable to him as a prisoner in the hands of the enemy”. The court tolled

the limitation period for an injury that occurred immediately prior to his internment because these circumstances were sufficiently extraordinary. In this regard, the court held: “All statutes of limitations are based on the assumption that one with a good cause of action will not delay in bringing it for an unreasonable period of time; but, when a plaintiff has been denied access to the courts, the basis of the assumption has been destroyed”.¹²²

In 1987, the doctrine was extended in *Forti v. Suarez-Mason*. There the court held: “Federal courts have also applied a theory of equitable tolling similar to an ‘impossibility’ doctrine. Where extraordinary events which are beyond plaintiff’s control prevent a plaintiff from bringing his claim, the limitations period is tolled until the barrier caused by these events is removed”.¹²³

The court held that even though the Argentine courts were available, “as a practical matter” the military regime controlled those courts, making it impossible for those wanting to sue to get a fair trial. The court held that: “Equitable tolling occurs under federal law in two types of situations: (1) where defendant’s wrongful conduct prevented plaintiff from timely asserting his claim; or (2) where extraordinary circumstances outside plaintiff’s control make it impossible for plaintiff to timely assert his claim”.¹²⁴

In *National Coalition Government of Union of Burma v. Unocal, Inc.*¹²⁵ the court noted that, in applying the *Forti* test for equitable tolling, the court in *Hilao* concluded that fear of intimidation and reprisal were extraordinary circumstances outside the plaintiff’s control.¹²⁶ As such, claims against Marcos for injury from torture, disappearance or summary execution were tolled until he left office. This is a crucial ruling for apartheid and colonialism cases. The Court in *Unocal* applied the *Hilao* ruling to the facts of the case and held that: “Under federal law, equitable tolling is available where (1) defendant’s wrongful conduct prevented plaintiff from asserting the claim; or (2) extraordinary circumstances outside the plaintiff’s control made it impossible to timely assert the claim”. The court further noted that: “In fact, based on the Ninth Circuit’s decision in *Hilao* John Doe I’s claims may well be tolled as long as SLORC remains in power if he can show that he is unable to obtain access to judicial review in Burma”.¹²⁷ This may have major significance for future cases.

In *Iwanova v. Ford Motor Co*¹²⁸ the claims related to World War II forced labor. The plaintiff sued Ford in Germany and its American parent company, seeking compensation for forced labor in Ford's German manufacturing plant. As far as the period to sue was concerned with regard to the German claim, the court held that the limitation period was tolled until 1997 when the moratorium on claims (imposed in various post-war treaties) was finally lifted. This was not alleged with respect to the US Corporation. Thus, it was the treaties that prevented the bringing of claims rather than the fault of the defendant. The Court held that: "equitable tolling may be appropriate, *inter alia*, where the defendant has actively misled the plaintiff. To avoid dismissal, a complainant asserting equitable tolling must contain particularized allegations that the defendant 'actively misled' the plaintiff".¹²⁹

Although the plaintiff made claims of misrepresentation and concealment¹³⁰ in its brief and in oral argument, because these were not contained in the complaint the court denied the relief.¹³¹ A similar result occurred in *Fishel v. BASF Group*.¹³²

In *Sampson v. Federal Republic of Germany*¹³³ a suit lodged for damages for unlawful detention in a Nazi concentration camp was disqualified because of the length of time between the injury and the bringing of the suit. In *Kalmich v. Bruno*¹³⁴ a claim for the return of property confiscated by the Nazis was time barred.

In *Jane Doe I v. Karadic*¹³⁵ the court found that "the TVPA's limitations period is subject to equitable tolling, including for periods in which the defendant is absent from the jurisdiction or immune from lawsuits and for periods in which the plaintiff is imprisoned or incapacitated". In *Estate of Cabello v. Fernandez-Larios*¹³⁶ the court held that: "Equitable tolling of the TVPA is appropriate in this case because Chilean military authorities deliberately concealed the decedent's burial location from Plaintiffs, who were unable to view the decedent's body until 1990".

In *Cabello vs. Fernandez Larios*¹³⁷ the court held that: "the pre-1990 Chilean government's concealment of the decedent's burial location and the accurate cause of death prevented plaintiffs from bringing this action until 1990. Accordingly, the ten-year limitation period did not begin to accrue until 1990. Since plaintiffs brought this action within ten years, and Defendant has not presented the Court with any

compelling reason to alter its previous ruling that the limitation period commenced in 1990, the Court finds that the claims alleged in the Second Amended Complaint are not time barred”.

Thus, it seems that the time limit may not always be a definite bar to such claims. Plaintiffs will need to show specific circumstances that fit in with the above rulings to ensure that statutes of limitations do not act as obstacles to such cases.

Other jurisdictions

While the majority of cases of this nature have been brought in the US, there has been international human rights litigation in courts elsewhere. This has primarily been in England. Such cases have included:

- Cape plc:¹³⁸ arising from asbestos-related injuries suffered by South African victims during the 1960s and 1970s.
- RTZ:¹³⁹ arising from a Scottish worker’s case of laryngeal cancer contracted from working at defendant’s uranium mine in Namibia.
- Thor Chemical Holdings Ltd.¹⁴⁰ In response to government health and safety criticisms in England, Thor relocated its facility to Natal, South Africa, where it continued to operate with the same deficiencies that necessitated its departure from England, and did little to reduce the danger to workers. Thor became subject to the court’s jurisdiction by serving a defence, which precluded a *forum non conveniens* dismissal, and ended up settling for 1.3 million British pounds.¹⁴¹

The issues in these cases appear to revolve entirely around personal jurisdiction, choice of law and *forum non conveniens*, with the merits not being reached; hence, Stephens’ comment that non-US jurisdictions lack a “core Filartiga” case. The litigation that has occurred in Australia surrounding Broken Hill Proprietary¹⁴² indicates the same problem.

The Hereros of Namibia’s claim for reparations

One of the first cases to be fought on issues relating back to colonial days is the case filed in 2001 in Washington DC by

the Herero People's Reparations Corporation and the Herero tribe, through its Paramount Chief Riruako and other members of the Herero tribe. They¹⁴³ are suing Deutsche Bank, Terex Corporation¹⁴⁴ a.k.a. Orenstein-Koppel and Woermann Line, now known supposedly as Deutsche Afrika-Linien GmbH & Co.¹⁴⁵ While most see South Africa¹⁴⁶ as being responsible for many of the atrocities that have occurred in southern Africa, Namibia's colonial legacy under Germany includes one of the worst atrocities committed – the genocide of nearly 100,000 people at the beginning of the twentieth century. In June 2001 the Herero People's Reparation Corporation filed suit against the corporations for two billion dollars.¹⁴⁷ They accuse these companies, including Woermann Lines, of forming an alliance to exterminate more than 65,000 Hereros between 1904 and 1907.

The case revolves around a genocide committed at the beginning of the twentieth century in Namibia¹⁴⁸ when more than 65,000 Hereros were killed in pursuance of a shoot on sight policy in that country. This policy was announced on 2 October 1904 when General Lothar von Trotha decreed: "The Herero people will have to leave the country. Otherwise I shall force them to do so by means of guns. Within the German boundaries, every Herero, whether found armed or unarmed, with or without cattle, will be shot. I shall not accept any more women or children. I shall drive them back to their people – otherwise I shall order them to be shot. Signed: the Great General of the Mighty Kaiser, von Trotha".

Besides the 65,000 people who were killed, water wells were sealed and poisoned to prevent Herero access to water. Thousands were condemned to slavery¹⁴⁹ on German farms, and surviving Herero women were forced into becoming comfort women for the settlers. German geneticists came to the country to perform racial studies of supposed Herero inferiority. Von Trotha also established five concentration camps, in which the mortality rate was more than 45 per cent.

