# DEALING WITH ORGANISATIONS AND CORPORATIONS

Cedric Ryngaert

## INTRODUCTION

While it may be common knowledge that historical injustices are perpetrated by repressive governments, accepting this would require one to overlook the role that private organisations and corporations may play in those injustices. Although it is true that governments normally are the principal perpetrators of historical injustices, it is no less true that governments are in need of practical support to carry out their plans, support that is often provided by willing organisations and corporations (e.g., financing, supply of chemicals and weapons, building of infrastructure, exploitation of natural resources, etc.). These organised private actors do not commit historical injustices entirely on their own, but tend to conspire with, or assist, governments in committing the wrongs. The question then arises as to what acts can precisely engage these actors' legal responsibility (liability), and how can they be held accountable.

The role of private organisations and corporations in committing, or contributing to, historical wrongs has not been widely documented, since accountability for historical injustices has so far mainly, and even almost exclusively, focused on states and individual actors as principal perpetrators. The corporate social responsibility movement has admittedly drawn more attention to the role of corporations recently, but the step from mere allegations and moral repudiation to legal liability, which forms the basis for remedies in courts, has not fully been made. Often, evidence regarding the exact participation of the corporation in the governmental criminal enterprise is lacking. But more fundamentally, liability and complicity standards currently appear to be too undetermined to buttress a viable case in court. Does it suffice for the private entity to have simple *knowledge* of the crimes (about to be) committed by the government which they assist for that entity to be held liable, or is *intent* on the part of the entity required (in the sense of the entity specifically *intending* the criminal consequences to take place)?

This chapter aims to discuss he corporate complicity standards that civil and criminal courts have grappled with since World War II. The contribution

will mainly analyse relevant court cases arising under the US Alien Tort Claims Act (ATCA) – which allows claims against corporations for violations of 'the law of nations' – and cases brought against Nazi industrialists before Allied war crimes tribunals in post-war Germany. Almost no corporate cases related to historical injustices have been brought in other jurisdictions, often because of an inhospitable political or procedural environment. The very state where the injustices have been committed may well be the least hospitable forum, since its authorities will typically be the principal perpetrators. This explains why third state courts – often heavily lobbied by victims' and rights groups – have filled the accountability vacuum left by the territorial state.

## DEFINITIONAL FRAMEWORK AND HISTORICAL EVOLUTION

Over the last few years, many calls have been made for increased social and legal responsibility of corporations. These calls are often inspired by the perceived lack of respect for labour and environmental standards exhibited by multinational corporations operating in developing countries or weak-governance zones. But violations of such standards sometimes amount to historical injustices that include international crimes targeted against entire groups.

As already noted, these injustices are ordinarily committed by government actors. It is not excluded, however, that private corporations provide services to the government which may amount to participation in the government's criminal scheme and hence to complicity in the crime. Sometimes, the private corporation may even directly commit an international crime (e.g., a private military company contracted by a government fighting a war bombs an undefended village indiscriminately; this act would be characterised as a war crime). This chapter, however, only focuses on the complicity of corporations in international crimes committed by a government (state), and examines under what conditions corporations can be held to account in a court of law.

It is noted that the commission of abuses by corporations and their complicity in the commission of abuses, is not a new phenomenon. For instance, in the seventeenth and eighteenth centuries the Dutch East India Company, a private trading company which had a monopoly on the trade between Asia and Holland, used and abused its right to represent the Dutch government in Asia and to wage war, not only by fighting off the Spaniards and the Portuguese, but also by escalating conflicts on Java and the Moluccans, islands forming part of Dutch East India (Indonesia), in the course of which many (what we now consider as) human rights abuses were committed.

Large corporations as we know them today only gained ascendancy on a wider scale after the industrial revolution, and notably in the late nineteenth century. These corporations were privately organised and functioned at arm's

length from the state. But because quite a few large corporations were (and still are) major suppliers of the government, they often developed a symbiotic relationship with the state. This relationship was not always innocuous, especially in times of war. And war was *the* scourge of the twentieth century, leading to many – what we call in this contribution – 'historical injustices'. And just as legal avenues were explored to hold government perpetrators of historical injustices accountable after World War II, so were such avenues to put on trial businessmen and corporations, although the latter process was embarked on more reluctantly.

