

# The Tradition of Civil Litigation in a New Age of International Law: International Perspectives on the Domestic Enforcement of Human Rights

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## Abstract

The enforcement of norms of international human rights law ('IHRL') and the provision of an effective and appropriate remedy for those who have had human rights abuses visited upon them represents one of the greatest contemporary challenges within international and domestic legal systems. In recent years a regime of domestic civil liability has emerged, largely within the United States, as an alternative means to enforce IHRL against offending individuals, governments and organisations. A particular feature of this regime has been the attribution of liability to non-state actors for human rights abuses. This article will examine these developments and chart the various advantages and disadvantages that civil litigation mechanisms represent for the enforcement of IHRL and victims of human rights abuses. The utility of this regime to remedy breaches of IHRL during and as a result of crisis situations and armed conflict will also be discussed. While focussing chiefly on the United States as the main source of domestic IHRL litigation jurisprudence, other systems of civil dispute resolution will also be examined.

*Key words:* International law, Human rights, Civil litigation.

## Resumen

La aplicación de las normas del derecho internacional de los derechos humanos ('DIDH') y la provisión de un recurso efec-

tivo y adecuado para las personas cuyos derechos humanos se han visto violados suponen uno de los mayores retos actuales en el seno de los sistemas jurídicos nacionales e internacionales. Durante estos últimos años ha surgido un régimen de responsabilidad civil nacional, principalmente en EEUU, como un medio alternativo de hacer respetar el derecho internacional de los derechos humanos ante las personas, gobiernos y organizaciones que lo infringen. Una característica particular de este régimen ha sido la de atribuir la responsabilidad de la violación de los derechos humanos a los agentes no gubernamentales. En este artículo, examinaremos estos acontecimientos y esbozaremos las diversas ventajas y desventajas que conllevan los mecanismos de litigio civil para la aplicación del derecho internacional de los derechos humanos y para las víctimas de los abusos de los derechos humanos. Asimismo, analizaremos la utilidad de dicho régimen para reparar las violaciones del DIDH durante el transcurso y como consecuencia de situaciones de crisis y de conflicto armado. Aunque nos centraremos principalmente en los Estados Unidos como fuente principal de jurisprudencia nacional para solventar litigios relativos al derecho internacional de los derechos humanos, también abordaremos otros sistemas de conflicto civil.

*Palabras clave:* Derecho internacional, Derechos humanos, Litigio civil.

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## 1. The availability of civil litigation mechanisms for human rights abuses

Victims of human rights violations and their supporters pursue many legal avenues to seek redress in various jurisdictions throughout the world. The attendant body of jurisprudence for such claims is largely found in decisions of domestic human rights courts, regional human rights frameworks such as those established by the *European Convention on Human Rights*<sup>2</sup> ('ECHR') or the *American Convention on Human Rights*<sup>3</sup> ('ACHR') as well as domestic and international criminal prosecutions of individuals for the commission of international crimes.<sup>4</sup> Due to the weakness of enforcement mechanisms in these traditional arenas of international human rights litigation, some claimants have begun to explore domestic civil remedies as an alternative means to seek accountability for breaches of IHRL. This manner of enforcement has proved particularly relevant for breaches of IHRL which have transpired on a transnational scale — where the subject matter and actors involved are often spread across a variety of states and domestic jurisdictions. Many domestic litigation systems have proved flexible in accounting for this international dimension in their framework.

The domestic litigation of IHRL has proceeded chiefly by importing norms of international human rights law into pre-existing domestic systems of tortious liability, rather than as a result of any concerted effort to develop an internationally consistent architecture of civil human rights litigation.<sup>5</sup> Accordingly, the manner in which civil liability may be imposed for breaches of IHRL will differ depending on the domestic system involved. This

section will examine some different legal traditions and how they have responded to the demand for domestic litigation of IHRL.