Von Trotha almost succeeded with the genocide. The Herero population was diminished by about 80 per cent to approximately 16,000 people, the majority in concentration camps. The court papers state: "Foreshadowing with chilling precision the irredeemable horror of the European Holocaust only decades later, the defendants and imperial Germany formed a German commercial enterprise which cold bloodedly

employed explicitly sanctioned extermination, the destruction of tribal culture and social organization, concentration camps, forced labour, medical experimentation and the exploitation of women and children in order to advance their common financial interests”.

Thus, the Hereros are suing Deutsche Bank as it is alleged that it was the principal financial and banking entity in German South West Africa. It is alleged that Disconto-Gesellschaft, which was acquired by Deutsche Bank in 1929, combined with Deutsche Bank, controlled virtually all financial and banking operations in German South West Africa from 1890 to 1915. The case asserts that these entities were major and controlling investors, shareholders in and directors of the largest mining and railway operations in German South West Africa during that time. It is further claimed that Deutsche Bank, itself and through Disconto-Gesellschaft, was a critical participant in German colonial enterprises and that Deutsche Bank is directly responsible for and committed crimes against humanity perpetrated against the Hereros. The Hereros are suing Deutsche Bank as they allege that the bank specifically financed the then government and companies linked with Germany’s colonial rule.¹⁵⁰

Terex was also sued, as it is alleged that it is the successor in interest to or merger partner of Orenstein-Koppel Co., the principal railway construction entity in German South West Africa from 1890 to 1915. The court papers state that Arthur Koppel, the principal of Orenstein-Koppel, was a powerful German executive; his business specialised in earth-moving technology and had contracts all over the world at the beginning of the twentieth century. It is alleged that Terex and its predecessors prospered over the 125 years of its existence through organising, participating in and taking advantage of a slave labour system. It is further alleged that they profited enormously from the system and were directly responsible for, and committed, crimes against humanity perpetrated against the Hereros.

The claimants later temporarily withdrew their legal claim for reparations against Terex, as the corporation claimed that it had been under different management at the time the atrocities were committed.¹⁵¹ However, the claimants did then file against the German government.¹⁵² In this regard, Chief Kuaima Riruako stated: “I am suing legitimate governments

and companies who happened to function in the colonial days ... We're equal to the Jews who were destroyed. The Germans paid for spilled Jewish blood. Compensate us, too. It's time to heal the wound".¹⁵³

Also being sued is Woermann Line as it alleged that they controlled virtually all of the shipping into and out of German South West Africa from 1890 to 1915. It is asserted in the plaintiff's claim that Woermann employed slave labor, ran its own concentration camp, was a critical participant in the German colonial enterprise and that "individually and as a member of that enterprise, Woermann is directly responsible for and committed crimes against humanity perpetrated against the Hereros".¹⁵⁴

It is alleged that the Otavi Mines and Railway Company (OMEG) was founded on April 6, 1900, with the legal status of a German Colonial Company whose purpose was the exploitation of copper deposits and the construction of a railway system. Deutsche Bank, it is alleged, was a member of the OMEG governing board from 1900 to 1938. The applicants aver that Disconto-Gesellschaft, one of Germany's largest banks by 1903, was a principal investor in OMEG and that the Woermann Shipping Line had, by 1900, established complete control of the shipping and harbor enterprises in South West Africa. All materials for the OMEG railway were shipped by, and through, Woermann who used the slave and forced labor of over 1,000 people to load and unload ships at Swakopmund.

The case has enormous relevance for a number of reasons. Firstly, it indicates how the German Holocaust was predated by an earlier genocide. Secondly, the case indicates how the courts can be used to pursue human rights violators even in another country. In this regard the Herero Chief has argued that: "We are taking our case to America because it's easier and fairer and we can get support from the public there. Jews could not take their case to Germany, what chance then do we have of succeeding [in Germany]?"¹⁵⁵

Thirdly, the case could be a precursor to a number of other cases where former colonial governments and commercial concerns, which benefited from the period of conquest and domination, are sued by the inhabitants of the territories then under their control. This is because the Hereros were not the only group to be the victims of colonial atrocities. For example, the Belgians under King Leopold II massacred thousands of

Congolese. The French are also guilty of such crimes, as are the British. As Sydney Haring has argued:

... it factually represents one of the best cases possible for opening the question of reparations for colonial oppression against the various imperial powers. The direct founding of this claim in the specific context of Germany's responsibility for reparations for Jewish victims of World War Two era genocide directly raises the question: how is colonial era genocide different from modern European genocide? In an impoverished Africa, it cannot be surprising that the indigenous people there cannot accept the legitimacy of two regimes of international law, one for Europeans, another for Africans. Because the Herero claim is narrow based on a particular – and well-documented – act of twentieth century genocide, in a particular colonial war, against a nation with a record of recidivism at genocide, it is an appropriate case for a reparations claim against Germany.¹⁵⁶

On a visit to Namibia at the beginning of March 1998, German President Roman Herzog said that too much time had passed for Germany to give any formal apology for slaughtering Hereros during colonial rule. Herzog said that German soldiers had acted “incorrectly” between 1904 and 1907 when about 65,000 members of the Herero group were killed for opposing colonialism. Herzog rejected the payment of compensation, stating that this was not possible as international rules for the protection of the civilian population were not in existence at the time of the conflict and no laws protected minority groups during the colonial period.¹⁵⁷ He also said that Germany had significantly assisted Namibia for many years and he pledged that Germany would live up to its special historical responsibility towards Namibia.¹⁵⁸ Germany has also stated that the issue of reparations would not be considered as Namibia was already receiving preferential financial support from Germany.¹⁵⁹

The Namibian Government has not supported the claim of the Hereros. Prime Minister Hage Geingob has said that the approach by Herero leaders to seek compensation only for Herero-speaking Namibians is wrong,¹⁶⁰ and that: “We [Government] are being condemned by the Chief for not taking action. But we cannot just say we want money for the Hereros. Not only the Hereros suffered the consequences of war. All

Namibians suffered and the best would be to help all Namibians by providing roads and schools".¹⁶¹

The Namibian Prime Minister said it was unfortunate that the issue of reparations had been politicized, and questioned why the issue of Herero reparations had not been brought before the Namibian Parliament. However, this has not happened because the Herero accuse the governing SWAPO party of diverting \$500 million in German aid to Ovambo voters.¹⁶² They therefore want Germany to establish a fund to allow Hereros to purchase land and cattle. Gottlob Mbaukawa, an opposition party Herero leader in Okahandja, has argued that: "What we are saying is that the Germans, because they only killed the Herero and no one else, must uplift us".¹⁶³

Eckhart Mueller, chairman of the German-Namibian Cultural Organization argues that: "Genocide is a relative term if you are involved in a war and you lose. I think they're taking a long shot to get some money. If not genocide, it will be something else. We must bury the past and look to the future".¹⁶⁴