## THE NUREMBERG PARADIGM OF HOLDING INDUSTRIALISTS TO ACCOUNT

The role of leading industrialists in Nazi Germany's war effort, including the financing, building and running of concentration and death camps, during World War II, for instance, is well-documented. However, in the reckoning after the war, at the Nuremberg trials, where many leading Nazis were held to account, German corporations were not targeted as such. The International Military Tribunal (IMT) at Nuremberg famously held in this respect that '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[1] This statement was in accordance with Article 9 of the IMT's Statute (the London Charter), which provided that the tribunal could in fact only go as far as *declaring* an organisation criminal (e.g., the Leadership Corps of the Nazi Party, the Gestapo, the SD, and the SS), without convicting it, while holding the individual *members* of the organisation to account. In the jurisprudence of the IMT and of the follow-up US trials under Control Council No. 10, one will indeed look in vain for convictions of organisations or corporations. In the 'IG Farben' case, for instance, only the directors of the IG Farben company – as opposed to the company itself – were charged, and a number of them convicted for the use of slave labour at an industrial plant in the vicinity of the Auschwitz extermination camp.[2]

The Nuremberg approach of refraining from criminalising corporate misbehaviour was replicated at the Rome conference leading to the establishment of the International Criminal Court in 1998. Pursuant to Article 25 of the Statute of the Court, the Court only has jurisdiction over *natural* persons.[3] It is noted,

1 The Nuremberg Trial, 6 F.R.D. 69, 110 (1946), 1 *Trial of the Major War Criminals* 223 (William S. Hein & Co., Inc. 1995) (1947).

2 United States v. Krauch ('The IG Farben Case'), 7 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 14 (1952).

3 This is in line with an earlier study of the ILC's Committee on International Legal Jurisdiction regarding a draft statute for an International Criminal Court. This committee stated that 'it was undesirable to include so novel a principle as corporate criminal responsibility in the draft statute'. UN GAOR, 9th Sess., Supp. No. 12, UN Doc. A/2645, para. 85 (1954).

though, that while the corporation itself cannot be prosecuted under this Article, the *directors* of the corporation surely can, in line with the IG Farben scenario. If those who actually pulled the strings can be prosecuted, it is unclear whether there is really a need to prosecute the corporation itself. Judge Erik Møse of the International Criminal Tribunal for Rwanda has stated in this respect, in relation to the Rwandese 'hate radio' RTLM, that, while it 'may be desirable to attach a particular stigma to such corporations' by prosecuting corporations themselves instead of the directors, 'the ICTR has managed reasonably well without such provisions in its Statute'.[4] In the remainder of this chapter, and especially in the section on complicity, we will not exclusively focus on the participation of corporations (legal persons) in a governmental criminal enterprise, but also on the role of industrialists (natural persons) in this respect.

## CIVIL SUITS AGAINST CORPORATIONS INVOLVED IN COMMITTING HISTORICAL INJUSTICES. THE US ALIEN TORT STATUTE

The reluctance to criminally prosecute corporations for historical injustices under international law may, at least partly, be explained by the fact that not all legal systems provide for corporate *criminal* liability.[5] However, most, if not all, legal systems provide for corporate *civil* or *tort* liability. And it is uncontroversial that, technically speaking, historical injustices may be considered as wrongful acts for which the victim may initiate a claim for compensation. As an International *Civil* Court does not yet exist as we write, such claims against corporations can only be filed in domestic courts. Since the 1990s, the US legal system has become the forum of predilection for victims of historical injustices seeking reparations, for a variety of reasons that the author has described elsewhere.[6] Most, but not all, of these claims are based on the so-called Alien Tort Claims Act or 'Alien Tort Statute', by virtue of which foreign victims of 'violations of the law of nations' can file a civil claim in US federal courts. Victims have gratefully used this provision to file claims against multinationals (both US- and foreign-based) in US courts. Victims typically allege the complicity of the multinational in gross human rights violations committed by repressive foreign governments, and point out the corporation's investments made in the state where the violations occurred, and its murky links with the government and the latter's wrongful activities.

4 E. Møse, in discussion on corporate criminal liability, in: *Journal of International Criminal Justice*, 6 (2008) 947–979, 974.

5 See e.g.: A. Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', in: *Journal of International Criminal Justice*, 6 (2008) 899–926, 899, 902.

6 C. Ryngaert, 'Universal Tort Jurisdiction over Gross Human Rights Violations under International Law', in: *Netherlands Yearbook of International Law*, 38 (2007) 3–60, The Hague: T.M.C. Asser Press.

So far, no judgment on the merits has been handed down, although the courts have rendered a number of ground-breaking judgments on matters regarding jurisdiction, procedure, and liability.