### a. *The United States: Alien Tort Statute and Torture Victim Protection Act*

The most noteworthy development of a domestic civil liability framework for human rights abuses is without doubt the statutory mechanisms of the *Alien Tort Statute*<sup>6</sup> ('ATS') and the subsequent *Torture Victim Protection Act*<sup>7</sup> ('TVPA'), which have emerged in the domestic practice of the United States in the past three decades. The former instrument, an eighteenth century Statute initially designed to provide redress against piracy for foreign nationals, confers US Courts with jurisdiction to hear tortious claims instituted by non-US citizens which allege acts 'committed in violation of the law of nations or a treaty of the United States'. Although laying dormant for almost two centuries, the statute was cleverly revived in 1980 in the case of *Filártiga v Peña-Irala*<sup>8</sup> as a means to attribute liability to a non-US defendant for acts of torture committed outside the US against a non-US citizen. The successful plaintiffs in the *Filártiga* case were the surviving family of a 17-year old Paraguayan citizen who was tortured until death by the defendant on the basis of his father's membership of an opposition political movement.<sup>9</sup> The application of the ATS to the completely international subject matter of the case represented a novel exercise of universal civil jurisdiction by an American court in respect of human rights abuses and set an important precedent for future claims in the US. Since the *Filártiga* decision, victims of IHRL abuses have been drawn to US as a forum for bringing human rights

<sup>2</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222, entered into force 3 September 1953.

<sup>3</sup> *American Convention on Human Rights*, Signed 22 November 1969, 1144 UNTS 123, entered into force 18 July 1978.

<sup>4</sup> International prosecutions are represented by the body of jurisprudence of international criminal courts and tribunals such as the International Criminal Court ("ICC"), the International Criminal Tribunals for Rwanda and the former Yugoslavia ("ICTR" and "ICTY") as well as hybrid or internationalised or 'hybrid' courts and tribunals such as the Special Court for Sierra Leone ("SCSL"), Extraordinary Chambers in the Courts of Cambodia ("ECCC") and the Special Tribunal for Lebanon ("STL").

<sup>5</sup> On the development of a universal system of transnational law litigation as a means to enhance human rights protection, see generally:

Aceves, William (2000): "Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation", 41, p. 129.

<sup>6</sup> *Alien Tort Statute*, 28 USC § 1350 (2000), originally the Judiciary Act of 1789, ch 20 § 9(b), 1 Stat 73, 77. Also known and at times referred to in this paper as the *Alien Tort Claims Act*.

<sup>7</sup> *Torture Victim Protection Act of 1991*, Pub L No. 102-256, 106 Stat 73 (1992).

<sup>8</sup> 630 F 2d 876 (2d Cir 1980) ("*Filártiga*").

<sup>9</sup> For commentary on the *Filártiga* and some subsequent ATS litigation, see: Stephens, Beth (1996): "Litigating Customary International Human Rights Norms", *Georgia Journal of International & Comparative Law*, 25, p. 191.

claims against foreign defendants. The effect of this statutory framework is that it confers upon US Federal Courts the authority to apply US law to tortious claims in which there is an absence of any other jurisdictional connection with the United States.<sup>10</sup> The potential for IHRL litigants is enormous in many respects.

The more recently enacted TVPA provides more opportunities for victims of torture by, among other things, extending jurisdiction to US plaintiffs.<sup>11</sup> The TVPA sought to codify some of the mechanisms that were developed by the *Filártiga* decision and other subsequent ATS litigation, while adding various prerequisites to the exercise of jurisdiction in respect of claims of torture. For instance, the subject matter jurisdiction of the TVPA is explicitly more restrictive, with claims being limited to allegations of torture and extrajudicial killing. Moreover, claims are subject to an exhaustion of local remedies provision, which requires litigants to have satisfactorily explored 'all adequate and available remedies in the place in which the conduct giving rise to the claim occurred'.<sup>12</sup>

The litigation opportunities presented by these statutory mechanisms have given rise to an abundance of IHRL claims in US courts. The foregoing section only paints a skeletal image of the entire litigation framework, which has been developed in subsequent jurisprudence to account for developments in human rights law and policy. Various aspects of these developments will be examined in greater detail below.