Victims of apartheid claims

Human rights abuses abounded against South Africa's majority during apartheid. Many people were dispossessed of their land, had their language and culture marginalized, and suffered gross human rights violations.¹⁶⁵ The majority of South Africans were denied access to an enormous variety of amenities, institutions and opportunities, including many places and types of employment, particularly in state institutions. The South African state systematically violated the rights of black people and subjected them to socioeconomic deprivation.¹⁶⁶ Black South Africans were disenfranchised and many were forcibly removed from where they lived and deprived of their citizenship.¹⁶⁷ State employees, and others acting with state sanction and assistance, routinely carried out torture, assault and killings.¹⁶⁸ Many detentions¹⁶⁹ and deaths in custody occurred.¹⁷⁰ Freedom of expression and association were severely limited. As a consequence, in 1973 the UN declared apartheid a crime against humanity. While state action was a major cause of human rights abuses, other actors also contributed to these violations, including multinational corporations who either aided and abetted or benefited from

their relationship with the regime. It has been alleged that more than \$3 billion in profits were transferred out of apartheid South Africa by foreign banks and businesses each year between 1985 and 1993.¹⁷¹ In 1987, an investigation by the UN Commission on Human Rights into the responsibility of multinational corporations for the continued existence of apartheid concluded that “by their complicity, those transnational corporations must be considered accomplices in the crime of apartheid and must be prosecuted for their responsibility in the continuation of that crime”.¹⁷²

South Africa’s process to deal with the past internally has been its Truth and Reconciliation Commission (TRC), wherein victims could testify about abuses committed against them and those who perpetrated human rights abuses could apply for amnesty from criminal prosecution as well as civil liability.¹⁷³ In addition, the TRC held hearings into various sectors including the judiciary, the health sector and political parties. Hearings were also held on the role of business. However, until the two cases brought in the US, which will be discussed below, nothing occurred to pursue multinationals or other corporations who benefited from the system during those years. Reparations to victims have been discussed as an obligation of the state. While recognising that it is required to provide some compensation, the state has, however, not been quick in responding to the TRC’s recommendations about when and how much to pay the 21,000 people who have been deemed to be victims by the TRC.

As far as business is concerned, all that has happened in South Africa is that the TRC reported on the role of business and labour during apartheid. It found that a “vast body of evidence points to a central role for business interests in the elaboration, adoption, implementation and modification of apartheid policies throughout its dismal history”.¹⁷⁴ In reaching this conclusion, the TRC did not lump together, in either its reportage or analysis, all business involvement, but instead attempted to provide a more nuanced and structured – and perhaps, therefore, more credible – indictment¹⁷⁵ of business’ role during apartheid.¹⁷⁶ Accordingly, the TRC divided the culpability of business into three categories:

- First order involvement: “direct involvement with the state in the formulation of oppressive policies or practices

that resulted in low labor costs (or otherwise boosted profits)".¹⁷⁷

- Second order involvement: "knowing that their products or services would be used for morally unacceptable purposes".¹⁷⁸
- Third order involvement: "ordinary business activities that benefited indirectly by virtue of operating within the racially structured context of an apartheid society", but "taken to its logical conclusion, this argument would need to extend also to those businesses that bankrolled opposition parties and funded resistance movements against apartheid. Clearly not all businesses can be tarred with the same brush".¹⁷⁹

One commentator wrote of this categorization: "The TRC found the first two levels reprehensible *per se*... Yet its nuanced conclusions regarding other businesses reflected an appreciation of the extent to which apartheid clearly benefited them and of the complexity of business interactions with the government. In the end, while concluding that government and business 'co-operated in the building of an economy that benefited whites,' it rejected both a condemnation of all business people as collaborators as well as an exculpation of them for taming and helping end the system".¹⁸⁰

The role of the banks

The TRC Report appears to place banks (both foreign and domestic) in the second and third culpability categories.¹⁸¹ In discussing second-order involvement, the Report notes the example of banks that provided police with covert credit cards, finding that: "A bank that provides a covert credit card to the police to help them with, say, investigations into white-collar fraud, is in a different position to one which knowingly provides covert credit cards to death squads to help them lure their victims".¹⁸²

Nevertheless, the TRC Report found that "there was no obvious attempt on the part of the banking industry to investigate or stop the use being made of their facilities in an environment that was rife with gross human rights violations".¹⁸³ Moreover, the Council of South African Banks (COSAB) "acknowledged that being a bank 'inevitably' meant

doing business with a variety of bodies that were an integral part of the apartheid system".¹⁸⁴ However, the TRC Report did not draw its own conclusions (it quotes but does not clearly adopt the submissions of others) regarding the consequences of a bank's "doing business" with the apartheid regime.

Similar to the first apartheid case, discussed later, and most likely due to the same lack of information, the TRC Report did not attempt the extra step of analyzing any particular transaction or relationship between a bank and an apartheid institution to ascertain: (1) to what extent lending activities aided and abetted oppression; and (2) to what extent banks should have foreseen or known that lending activities would aid and abet oppression.

For example, the Report quoted COSAB's submission to the TRC, which stated that: "By the very nature of their business, banks were involved in every aspect of commerce during the apartheid years. Without them, government and the economy would have come to a standstill. But it would have been an 'all or nothing' decision. There could have been no halfway position. Either you are in the business of banking, or you are not. It does not lie in the mouth of a bank to say that it will accept the instruction of its client to pay one person but not another".¹⁸⁵

Therefore, although the TRC report acknowledged that while "banks were 'knowingly or unknowingly' involved in providing banking services and lending to the apartheid government and its agencies", it also noted that banks "were similarly involved in the movement of funds from overseas donors to organizations resisting apartheid".¹⁸⁶ This manner of allowing the murkiness of the picture to emerge, but without addressing it fully, is equally evident in the TRC's approach to the role of "business" generally.

The role of business

Although finding that the general involvement of business during apartheid spanned all three categories of culpability, the TRC report paid close attention to the dual role of business in (often simultaneously) helping and hindering apartheid. For example, the Report noted that: "[m]any business organisations were uncertain how to react to the economic crisis and political unrest. As COSAB put it: The business

community was caught between a recognition of the inevitability and desirability of significant political reform, and a range of developments which resulted in a great deal of instability and which were, quite simply, bad for business stakeholders”.

Their response to this acute dilemma was, on the one hand, to try to speed up the reform process and facilitate contact between the different political interests – both within and outside of South Africa – and on the other, to fight a rearguard action against the sanctions and disinvestment campaign, and the rising levels of violence, which threatened the economy and job creation.¹⁸⁷

While the Report chronicled efforts by business to accelerate reform – such as “visits by leading business representatives to the ANC in exile”¹⁸⁸ – it also emphasized “rearguard actions” such as business’ involvement with Joint Management Committees (JMCs), which formed part of the National Security Management System.¹⁸⁹ While making clear that the goal of the JMCs was “essentially to prolong white domination”,¹⁹⁰ the report also observed that: “Where [business’] participation resulted in the channeling of resources to townships, the moral issues are more opaque. While JMC-facilitated development in townships was certainly motivated by counter-revolutionary aims, there is an important difference between counter-revolutionary strategies based on providing infrastructure to people, and strategies based on torture and repression. Again, not all businesses played the same role in the process”.¹⁹¹

On the subject of sanctions, the report noted that business’ opposition to sanctions, in addition to arising from profit-driven self-interest, “also stemmed from a belief by some businesses that economic growth rather than the intensification of poverty promotes democracy”.¹⁹² Remarkably, the Report made little attempt to evaluate either this belief itself, how widespread and representative it truly was, or reasons why a self-interested actor might choose to embrace (or claim to embrace) it.

In the TRC’s defense, however, there were few corporations – particularly multinational corporations – that offered to make submissions to the TRC.¹⁹³ In addition, the fact that the TRC was not “in a position to impose – or eliminate – legal, let alone criminal, liability upon corporations”,¹⁹⁴ may have

influenced both its own hesitation to issue condemnations and, in the air of relative impunity, multinational corporations to see fit to ignore the proceedings.

As a result of these processes, two cases have been filed in the United States claiming damages for events during apartheid.