Many well-known multinational corporations have been targeted under the ATCA by victims and their representatives. The claims relate to the great wrongs of humanity's recent history, such as the Apartheid in South Africa between 1948 and 1994,[7] the use of slave labour from the Herero tribe in German-controlled South West Africa (Namibia) between 1890 and 1915, the US army's use of the defoliant 'Agent Orange' during the Vietnam War between 1961 and 1971,[8] and Israel's demolition of homes in the Occupied Palestinian Territories.[9] But they also relate to lesser known abuses perpetrated by repressive governments teaming up with corporations to develop the oil, gas and mining industry, e.g., in the Nigerian Delta (Shell), Sudan (Talisman Energy),[10] and Myanmar/Burma (Unocal).[11]

## CORPORATE COMPLICITY

Several legal issues arise in ATCA-style civil suits against corporations. Was the alleged abuse a violation of the law of nations (international law)?[12] Is the case justiciable in the US in light of the doctrine of forum non conveniens (pursuant to which US courts only step in when the courts of the place where the wrong occurred are not available)? Can corporations commit violations of international law in the first place? What is the applicable legal standard for complicity in the commission of the violation? It is this last question which we will deal with now.[13]

As already mentioned, corporations are typically targeted under the ATCA not as the principal offenders of a grave injustice, but as accomplices in the commission of such an injustice by a government with which they have links.[14]

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7 Khulumani v. Barclay National Bank, Ltd; Ntsebeza v. Daimler Chrysler Corp., 504 F.3d 254 (2nd Cir. 2007).

8 In Re 'Agent Orange' Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

9 Corrie v. Caterpillar, 503 F.2d 974 (9th Cir. 2007).

10 The Presbyterian Church of Sudan v. Talisman Energy, Inc., US Court of Appeals for the Second Circuit, August Term, 2008, Docket No. 07–0016-cv, 2 October 2009.

11 Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

12 The US Supreme Court has provided some guidance in this respect, by stating that 'federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when Section 1350 was enacted': Sosa v. Alvarez-Machain, 542 US 692, 732 (2004).

13 It is noted, however, that a focus on complicity can also ease the concerns featuring in the penultimate question posed in the previous paragraph. Indeed, it may be argued that it is immaterial whether or not corporations are recognised legal persons that can commit violations of international law, as long as they are accomplices to a violation of international law by a state, the recognised international legal person *par excellence*.

14 Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', 906.

The question then arises as to what links can trigger the corporation's accomplice liability. Accomplice liability can be conceived of as a continuum. At one extreme end of the spectrum, the corporation may incur liability on the mere basis of investing in a state which violates international law ('silent complicity'); and at the other end, the corporation only incurs liability if it provides assistance to the state with the intention to further the state's criminal enterprise. Somewhere along this continuum, the corporation could be held liable if it knows that international crimes directly related to the corporation's investment project are perpetrated.

It is generally agreed that the mere presence of a corporation in a state governed by a repressive regime does not entail the legal responsibility of the corporation in the absence of a specific link between the activities of the corporation and the regime's brutalities. But when such a link is present, it is unclear whether knowledge on the part of the corporation that government forces are likely to commit rights violations – e.g., when guarding the corporation's sites or when disbursing funds which the government uses to developed the criminal enterprise – suffices for a finding of liability, or whether it is required that the corporation specifically directed the government to commit the abuses.

The complicity standard that does not require specific intent on the part of the corporation was employed in a rather recent case against the US energy corporation Unocal relating to its investment in the 'Yadana' gas pipeline in Myanmar/Burma. This case was decided by the US Court of Appeals for the Ninth Circuit and drew heavily on the extant case law of the international criminal tribunals. Admittedly, the Unocal case involved only a relatively limited number of victims and therefore possibly does not satisfy the definition of historical injustices used in this book. However, although the Unocal case does not relate to a historical injustice par excellence, it is a fine illustration of the operation of the ATCA; it demonstrates the difference between flexible and non-flexible standards, which is of relevance to the determination of the limits of filing civil cases against organisations and corporations.

> [W]hat is required is actual or constructive (i.e., 'reasonabl[e]') 'knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime'. Thus, 'it is not necessary for the accomplice to share the *mens rea* [CR: *i.e.*, the 'guilty mind', the mental fault] of the perpetrator, in the sense of positive intention to commit the crime'. In fact, it is not even necessary that the aider and abettor knows the precise crime that the principal intends to commit. Rather, if the accused 'is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.[15]

[15] Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); D.C. No. CV-96-06959-RSWL, 14187, 14218 (citations and footnotes omitted, citing ICTY, Prosecutor v. Furundzija, IT-95-17/1-T (Dec. 10, 1998), para. 245).