The first apartheid case

In June 2002 thousands of South African claimants filed a class-action suit against several multinational corporations¹⁹⁵ in the Southern District of New York under the Alien Torts Claims Act (ATCA).¹⁹⁶ By August, a lawsuit targeted the following companies as co-conspirators with the apartheid regime: Citigroup, Credit Suisse, UBS, Deutsche Bank, Dresdner Bank, CommerzBank, IBM, Amdahl Corporation, ICL Ltd., Burroughs, Sperry and Unisys (the parent company of Sperry and Burroughs).¹⁹⁷ According to their lawyers, the mining companies Anglo American and De Beers may be added to this list of defendants. In addition, the lawyers have written to over 27 banks and corporations proposing settlement talks.¹⁹⁸ Aside from potential defendants Anglo American and De Beers, the lawsuit does not target domestic businesses.¹⁹⁹

The complaint, originally lodged solely against Swiss and United States banks, contends that “for justice to be done, the financial institutions and companies that fuelled and made possible the apartheid regime’s reign of terror must account for their sins, crimes and profiteering, just as did the companies that fuelled and made possible the Nazi reign of terror”.²⁰⁰ The complaint seeks \$50 billion in damages,²⁰¹ asserting that but for the banks’ loans, the apartheid regime would not have survived as long as it did²⁰² and that the computer companies “knew full well that their equipment, technology and systems were used within the apartheid system in a manner that facilitated and encouraged the violation of human rights and the commissioning of atrocities against the majority of South Africa’s population”.²⁰³

The mining concerns are being targeted to include racist and exploitative labor practices during the apartheid era.

Ed Fagan, the US lawyer leading the case, sent out a press advisory highlighting a portion of the complaint that traces the German banks’ behavior to their Third Reich history.²⁰⁴ Fagan “has been variously described as a champion of lost causes

and an opportunistic show boater”.²⁰⁵ Responses to Fagan and the lawsuit have, not surprisingly, been mixed, with government unreservedly chilly, and news media somewhat less so, but probably not as supportive as Fagan had hoped.²⁰⁶

The second apartheid case

On 12 November 2002 the second case, *Khulumani et al. v. Barclays et al.*,²⁰⁷ was filed in the New York Eastern District Court against eight banks and 12 oil, transport, communications technology and armaments companies from Germany, Switzerland, Britain, the United States, Netherlands and France.²⁰⁸

It was filed on behalf of the Khulumani Support Group and 108 individual “victims of state-sanctioned torture, murder, rape, arbitrary detention, and inhumane treatment”. Jubilee South Africa stated that: “The corporations aided and abetted a crime against humanity whose persistent social damage requires urgent repair ... They made massive profits while the suffering of the victims of apartheid intensified. The banks and businesses have consistently ignored our attempts to engage in discussion about their role in supporting broad social programmes for the reconstruction and development of affected communities and in compensating specific individuals for the damage that the corporations made possible”.²⁰⁹

In their press statement, the plaintiffs averred that they had for four years been attempting, albeit unsuccessfully, to “get multinational banks and businesses that propped up the apartheid state to account for their odious profiteering”. The Khulumani Support Group noted that this case: “is the only route left open to us to ensure that the truth is known about the extent of corporate complicity in apartheid abuses and that justice is delivered to those who suffered. The victims cannot be left to pay for their own suffering. Multinational corporations must be put on notice that complicity in crimes against humanity does not pay”.²¹⁰

In its press release, the Apartheid Debt & Reparations Campaign said: “In this claim, we express our commitment to the future of apartheid’s victims, to the protection of human rights, and to the rule of law ... This suit has been filed after extensive international consideration of its legal and factual basis, and after thorough consultation amongst key

organizations. Further complaints of similar weight in regard to other aspects of apartheid crimes will be filed in coming months”.²¹¹

The US law firm representing the plaintiffs noted in their press release²¹² that the complaint:

... seeks to hold businesses responsible for aiding and abetting the apartheid regime in South Africa in furtherance of the commission of the crimes of apartheid, forced labor, genocide, extrajudicial killing, torture, sexual assault, and unlawful detention. The world community recognized apartheid itself as a crime against humanity and a violation of international law. Apartheid could not have been maintained in the same manner without the participation of the defendants ... The suit is based on common law principles of liability and on the Alien Torts Claims Act, 28 USC. 1350, which grants US courts jurisdiction over certain violations of international law, regardless of where they occur ... Recent historical evidence demonstrates that the involvement of companies in the key industries of mining, transportation, armaments, technology, oil, and financing were not only instrumental to the implementation of the furtherance of the abuses, but were so integrally connected to the abuses themselves that apartheid would probably not have occurred in the same way without their participation.

In South Africa, these two cases have been viewed somewhat contentiously. Former President FW de Klerk has come out against the cases, stating that he will advise the companies to fight the lawsuits. He has also stated these cases would raise false hopes of enrichment among poor South Africans.²¹³

As far as the South African government is concerned, it has stated that it will not support the claims against multinationals cited for having propped up apartheid. Minister of Justice and Constitutional Development, Penuell Maduna, has been quoted as saying that the Cabinet had taken a decision of ‘indifference’, neither supporting nor rejecting the lawsuits. He stated that: “We are not supporting the claims for individual reparations. We are talking to those very same companies named in the lawsuit about investing in post-apartheid SA. The focus is on getting those companies to keep investing in SA to benefit the entire population”.²¹⁴

The South African Minister of Finance, Trevor Manuel,

has stated that the lawsuits cannot solve the problems apartheid caused or account for them: “the enormity of the crime is apartheid itself. And for that there can’t be compensation individually ... This kind of adventurism, when you look for victims ... does not see apartheid itself as a serious violation of human rights, but looks for physical assault, and battery and torture and killings”.²¹⁵

Conclusion

The role of multinational corporations in the perpetration of human rights abuses during the colonial and apartheid eras was considerable. Their role is under greater scrutiny now than at any other time in history. Part of the reason for this is that more and more norms and standards are being developed relating to the conduct of companies in respect of human rights. As this happens, so the role played by corporations in the past is being examined in much finer detail. Another reason for the increased scrutiny and calling to account is the fact there has been a growth of accountability mechanisms at both international and domestic levels. As this scrutiny intensifies, still more attention is being focused on these questions and, as more information emerges, the possibilities for redress expand.

Recently, the reparations movement has been growing in leaps and bounds. On a number of fronts over the last few years, the likelihood of reparations for human rights abuses has become more of a reality. It is, therefore, possible that a solution to the thorny issues of reparations for violations committed a relatively long time ago might be achieved in the future. Developments relating to universal jurisdiction might also assist in this regard. At the domestic level, it is largely the US legal system that permits, or is useful for, foreign claimants seeking redress. However, it is possible that claimants may seek to use the courts in other countries to pursue violators. The time-limit question will be one of the major issues that may hinder these claims. The lessons of other cases, particularly those relating to the Holocaust, show that these types of claims are often successful not because a court makes a finding but because of the pressure placed on defendants who then wish to settle because of the adverse publicity attracted. This has not yet occurred with the claims relating to colonialism or apartheid, but these cases are still in their early stages. The

extent to which they are successful, either in the courtroom or because the defendants settle, will determine whether and how many other cases are filed.