This reasonably relaxed standard (that might lead to a rather swift finding of liability) seems however to have been abandoned in recent years. In a 2009 decision in the case of The Presbyterian Church of Sudan v. Talisman Energy, which revolved around the Talisman Energy company's complicity in the Sudanese government's human rights abuses against non-Muslim Sudanese living in the area of Talisman's oil concession in southern Sudan, by means of building roads and airstrips, the US Court of Appeals for the Second Circuit (affirming the District Court's decision) upheld the following standard:

> To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show:
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> 1) that the principal violated international law;
> 2) that the defendant knew of the specific violation;
> 3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically directed his acts to assist in the specific violation;
> 4) that the defendant's acts had a substantial effect upon the success of the criminal venture; and
> 5) that the defendant was aware that the acts assisted the specific violation.[16]

From the second and third conditions put forth by the Court it could be gleaned that knowledge or awareness of the commission of the crime by the principal perpetrator (the state) is not sufficient, but that specific intent is required. Ordinarily, however, corporations will *not* specifically direct their acts to assist in a specific violation by government forces, as they are typically merely concerned with making a profit from their business activities. This is also why financiers of governments committing international crimes will normally not incur liability for their acts of financing. Admittedly, their funding may have facilitated the commission of the crime, but they have not specifically intended for that crime to be committed. Therefore, the US Military Tribunal at Nuremberg, which was established under Control Council No. 10, let a financier of the Nazis off the hook in the 'Ministries' case, stating that '[l]oans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the

[16] The Presbyterian Church of Sudan v. Talisman Energy, Inc., US Court of Appeals for the Second Circuit, August Term, 2008, Docket No. 07-0016-cv, 2 October 2009, 22, affirming The Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006).

transaction can hardly be said to be a crime'.[17] Likewise, banks that are alleged to bankroll Israeli settlements in the Occupied Palestinian Territories (settlement activity in occupied territory is in violation of Article 49(6) of the Fourth Geneva Convention of 1949) will normally not incur liability under the complicity standard set out above.

Undeniably, the stricter standard may accommodate concerns over judicial overreaching. Corporations and commentators had submitted, not unreasonably so, that the complicity standard used by the courts was too vague and even retroactive (meaning that the standard may not have applied at the time of the alleged assistance activities), and thus caught corporations unaware, in flagrant breach of the principle of legality.[18] While the strict complicity standard espoused by the Court in the 'Talisman' case may please the corporate world, it is not clear whether it is actually mandated by international law. After all, the Court in 'Unocal' purportedly based its more relaxed standard on the case law of the international criminal tribunals, which are supposed to apply international law. And in an interesting (criminal) case in the Netherlands against the businessman Frans van Anraat, who supplied chemicals to the Iraqi regime (which used them for the production of chemical weapons that were used against Iran and the Kurds), the Court only appeared to require 'willing and knowing acceptance of the reasonable chance that a certain consequence or a certain circumstance will occur'.[19] The Court applied this standard to the case before it and held:

> Through his conscious contribution to the production of mustard gas in a country at war, the defendant knew under those circumstances that he was the one who supplied the material and created the occasion for the actual use of that gas, in the sense that he was very aware of the fact that in the given circumstances the use of this gas could not and would not fail to materialise. In different words: the defendant was very aware of the fact that 'in the ordinary cause [sic] of events' the gas was going to be used. In this respect the Court assumes that the defendant, notwithstanding his statements concerning his relevant knowledge, was aware of the also then known unscrupulous character of the then Iraqi regime.[20]

17 The officer of Dresdner Bank was alleged to have 'made a loan, knowing or having good reason to believe that the borrower w[ould] use the funds in financing enterprises [conducted] in violation of either national or international law', but the prosecution failed to prove that he specifically directed his acts to assist in the German governments' violations. United States v. Von Weizsaecker (The Ministries Case), in: 14 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, 308, 622 (William S. Hein & Co., Inc., 1997) (1949).

18 M.C. Medish and D.R. Lucich, in: 'Trying an Old Law', *New York Times*, 2 June 2009.

19 District Court of The Hague, Public Prosecutor v. Frans van Anraat, 23 December 2005, aff'd by Court of Appeal of The Hague, 9 May 2007, reprinted (and translated, and commented upon) in Oxford Reports on International Law in Domestic Courts (ILDC) 753 (NL 2007), para. 7.

20 *Ibid*., para. 11.16.

The Dutch case against Van Anraat bears a striking resemblance to the 'Zyklon B' trial, conducted before the British Military Court in Hamburg in 1946 against the suppliers of a deadly poison gas used to exterminate inmates of German concentration camps.[21] It appears that a businessman's supply of substantial amounts of poisonous chemicals which could not be put to any use other than to commit crimes, in conjunction with his knowledge of the government's unlawful activities, and possibly his providing training in the use of the poison to government officials, inexorably leads to a finding of qualified knowledge or intent on his behalf.

In case the law also requires specific intent on the part of the principal perpetrator (the state), as is the case with genocide, the prosecution may however face an uphill struggle to establish the accomplice's knowledge of the principal perpetrator's intent, and it may have to satisfy itself with charging the businessman with aiding and abetting war crimes or crimes against humanity. It is noted in this respect that the suppliers in the 'Zyklon B' case were only charged with violations of the laws and usages of war.[22] Along the same lines, Van Anraat was only held liable for complicity in war crimes, and not for complicity in genocide – for which he was charged – on the grounds that the prosecutor had failed to establish that Van Anraat had knowledge of the principal perpetrator's possible genocidal intent. Nevertheless, it appears that the commercial suppliers of deadly chemicals need not share the principal perpetrators' specific genocidal intent themselves for the former to be qualified as accomplices to genocide. Mere knowledge that the purchaser intends to employ the gas to eradicate a group, and thus knowledge of the purchaser's genocidal intent, may suffice.[23]

The sort of 'aiding and abetting' in the 'Zyklon B' and 'Van Anraat' scenarios is clearly different from what appears to be aiding and abetting in the majority of corporate cases arising under the ATCA: the circumstance that a corporation, e.g., Unocal, hires security forces from a repressive government to protect its activities (often relating to the exploitation of natural resources), knowing that those forces might commit human rights violations. Possibly, the simple knowledge-based standard ought to be limited to scenarios of corporations providing the means (weapons, chemicals) to commit the crime, and a higher standard should apply to other scenarios, such as hiring state security personnel or building infrastructure or investing in a repressive state.

What also has to be pointed out is that, in determining the applicable complicity standard, courts may in fact base their decision on policy

[21] Trial of Bruno Tesch and Two Others (Zyklon B Case), in 1 Law Reports of War Criminals 93 (William S. Hein & Co., Inc. 1997) (1946).

[22] The charges were based on Article 46 of the Hague Convention No. 4 of 1907: 'Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated'; Zyklon B Case, above n. 27, at 94.

[23] This is at least how I understand the dissenting opinion of J. Shahabuddeen in ICTY Appeals Chamber, Prosecutor v Krstić, Case No IT-98-33-A, 19 April 2004, para. 67.

considerations (although they may be loath to admit this). If the court puts a high premium on encouraging foreign direct investment and accommodating the host state with which the indicted corporation has links, it will tend to espouse a strict (intent-based) liability standard. If the court prioritises the deterrent effect of judicial intervention on corporate conduct, it will tend to espouse a more relaxed (knowledge-based) liability standard, especially if the crimes allegedly committed by the principal offender are of particular gravity.[24]

## SOVEREIGNTY CONCERNS

Whatever the exact contours of the complicity standard employed, it is in the nature of the concept of complicity that a rather strong link between the corporation and the state is required for the corporation to be considered as an aider and abettor of the state's violations. It would appear that the stronger the connection between the corporation and the state is, the likelier a finding of liability will be. At the same time, however, in case the forum is a third state (e.g., the United States), political sovereignty considerations may militate against establishing jurisdiction over a case involving a corporation which has developed overly strong links with the state on whose territory the corporation is active (e.g., a developing country). Indeed, passing judgment on the corporation's acts as an accomplice may amount to passing judgment on the foreign state's acts. For a third state, this may give rise, if not to concerns over the violation of the principle of non-intervention, then at least to the application of the political question doctrine, according to which – in this context – the conduct of foreign policy is the prerogative of the political branches and not of the judiciary. For instance, the South African government and the US State Department's intervention in the so-called 'Khulumani' case, brought against such multinational companies as GM, Ford, and IBM which had provided transportation, computer and banking services to the South African Apartheid regime, signalled serious adverse consequences for US interests and relations with South Africa if the Court were to uphold jurisdiction. Arguably, such a finding would deter investment in South Africa and interfere with South Africa's own transitional justice-based method of dealing with the legacy of Apartheid.[25] A US district court has put this concern succinctly as follows, in a case brought against a private military company: 'the more plaintiffs assert official complicity in the acts of which they complain, the closer they sail

[24] Van Anraat Case, ILDC 753 (NL 2007), para. 16.