However, these cases are not the panacea to the problems that the affected countries and individuals who live there face, as “virtually no judgments ... have been collected, and many defendants have chosen to flee the United States during the course of the litigation”.²¹⁶ Additionally, the courts are not yet sufficiently disposed towards such cases, and very few have been successfully concluded in the courts. Although it seems that the climate is improving, it will take time for the courts in the United States, or elsewhere, to become more sympathetic towards this type of litigation. It must also be borne in mind that:

Corporations, unlike the other defendants in ATCA lawsuits, have the motivation, money and experience to litigate fully all jurisdictional limits and advantages of corporate structure available to them to avoid a litigation on the merits. In order to circumvent or overcome such corporate defenses, plaintiffs suing MNCs are pushed in two different directions. On the one hand, plaintiffs have to target the behavior of the MNC as it directly led to the alleged human rights violations in the host State (requiring a focus on the MNC operations in and with the host State) because ATCA cases demand a higher than normal factual basis at the initial stages; on the other hand, plaintiffs must concentrate on the MNCs' activity at its corporate headquarters in order to facilitate the court's assertion of personal jurisdiction over the MNC defendant and to avoid impermissible intrusions upon the government of the host State and its relationship with the US. The synthesis of these opposing trends may make life difficult for some human rights litigators, but in the long run will serve to ensure that only meritorious cases, properly heard in the US, will proceed.²¹⁷

Because of these factors, which will stymie or limit such cases for some time to come, the political route for redress will become more important in the future. This will occur as the issues receive more international acceptance and more pressure is brought to bear by those who endured the brunt of colonial and apartheid human rights abuses.

NOTES

1. See generally T. de Pelsmaeker et al., 2002.
2. See generally J. Sarkin & W. Binchy (eds.), 2001.
3. See further J. Sarkin et al., 2001.
4. An example of pursuing a human rights abuser is the prosecution of the former President of Chad, Hissene Habre. See R. Brody, 2001; see also B. Crossette, 1999.
5. See further J. Sarkin, 1996; 1997; 1998; 1999a; 1999b; 1999c; 2000a; 2000b; 2001a; 2003.
6. Most countries in Africa, for example, went through a colonial period under the domination of countries such as France, Germany, Great Britain, Italy, Belgium and Portugal.
7. The concept of crimes against humanity is found in the Martens Clause of the 1899 Hague Convention II and the 1907 Hague Convention IV. The earlier version of the Martens Clause (Preamble, 1899 Hague Convention II) refers to "laws of humanity"; the later version (Additional Protocol I) refers to "principles of humanity". See E. Kwakwa, 1992, 36. The 1907 Convention states that: "Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience". An even earlier use of the term is found in the 1868 Saint Petersburg Declaration of an International Military Commission. This declaration limited during war the use of certain explosive or incendiary projectiles, because they were declared "contrary to the laws of humanity".
8. The Convention with Respect to the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land of 1899, are seen as "the first significant modern treaties on *jus in bello*". See S.R. Ratner & J.S. Abrams, 1997, 45. It is relevant only to some degree, because it is binding on the parties that are signatories to them. Where there was war between signatory parties there were provisions that demanded that prisoners of war were treated humanely, and these prisoners "shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them". Article 23 (c) prohibited the killing or wounding of enemies that are unable to defend themselves or have surrendered. Also relevant for future claims could be Convention (IV) in respect of the Laws

and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land of 1907.

9. The term "genocide" only received formal and legal recognition at the Nuremberg trials, although the Charter of the Tribunal did not expressly use the term. The term was coined in the 1940s by Raphael Lemkin. The Genocide Convention was only adopted by the UN General Assembly in 1948.

10. An example of this, which will be dealt with in much greater detail below, is the case of the genocide committed on the Hereros in Namibia at the beginning of the 20th century. The argument made by President Roman Hertzog of the Federal Republic of Germany, when visiting Namibia in 1998, was that no crime had been committed as no law existed then which proscribed such conduct.

11. The declaration of the World Conference against Racism held in 2001 recognized in article 158 "that these historical injustices have undeniably contributed to the poverty, underdevelopment, marginalization, social exclusion, economic disparities, instability and insecurity that affect many people in different parts of the world, in particular in developing countries. The Conference recognizes the need to develop programs for the social and economic development of these societies and the Diaspora, within the framework of a new partnership based on the spirit of solidarity and mutual respect, in the following areas: ... United Nations A, General Assembly Distr., General, A/ Conf. 189/ 24 September 2001, Original: English, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 31 August-8 September 2001. Adopted on September 8, 2001 in Durban, South Africa (Final version released on December 31, 2001).

12. For example, the legacy of the 1884-1885 Berlin conference, where the colonial powers of Europe met in Berlin to carve up Africa among themselves as colonies and dependencies, still has a major effect on the extent to which conflict racks the continent. See J. Sarkin, 2002. It is not surprising that, against the backdrop of these inexcusable and arbitrary colonial border placements and policies of rigid ethnic identity in a pervasive environment of underdevelopment, 20 of the 48 genocides and 'politicides' that occurred worldwide between 1945 and 1995 took place in Africa. See H. Solomon, 1999, 34. See further P. Brogan, 1992.

13. N. Kritz, 1998, xxvii.

14. See Universal Declaration of Human Rights Article 8; International Covenant on Civil and Political Rights Article 2(3) (a) and the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment Article 14 (1).

15. See the Chozrow Factory case, Publications of the Permanent Court of International Justice, Collection of Judgments, Series A, No. 9, 21; Series A, No. 17, 29 (June 27, 1928). This case was cited with approval in the

14 February 2002 judgment Democratic Republic of the Congo v. Belgium, where the court held 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".

16. An example is the finding of the Inter-American Court of Human Rights decisions in the Velásquez Rodríguez case. See Inter-American Court of Human Rights, Velásquez Rodríguez v. Honduras, Serie C, n. 7, Judgment of July 21, 1989 (Compensatory Damages), paragraph 71. See further C. Tomuschat, 2002.

17. See further K. Rendall, 1998; B. Brown, 2001; R. Brody, 2001; N. Roht-Arriaza, 2001; L. Sadat, 2001 and M. Scharf & T. Fischer, 2001.

18. See M.J. Bazyler, 2002.

19. Cases have also been filed in terms of the Torture Victims Protection Act of 1991. Act 12, 1992, P.L. 102-256, 106 Stat. 73. However, the court in *Beanal v. Freeport-McMoran, Inc.* held that because the TVPA used the term "individual", Congress did not intend to include corporations as defendants. 969 F. Supp. 362, 382, (E.D. La. 1997).

20. An example of the growth in the number and type of suits filed is one against Royal Dutch Petroleum Company and Shell Transport and Trading Company (Royal Dutch/Shell). In *Wiwa v. Royal Dutch Petroleum*, 96 Civ 8386 (S.D.N.Y., filed November 8, 1996) 226 F.3d 88 (2d Cir. 2000), Shell was charged with complicity in the November 10, 1995 hanging of Ken Saro-Wiwa and John Kpuinen, two of nine leaders of the Movement for the Survival of the Ogoni People (MOSOP), the torture and detention of Owens Wiwa, and the wounding of a woman, peacefully protesting the bulldozing of her crops in preparation for a Shell pipeline, who was shot by Nigerian troops called in by Shell. The case was brought under the ATCA and the Racketeer Influenced and Corrupt Organizations Act. Another case was brought against President Robert Mugabe of Zimbabwe. This case was, however, objected to by the US government, citing concerns that he might be entitled to diplomatic immunity. See "Zimbabwe president accused of orchestrating terror in United States suit", *CNN.com*, September 10, 2000. See further F.L. Kirgis, 2000.

21. M. Bossuyt & S. Van de Ginste, 2001.

22. See A.J. Sebok, 2001.

23. United Nations A, General Assembly Distr., General, A/ Conf. 189/ ... 24 September 2001, Original: English, World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Durban, 31 August-8 September 2001, Adopted on 8 September 2001 in Durban, South Africa (Final Version Released on December 31, 2001).

24. Just two examples of this are articles 13 and 14. Article 13 reads: "We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity and should always have been so, especially the transatlantic slave trade, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, Asians and people of Asian descent and indigenous peoples were victims of these acts and continue to be victims of their consequences". Article 14 reads: "We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented. We further regret that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today".

25. In the context of the Herero of Namibia's claim, Harring claims that the "Herero are aware that reparations regimes operant in the world today are political and not legal. But, these political actions have a common history of being moved by extensive legal posturing, creating a powerful moral climate supporting reparations, and shaping public opinion". S.L. Harring, 2002, 393, 410.

26. J.R. Paul, 2001.

27. S. Zia-Zarifi, 1999, 4, 81, 85. See further B. Frey, 1997.

28. See, for example, L. Fernandez, 1996.

29. See M. Penrose, 2000; A. Perez, 2000; C. Pierson, 2000; and A. Hasson, 2002.

30. There are obstacles that plaintiffs would have to surmount for a claim to succeed against a country. In the US, the Foreign Sovereign Immunities Act often operates to insulate state actors from liability. See further L. Saunders, 2001, 1402. The Supreme Court in *Argentine Republic v. Almerada Hess Shipping Corporation* held that the Act of 1976 established a general immunity of foreign states from suits before American courts. See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 US 428 (1989).

31. M. Ellinikos, 2001, 35.

32. J. Charney, 1983.
33. C. Forcese, 2002, 26, 487.
34. See the case of *Eastman Kodak Co. v. Kavlin*, where the plaintiff was involved in a contractual dispute with a Bolivian company and claimed a conspiracy on the part of the firm and the Bolivian authorities to imprison him. The District Court observed that "it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power". 978 F. Supp. 1078 (S.D. Fla. 1997).
35. A. Ramasastry, 2002b, 20, 91.
36. *Id.*, *ibid.*
37. The corporation, at times, could be seen to be an accomplice with the regime that actually carries out the abuses. In this regard, the International Criminal Tribunal for Yugoslavia has found that an accomplice is guilty if "his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. The court furthermore required that the defendant act with knowledge of the underlying act". Quoted in S.R. Ratner, 2001, 111, 443, 501.
38. A. Clapham & S. Jerbi, 2001, 339, 340 (quoting UNDHR preamble).
39. *Id.* The authors also note that although corporations are not bound by the UNDHR, a number of them are responding to the societal condemnation that arises from violating it by incorporating "an explicit commitment in their business principles" to upholding human rights.
40. L. Henkin, 1999, 25, 17, 25 (as quoted in B. Stephens, 2002, 20, 45).
41. *Barcelona Traction, Light and Power Co., Belgium v. Spain*, INT.GERI 3, paragraph 70 (1970).
42. S.R. Ratner, *op. cit.*, 492.
43. *Id.* at 493.
44. *Id.* at 494.
45. See generally *id.*
46. A. Ramasastry, 2002a, and 2002b.
47. S.R. Ratner, *op. cit.*, 493.
48. T. Van Boven, "Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms". UN GAOR 4th Comm., 45th Sess., Provisional Agenda

Item 4, paragraph 57, UN Doc. E/CN.4/Sub.2/1993/8 (1993).

49. See UN Commission on Human Rights document E/CN.4/2000/62 of 18 January 2000.

50. See further C. Tomuschat, 2002.

51. In the decision *Prosecutor v. Tadic* IT-94-1-A (July 15, 1999) the tribunal considered international principles for attributing actions of private actors to state actors. The Tribunal held that a State can be held responsible because of its request to a private individual to discharge tasks on its behalf. (Judgment of the Appeals Chamber, at paragraph 119).

52. K. Parker, 1994, 497, 502.

53. Another more recent example where the US government agreed to pay \$5,000 and issue an apology to 2,200 Latin-American Japanese who were removed from Latin America during WWII and held in internment camps in the US. This resulted from a settlement agreement arising out of the case *Mochizuki v. United States* No. 97-924C, 41 Fed. Cl. 54 (1998). See N.T. Saito, 1998.

54. 630 F.2d 876, 880 (2d Cir. 1980).

55. *Ibid.* at 890.

56. 9 Hum. Rts. L.J. 212 (1988).

57. See T. Yu, 1995; T. Tree, 2000, 466-68 and K. Park, 2000.

58. See M.J. Bazzyler, 2002.

59. *Id.*, *ibid.*

60. *Id.*, *ibid.*

61. *Id.*, *ibid.*

62. *Id.*, *ibid.*

63. See further R. Foos, 2000.

64. M.J. Bazzyler, *op. cit.*, 11.

65. *Id.*, *ibid.*

66. *Id.*, *ibid.*

67. See generally V.N. Dadrian, 1998.

68. M.J. Bazzyler, *op. cit.*, 11.

69. Even at that time questions relating to statutes of limitations were being asked. For example Oliver Wendell Holmes asked "What is the justification for

depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?". O.W. Holmes, Jr., 1897. This issue will be explored later in more detail.

- 70.** Attended the conference: Austria-Hungary, Germany, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, Turkey and the USA.
- 71.** It is a highly controversial issue. See R.W. Tracinski, 2002.
- 72.** *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).
- 73.** At 1105. Cited in A. A. Aiyetoro, 2002, 3, 133.
- 74.** *Id.*, 3, 133, 138.
- 75.** *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir 1980) where the court found that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus whenever an alleged torturer is found and served with process within United States borders, the ATCA provides jurisdiction". 630 F.2d 876, 880 (2d Cir. 1980).
- 76.** For an analysis of why non-US jurisdictions in general have seen so few civil international human rights claims, see B. Stephens, 2002, 27, 1.
- 77.** H. Ward, 2001, 27, 451, 454-55. For discussion of how Dutch courts might handle the jurisdictional remedies and choice of law issues if cases were brought involving harms suffered in foreign countries, see generally, A. Nollkaemper, 2000 and G. Betlem, 2000.
- 78.** J. Glaberson, 2001.
- 79.** B. Stephens, 2002b, 27, 1, 24.
- 80.** *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
- 81.** B. Stephens, *op. cit.*, 13.
- 82.** *Id.*, *ibid.*, 18.
- 83.** *Id.* Obviously the Pinochet process in the UK gives some impetus to the idea of pursuing human rights violators. See R. Brody, 1999. See also C. Nicholls, 2000.
- 84.** B. Stephens, *op. cit.*, 14-16.
- 85.** B. Stephens, 2001.
- 86.** *Smith Kline & French Labs v. Bloch*, 2 All E.R. 72, 74 (Eng. 1983).
- 87.** These include the Torture Victims Protection Act, the Foreign Sovereign Immunities Act (FSIA) and terrorism laws.

88. 630 F.2d 876, 880 (2d Cir. 1980).
89. D.M. Ramsey, 2001, 24, 361.
90. Id., *ibid.*, at 364.
91. These include *forum non conveniens*, international comity, act of state, and the political question doctrines.
92. See generally, E. Gruzen, 2001a e 2001b; and M.D. Ramsey, 2001, 24, 361.
93. *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d 424, 489-90 (D.N.J. 1999).
94. A.X. Fellmeth, 2002, 5, 241, 249.
95. 70 F.3d 232 (2d Cir. 1995). Here the plaintiffs were Croat and Muslim citizens of Bosnia-Herzegovina. They sued the leader of the other forces for having committed gross human rights violations such as genocide and war crimes. See also J. Lu, 1997, 35, 531.
96. At 350.
97. At 239.
98. *Doe v. Unocal Corp.*, 2002 US App. LEXIS 19263 (9th Cir. September 18, 2002) at 32-33.
99. See further J. Sarkin, 2001b.
100. See, e.g., *Doe v. Unocal*, 110 F. Supp. 2d at 1294, 1306-1307 (C.D. Cal. 2000); *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d. 424, 443 (D.N.J. 1999).
101. 963 F. Supp. 880, 885 (C.D. Cal. 1997).
102. *Doe v. Unocal Corp.*, 2002 US App. LEXIS 19263 (9th Cir. September 18, 2002) at 32-33.
103. See *id.* at 35-55.
104. *Id.* at 36.
105. *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d. 424, 445 (D.N.J. 1999).
106. 226 F. 3d 88, 93 (2d Cir. 2000).
107. See further A.X. Fellmeth, 2002, 5, 241.
108. *Id.*, *ibid.*
109. *Id.*, *ibid.*
110. 197 F. 3d 161 (5th Cir. 1999).
111. 507 US 349 (1993).
112. 107 F.3d 720 (9th Cir. 1997).