[25] Brief of Amicus Curiae Republic of South Africa in Support of Affirmance, Khulumani v. Barclay Nat'l Bank, No. 05–2141 (2d Cir. 2005); Brief for the United States as Amicus Curiae In Support of Affirmance, Khulumani v. Barclay Nat'l Bank Ltd., Nos. 05–2141-cv, 05–2326-cv (2d Cir. 2005).

to the jurisdictional limitation of the political question doctrine'.[26] Corporations could in fact rely on various non-justiciability doctrines, such as political question, act of state, or comity, to have the claim against them dismissed, even if their liability can be established.

It must have become clear by now that restrictive procedural and liability doctrines could severely hamper the success of a lawsuit against corporations for serious rights violations. This is, however, not necessarily regrettable. Allowing such a lawsuit to be aborted on legal grounds before the trial stage appears to be justified if the suit unduly interferes with local reconciliation processes that are widely supported by local stakeholders and the 'international community' (e.g., the Truth and Reconciliation Commission established to deal with the abuses committed by the South African Apartheid regime), and that take into account the entire illegal enterprise, including the role of corporations.[27] Similarly, claims that can be filed in local courts with a reasonable chance of success should not be filed in courts of third states that have no intimate knowledge of local circumstances (the forum non conveniens doctrine could be resorted to so as to dismiss such claims). Political and economic considerations should also be allowed to play a legitimate role in deciding the justiciability of cases, e.g., concerns over diminishing foreign direct investment in poor countries, or concerns over souring international relations (which may for instance have adverse repercussions on international cooperation, e.g., in the fight against terrorism). Judges should however always see to it that accepted legal doctrines are not used to protect narrow interests of states or corporations to the detriment of victims of gross historical injustices.

## OUT-OF-COURT SETTLEMENTS

In spite of the very low chances of a successful lawsuit against corporations for violations of international law, the mere threat of a lawsuit has caused corporations to enter into pre-trial settlements with plaintiffs. The most well-known and wide-ranging settlement is probably the 'Swiss Banks Settlement' of January 1999, pursuant to which a number of Swiss financial institutions agreed to disburse 1.25 billion US dollars to victims of the Holocaust. This settlement

[26] Saleh et al. v. Titan Corp, 436 F.Supp.2d 55, at 5 (D.D.C. 2006). I have studied the problems hobbling litigation against private military companies in more detail in the following publication: C. Ryngaert, 'Litigating Abuses Committed by Private Military Companies', in: *European Journal of International Law*, 19 (2008) 1035–1053.

[27] Compare president Thabo Mbeki's statement in relation to the *Apartheid Litigation* in US courts: '[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and (…) the promotion of national reconciliation'. Mbeki subsequently noted the government's 'desire to involve all South Africans, including corporate citizens, in a co-operative and voluntary partnership to reconstruct and develop South African society'. Khulumani, 504 F.3d 299, A00747.

settled a number of class action suits filed in US courts, some of them under the ATCA, in 1995–1996 in relation to the collaboration of Swiss banks with the Nazi regime, to the detriment of victims of the Holocaust.[28] A similar lawsuit led to the establishment by the German Bundestag of the 'Remembrance, Responsibility and Future' foundation (*Stiftung Erinnerung, Verantwortung, Zukunft*) in 2000, which provided payments to former slave labourers and former forced labourers used by, amongst others, German corporations during World War II.[29] By the end of 2006, the foundation had disbursed 4.37 billion Euro to more than 1.66 million former forced labourers and other victims of National Socialism in ninety-eight countries. Its payment programs were completed in 2007.

The 'Unocal' case, of which a relevant decision as to the applicable liability standard has been discussed above, was settled confidentially in March 2005. The joint statement announced by the parties to the case (Unocal and the plaintiffs) may be said to be typical of the commitments made by corporations, in terms of compensation and assistance, in settlement agreements:

> The parties to several lawsuits related to Unocal's energy investment in the Yadana gas pipeline project in Myanmar/Burma announced today that they have settled their suits. Although the terms are confidential, the settlement will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region. These initiatives will provide substantial assistance to people who may have suffered hardships in the region. Unocal reaffirms its principle that the company respects human rights in all of its activities and commits to enhance its educational programs to further this principle. Plaintiffs and their representatives reaffirm their commitment to protecting human rights.[30]