113. E. Schrage, 2002.

114. Very relevant to this issue internationally is the fact that the General Assembly, in 1968, adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. See further M. Lippman, 1998. The first sentence of Article 1 states that “no statutory limitation shall apply to the following crimes, irrespective of the date of their commission” following the definitions of war crimes and crimes against humanity. However, Article 2 reads: “If any of the crimes mentioned in Article 1 is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals ...” The key word is “is”. Does this mean that the convention only applies prospectively?

115. In *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d at 433-34 the Court found that the Torture Victim Protection Act of 1991, 28 USC 1350, which has a 10-year statute of limitations, was the most comparable statute to the ATCA. See *Iwanova* at 462.

116. US Senate report S. Rep. No. 249, 102d Cong., 1st Sess., (1991) 5.

117. US Senate report S. Rep. No. 249, 102d Cong., 1st Sess., (1991) 11.

118. In *Forti*, at 1549 the court held: “Although the limitations period of a claim under the Alien Tort Statute is governed by state law, because the claim itself is a federal claim, federal equitable tolling doctrines apply”.

119. 518 A. 2d 423, 425 (DC App. 1986).

120. 886 F. Supp. 162, 191 (D. Mass. 1995).

121. 164 F. 2d 767 (2d Cir. 1947).

122. At 769. This statement is reproduced in *Forti* at 1550.

123. At 1550.

124. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987).

125. 176 F.R.D. 329, (C.D. Cal. 1997).

126. Citing the Ninth Circuit’s ruling in *Hilao v. Estate of Marcos* 103 F. 3d 767 at 772.

127. At 360.

128. 67 F. Supp. 2d 424, 462 (D.N.J. 1999).

129. At 467.

130. See also *Pollack v. Siemens AG*, No. 98CV-5499 (E.D.N.Y.) filed Aug. 30 1998. The *Pollack* complaint alleged significant concealment on the part of the defendant corporations and that important documents were made public only in

the mid-1990s. See J. Roy, 1999. The issue of concealment is also seen to be important; Bilenker, for example, argues that for the claims against banks for World War II acts "the court could apply the 'fraudulent concealment' doctrine to the banks' situation if it finds evidence that the banks in fact concealed essential information from plaintiffs regarding the status of their accounts and the deposits of looted assets". See S.A. Bilenker, 1997, 21, 251.

131. See: M.J. Bazylar, 2000.

132. Civ. No. 4-96-CV-10449, 1998 US Dist. LEXIS 21230, at 30-31 (S.D. Iowa, Mar. 11, 1998).

133. 975 F. Supp. 1108, 1122 (N.D. III. 1997) aff'd, 250 F.3d 1145 (7th Cir. 2001).

134. 450 F. Supp. 227, 229-30 (N.D. III. 1978).

135. No. 93 Civ. 0878 (PKL), 2000 WL 76861, 1 nr. 3 (S.D.N.Y. Jun. 13, 2000).

136. 157 F. Supp. 2d 1345, 1368 (S.D.Fla., 2001).

137. 205 F. Supp. 2d 1325; (S.D. FLA 2002) 2002 US Dist. LEXIS 10323; 15 Fla. L. Weekly Fed. D 336.

138. See *Lubbe v. Cape plc*, [1999] Int'l Litigation Procedure 113, CA.

139. See *Connelly v. RTZ Corp. plc*, [1996] 2 WLR 251; [1997] 3 WLR 373.

140. See *Ngcobo and others v. Thor Chemical Holdings Ltd. and another*, [1995] TLR 579; *Sithole and others v. Thor Chemical Holdings Ltd. and another*, [1999] TLR 110.

141. For further discussion, see R. Meeran, 1999 and 2000.

142. See *Dagi v. Broken Hill Proprietary Co. Ltd.*, (No. 2) [1997] 1 VR 428.

143. The Herero People's Reparation Corporation, the Herero tribe by and through its Paramount Chief Kuaima Riruako, 199 individuals and the Chief Hosea Kutako Foundation filed in the Superior Court of the District of Columbia a case captioned *The Herero People's Reparation Corporation, et al. v. Deutsche Bank AG, et al.*, 01 CA 4447.

144. The Terex claim was later dropped, at least temporarily. See UN Integrated Regional Information Network, 21 Sep. 2001.

145. Various strategies have been attempted to claim reparations for the atrocities committed against the Herero. Speaking at the commemoration of Herero Day at Okahandja in 1999, Chief Riruako stated: "On the threshold of the new millennium the Hereros, as a nation, have decided to take Germany to the International Court for a decision regarding reparations. We also warn the Namibian Government not to stand in our way as we explore this avenue to

justice". Each year in August, the Hereros come together in memory of their fallen heroes who died during the 1904-1907 Herero-German war. See C. Maletsky, 1999.

146. South Africa has also been called on to provide reparations to the Hereros. Herero paramount chief Kuaima Riruako has called on the Namibian government to institute a legal suit, similar to the one of the Hereros against the German government, against their South African counterparts. He has stated that: I'm not quite happy (with the state of affairs against SA). We suffered a lot (at the hands of SA) and we can't let them off the hook. The South Africans responded that it will not pay reparations and compensation to the Herero people in Namibia. Foreign affairs spokesman Ronnie Mamoepa stated that the current South African government was composed of former victims of colonization and apartheid and can you ask for reparation or compensation from the same victims who suffered under those regimes? See C. Maletsky & T. Mokopanele, 2001.

147. On September 19, 2001, plaintiffs filed a similar claim against the Federal Republic of German, see *The Herero Peoples' Reparation Corporation, et al. v. Federal Republic of Germany*, 1:01CV01987CKK.

148. Chief Riruako has expressed dismay at the Namibian government's lack of interest in the Herero case stating that: "For the (Namibian) government or any one to say, 'I'm not part of it' ... must be nuts", he said. See C. Maletsky & T. Mokopanele, 2001.

149. It is interesting to note that the Special Rapporteur to the UN Sub-Commission in 1993, Theo Van Boven notes: "it would be difficult and complex to construe and uphold a legal duty to pay compensation to the descendants of the victims of the slave trade and other early forms of slavery". (E/CN.4/Sub.2/1993/8). He refers to a report of the UN Secretary-General on the Right to Development (E/CN.4/1334) who notes, with regard to "moral duty of reparation to make up for past exploitation by the colonial powers", that "acceptance of such a moral duty is by no means universal".

150. F. Bridgland, 2001.

151. C. Maletsky, 2001.

152. On September 19, 2001, plaintiffs filed against the Federal Republic of Germany. See *The Herero Peoples' Reparation Corporation, et al. v. Federal Republic of Germany*, 1:01CV01987CKK. See also C. Maletsky & T. Mokopanele, 2001.