And in June 2009, Shell – after it lost some procedural rulings[31] and presumably got cold feet – settled a case brought by Nigerian villagers (alleging, amongst

[28] See for an overview: www.swissbankclaims.com [accessed 6 May 2014]. See for a critical examination: A. Ramasastry, 'Secrets and Lies? Swiss Banks and International Human Rights', in: *Vanderbilt Journal of Transnational Law*, 31 (1998) 325–456; M.J. Bazyler and R.P. Alford, eds., *Holocaust Restitution: Perspectives on the Litigation and its Legacy*, New York: New York University Press, 2006; M.J. Bazyler, 'The Legality and Morality of the Holocaust-era Settlement with the Swiss Banks', in: *Fordham International Law Journal*, 25 (2001) 64–106, 65; M.J. Bazyler, 'Nuremberg in America: Litigating the Holocaust in the United States', in: *University of Richmond Law Review*, 34 (2000) 28–30.

[29] See on the activities of the foundation: www.stiftung-evz.de [accessed 6 May 2014]. See for the final report of the compensations programs of the foundation: M. Jansen and G. Saathoff, eds., *Final Report of the Compensations Programs of the Remembrance, Responsibility and Future Foundation*, New York: Basingstoke, Palgrave MacMillan, 2009.

[30] *Statement available at:* www.earthrights.org/legal/final-settlement-reached-doe-v-unocal [accessed 6 May 2014].

[31] Wiwa v. Royal Dutch Petroleum Co., 2009 WL 1574869 (S.D.N.Y. 23 April 2009); Wiwa v. Royal Dutch Petroleum Co., 2009 WL 1560197 (2nd Cir., 3 June 2009).

others, complicity of Shell in torture and crimes against humanity) in a federal district court in New York in 1996 for 15.5 million US dollars.[32]

While such settlements may please the plaintiffs, they are hardly conducive to a proper development of the law. The terms of the settlement often remain confidential, as a result of which uncertainty as to the exact liability standards for use in future cases remains. As we write, the sheer lack of ATCA-based judgments is at least partly attributable to the defendant corporations settling with the plaintiffs. To be true, such settlements may precisely constitute the success of the ATCA,[33] but they do not provide the necessary legal clarification for both corporations and victims. In addition, corporations may be coerced to settle cases that are in reality not viable in court because the causal link between the conduct of the corporation and the injury of a particular victim cannot be established (e.g., the conduct of foreign corporations in Apartheid South Africa and the injury to the victims of Apartheid).

At the same time, victims – or their representatives – may accept settlements pursuant to which corporations commit themselves to provide reparations that are well below what the victims would be entitled to. The 'Bhopal' settlement is a case in point. In 1989, five years after a gas leak from a pesticide plant owned by the US corporation Union Carbide in Bhopal, India – a leak which killed or otherwise affected thousands of people living in the vicinity of the plant – Union Carbide agreed to an out-of-court settlement pursuant to which it agreed to pay 470 million US dollars to – what in the end proved to be – more than five hundred thousand victims. For the families of the deceased, this meant on average a mere 2200 dollars.[34] This settlement put an end to past lawsuits against Union Carbide in the US and India, and precluded future post-settlement suits.[35] But one may wonder whether the victims were adequately compensated, and whether the corporation should not have cleaned up the remaining toxic waste, and provided health care and socio-economic support for the victims.[36] It is noted in this respect

32 See for a discussion: I. Wuerth, 'Wiwa v. Shell: The USD 15.5 Million Settlement', in: *ASIL Insight*, 13 (2009): www.asil.org/sites/default/files/insight090909pdf.pdf [accessed 6 May 2014].

33 Wuerth, 'Wiwa v. Shell: The USD 15.5 Million Settlement'. The public terms of the Wiwa settlement and the substantial (at least to the plaintiffs) amount of money involved, demonstrate that some victims of foreign human rights abuses at the hands of multinational corporations can find meaningful redress in US courts.

34 See for details of the settlement and its implementation: Website Bhopal Information Center: www.bhopal.com [accessed 6 May 2015]; Website International Campaign for Justice in Bhopal (ICJB): www.bhopal.net/ [accessed 6 May 2015].

35 See for the US lawsuits, amongst others: In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984, 809 F.2d 195 (2d Cir. 1987), cert. denied, 484 U.S. 871, 108 S.Ct. 199, 98 L.Ed.2d 150 (1987); Bi v. Union Carbide Chemicals & Plastics Co., 984 F.2d 582 (2nd Cir. 1993). See for the lawsuits in India, amongst others: Supreme Court of India, Union Carbide Corp. v. Union of India, 1989 [Supplement] S.C.A.L.E. 89 (approving the settlement).

36 See for a critical evaluation of how Union Carbide (now Dow Chemical) and the Indian government dealt with the consequences of the Bhopal disaster: S. Mehta, 'A Cloud Still Hangs Over Bhopal', in: *New York Times*, December 2, 2009; Website ICJB.

that the 1989 'Bhopal' settlement was entered into with the Indian government which 'represented the victims', and not with the victims themselves.[37] This may lead one to question whether the government had paid sufficient heed to the latter's interests.

## CONCLUDING OBSERVATIONS

In this chapter we have highlighted that not only governments, but also organisations and corporations can be responsible for the commission of historical injustices and international crimes. Those private actors often do not commit those wrongs directly or on their own, given the scale of the crimes and their political purpose. The *modus operandi* is instead that they 'aid and abet' injustices committed by government forces. Because the principal perpetrator of the injustices is the government, it is often senseless for the victims to seek legal remedies in the courts of the state where the injustices were committed, for in repressive states the judiciary will ordinarily be subservient to precisely the political branches that ordered the crimes to be committed. Accountability for historical injustices in which corporations had a hand will therefore have to be sought either in territorial courts after the ousting of the repressive regime, or in 'extraterritorial' courts (these are courts sitting in third states). An example of the first avenue is offered by the Allied war crimes tribunals sitting in Germany after World War II. The availability of a US forum for 'foreign-to-foreign' (tort) claims under the US Alien Tort Statute exemplifies the second avenue.

Few corporate cases have made their way successfully through the courts, due to various practical, legal, and political constraints. This chapter has mainly focused on how questions of corporate accomplice liability hobble litigation against corporations and industrialists related to alleged historical injustices. An overview of relevant cases arising in Allied criminal courts in Germany, federal courts in the US, and a court in the Netherlands has demonstrated that no catch-all complicity standard is used. Some courts appear to satisfy themselves with corporate knowledge of the government's violations, whereas others require specific intent on the part of the corporation to assist the government's violations for the corporation's liability to be established. Nevertheless, it seems that the complicity standard used depends on the precise factual scenario of corporate aiding and abetting. If an industrialist supplies poison to a repressive regime, he may be presumed to have knowledge of the use of this poison by the regime for rights violations. In contrast, if the corporation merely collaborates with the

[37] The year after the gas leak, on 29 March 1985, India had enacted the Bhopal Gas Leak Disaster (Processing of Claims) Act pursuant to which the Indian government would have the exclusive right to represent the victims of the disaster in India or elsewhere. The constitutional validity of the act was upheld by the Supreme Court of India in Union Carbide Corp. v. Union of India, 1989 [Supplement] S.C.A.L.E. 89.

government in the development of investment projects in the context of which the government commits violations, a higher complicity threshold might be appropriate; possibly, the corporation should only be held liable if it specifically directed government forces to commit violations for the corporation's benefit.

Still, even if the liability hurdle can be overcome, it remains to be seen whether courts should always allow the case against the corporation to move forward given the strain this may put on the forum state's conduct of foreign relations with the state where the rights violations occurred. Arguably, the forum state should defer to the territorial state if the latter has put in place, according to a democratic decision-making procedure, an adequate legal and/or policy framework geared to dealing with historical injustices, including the role of corporations therein.

The legal uncertainty surrounding the applicable accomplice liability standards and the uncertain application of the justiciability doctrines (that safeguard the interests of the political branches of the forum and territorial state) have caused corporations targeted by victims of injustices to remain on the safe side. Threatened with lawsuits, many of them have entered into out-of-court settlements with victims. Such settlements may satisfy both corporations and (alleged) victims; the latter may be given compensation, while the former avert a lawsuit that may bring negative publicity and possibly result in an astronomic damages award under an excessively liberal liability standard. Nonetheless, pre-trial settlements reinforce the existing legal lack of clarity. This uncertainty may impel corporations to settle even if there is no proven causal link between the corporation's conduct and the plaintiffs' injuries, and victims to settle in return for far too inadequate reparations.

However, many cases related to corporate involvement in historical injustices remain pending. An academic lawyer can only hope that courts are allowed to see through these cases and set precedents that can guide the conduct of corporations in weak-governance zones and *vis-à-vis* repressive regimes, while at the same time clarifying victims' legitimate expectations of corporations and courts.

## FURTHER READING

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