153. F. Bridgland, 2001.

154. Herero complaint.

155. *The Independent* – London, 9 September 2001.
156. S.L. Harring, 2002, 393, 414-5.
157. C. Maletsky, 2001.
158. "Reparations not on the Table", in *The Namibian*, August 31, 2000.
159. Comments of the spokesperson for the Southern African Development Community (SADC) in the German Parliament, Hans Buttner, during a meeting with Prime Minister Hage Geingob in Windhoek reported in "Reparations not on the Table", in *The Namibian*, August 31, 2000.
160. "Reparations not on the Table", in *The Namibian*, August 31, 2000.
161. *Idem*.
162. T. Bensman, 1999.
163. *Id.*, *ibid*.
164. *Id.*, *ibid*.
165. See J. Sarkin, 1998.
166. J. Sarkin, 1993.
167. See D.D. Mokgatle, 1987.
168. See H. Varney & J. Sarkin, 1996.
169. See J. Sarkin, 1993, 209, 271.
170. M. Coleman (ed.), *A Crime against Humanity: Analysing the Repression of the Apartheid State*, 1998.
171. Calling Apartheid's Profiteers to Account – Njongonkulu Ndungane, Anglican Archbishop of Cape Town Action for Southern Africa <http://www.actsa.org/News/Features/011002_Reparations.htm>. Last access on April, 19, 2004.
172. *Id.*, *ibid*.
173. See further J. Sarkin, 1996; 1997; 1998; and 2003.
174. Final Report of the Truth and Reconciliation Commission, v. 4, ch. 2, Institutional hearing "Business and Labor" (TRC Report on Business and Labour), paragraph 21.
175. I use the term "indictment" with full knowledge that this was exactly not what the TRC report was intended to be. Nevertheless, the term does not seem altogether inappropriate given that (1) Ntsebeza, who was a TRC commissioner who helped draft the report, is now leading the lawsuit that is in part based on the TRC's findings; and (2) Terry Bell, who provided research for the TRC and

subsequently wrote *Unfinished Business: South Africa Apartheid & Truth*, *infra*, with Ntsebeza, is also involved with the lawsuit.

176. See, e.g., *id.* at paragraph 49 (“Business was not a monolithic block and it can be argued that no single relationship existed between business and apartheid”).

177. TRC Report on Business and Labor at paragraph 23.

178. *Id.* at paragraph 28.

179. *Id.* at paragraph 32.

180. S.R. Ratner, 2001, 111, 443, 503.

181. Although brief mention of banks is made in the Report’s discussion of first-order involvement, the Report shies away from ascribing principal liability to banks. Instead, the Report records without concurring in the view of The Apartheid Debt Coordinating Committee, that “even the seemingly most pristine ... trade loans were tainted by apartheid. The simple fact of trade with South Africa inescapably meant helping to sustain and reproduce ... apartheid. No loan could avoid this institutional contamination”. TRC Report on Business and Labor at paragraph 25.

182. *Id.* at paragraph 28.

183. *Id.* at paragraph 31.

184. *Id.* at paragraph 29.

185. *Id.* at paragraph 35.

186. *Id.* at paragraph 30.

187. *Id.* at paragraph 118.

188. *Id.* at paragraph 119.

189. *Id.* at paragraph 120. It is unclear whether or not MNCs participated in such JMCs with the apartheid regime.

190. *Id.*, *ibid.*

191. *Id.* at paragraph 122.

192. *Id.* at paragraph 123.

193. See e.g. *id.* at paragraph 5 (reporting that multinational oil corporations (which were the largest foreign investors in South Africa) did not respond to the invitation to participate); and paragraph 131 (“The failure of multinational corporations to make submissions at the hearing was greatly regretted in view of their prominent role in South Africa’s economic development under

apartheid. It was left to the AAM Archives Committee to explain the role of foreign firms in South Africa.”).

194. Ratner, 2001, 503.

195. C. Terreblanche, 2002a.

196. A. Ramasastry, 2002.

197. J. Lauria, 2002.

198. B. Boyle, 2002.

199. See *Weekly Mail and Guardian*, July 25, 2002.

200. N. Deane, “South Africans take on the giants”, in *Weekly Mail and Guardian*, June 27, 2002. The article appears to be quoting the complaint.

201. “More join apartheid victims’ suit” in *Star*, June 24, 2002. A letter Fagan sent to the chief executive of Barclay’s Bank in London employs a strikingly less hyperbolic approach: “We hope to enter into a dialogue with you and others and through which we can find a meaningful way that can address both objectively and proportionately the nature and extent of your company’s involvement in South Africa during apartheid and what your company has done to help redress the wrongs that were committed. Entering into this dialogue would be taken as an expression of your company’s desire to work together to find a resolution for the benefit of victims of apartheid”. D. Carew, 2002.

202. See Ntzebesa, Mequbela, Molefi, Mpendulo et al. v. Citigroup Inc., UBS A.G., Credit Suisse Group et al. Affidavit in Support of Motion for Preservation of Evidence at 5-6.

203. C. Terreblanche, 2002b. See also Affidavit at 5-6. In his book, Terry Bell notes how “greater reliance on computer technology was seen as one of the ways of making more efficient the maintenance of the apartheid system”, and why “Botha and his generals ... saw more centralized and efficient information processing as the key”. As Bell explains, and as noted earlier, “close, collaborative ties with international business and the links through South African corporations, were not explored much locally and not at all by the TRC”. Touching on the role of companies such as IBM, Bell writes: “The whole racial classification system, from ‘influx control’ for blacks to the ‘books of life’ for other categories, had been maintained since the 1950s, by electronic hardware and software provided by companies such as Britain’s ICL, IBM of the United States and the Burroughs Corporation. The shortage of military personnel in the 1970s had partially been overcome by the use of computers supplied by ‘Big Blue’, the IBM Corporation. By the time of the bloody decade of the Eighties, South Africa had become the biggest spender in terms of percentage of national wealth (GDP) on computers after the US and Britain”.

In addition, Bell draws the connection between the information infrastructure provided by foreign corporations, and the functioning of the Civil Co-operation Bureau, "the military's full-time murder and terror squad".

204. See "Press Advisory", July 1, 2002, p. 2.

205. Sapa-AFP, "Justice with a hefty price tag" in *Cape Argus*, June 27, 2002.

206. See, e.g. "Govt wise to shun compensation suit" in *The Herald* (EP Herald), June 25, 2002; A. Dasnois, "Fagan's Campaign is unlikely to enrich citizens" in *Star*, July 22, 2002 ("There is a danger that Fagan's campaign will serve his own ends more than those of justice").

207. The Khulumani Support Group is a coalition partner organization in Jubilee SA Khulumani is an organization of about 32,000 victims of gross apartheid human rights violations.

208. From the United States of America (USA) – Citigroup, J.P. Morgan Chase (Chase Manhattan), Caltex Petroleum Corporation, Exxon Mobil Corporation, Fluor Corporation, Ford Motor Corporation, General Motors, International Business Machines (IBM); from the United Kingdom (UK) – Barclays National Bank, British Petroleum P.L.C.; Fujitsu ICL. (previously International Computers Limited); from the Federal Republic of Germany – Commerzbank, Deutsche Bank, Dresdner Bank, Daimler Chrysler, Rheinmetall; from Switzerland – Credit Suisse Group, UBS; from France – Total-Fina-Elf; from The Netherlands – Royal Dutch Shell.

209. Press Release by the Apartheid Debt & Reparations Campaign – Tuesday, 12 November 2002.

210. Press Release Khulumani Support Group 12 November 2002.

211. Press Release Apartheid Debt & Reparations Campaign 12 November 2002.

212. Press Statement by Cohen, Milstein, Hausfeld & Toll – November 12, 2002.

213. "Manuel doubts value of apartheid lawsuits". *SABC News*, November 26, 2002.

214. id., ibid. .

215. id., ibid.

216. S.R. Ratner & J.S. Abrams, 1997, 211.

217. S. Zia-Zarifi, 1999, 4, 81, 120-1.

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