### b. Other common law jurisdictions

In addition to the United States, various other legal systems with a common law tradition offer mechanisms for victims to

seek civil redress for human rights abuses. These systems also contain procedures for the resolution of civil disputes that are independent from criminal prosecutions; however, due to the absence of any statutory regimes of universal civil jurisdiction (akin to the ATS) their jurisdictional scope is significantly limited. In the absence of universal civil jurisdiction, a domestic court may only exercise extraterritorial jurisdiction where there is some form of connection with the forum state, such as the nationality of the perpetrator or the victim.<sup>13</sup> Accordingly, a closer jurisdictional link between the civil wrong and the forum state is required before a claim can be entertained by such domestic courts.

Due primarily to this absence of a clearly defined universal civil jurisdiction outside the US, fewer claims been pursued in other common law legal systems. Many of those which have been attempted have been struck out on the basis of the immunity of the defendant<sup>14</sup> or lack of jurisdiction over the matter.<sup>15</sup> Some commentators have suggested that the distinct legal culture of the United States sets it apart it from other common law jurisdictions as a favoured forum for bringing IHRL claims. Although other common law systems exhibit a similar tradition of civil liability, couched in the values of freedom of litigation, the practice of litigation in these systems is normally understood as an innately private affair, utilised as means to resolve civil disputes between two conflicting parties. The development in the US of 'mass tort' and public interest lawsuits throughout the twentieth century serves to locate civil litigation within the realm of public law, as a means to achieve social reform through the initiation of private claims by aggrieved parties. This approach to civil litigation in the US arguably renders its domestic jurisdiction

<sup>10</sup> On the uniqueness of the ATS framework, see: Stephens, Beth (2002): "Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations", *Yale Journal of International Law*, 25, pp. 10-12.

<sup>11</sup> For further commentary on the differing features of the ATS and TVPA, see: Stephens, Pamela (2007): "Spinning Sosa: Federal Common Law, the Alien Tort Statute and Judicial Restraint", *Boston University International Law Journal*, 25(1), p. 7.

<sup>12</sup> *Torture Victim Protection Act*, s 2(b). Note that a failure to exhaust local remedies will not be decisive in claims pursuant to the ATS, see: Baldwin, Jeffrey (2007): "International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens", *Cornell International Law Journal*, 40, pp. 753-754. On the exhaustion of local remedies under the ATS and TVPA generally, see: Duruigbo, Emeka (2006): "Exhaustion of Local Remedies in

Alien Tort Litigation: Implications for International Human Rights Protection", *Fordham International Law Journal*, 29, p. 1245.

<sup>13</sup> For a succinct summary of the various applicable forms of extraterritorial jurisdiction, see: van Schaack, Beth (2001): "In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention", *Harvard International Law Journal*, 42, p. 144 (fn 10).

<sup>14</sup> See, for example: *Bouzari v Iran* C38295 [2004] OJ 2800 (Ontario Court of Appeal, Canada); and *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia) [2007] 1 AC 270 (House of Lords, UK) ('*Jones* (House of Lords)').

<sup>15</sup> See, for example: *Al-Adsani v Kuwait*, 103 ILR 420 (QB 1995) (England and Wales Court of Appeal, UK) ('*Al-Adsani* (Court of Appeal)').

and legal culture more flexible and responsive to dealing with IHRL litigation, on the basis of the public interest dimension that pervades such claims.<sup>16</sup>

The particular jurisdictional barriers to IHRL claims outside the US will be examined in greater detail in later sections of this article and often render other common law jurisdictions less attractive than the US to victims of human rights abuses. Despite these limitations, human rights litigation against domestic defendants has proceeded in the UK,<sup>17</sup> Canada<sup>18</sup> and Australia<sup>19</sup> and still remains a possibility if the jurisdictional conditions can be satisfied; in particular, if either the plaintiff or defendant has a jurisdictional connection with the domestic forum.<sup>20</sup>

### c. Civil law jurisdictions

The dynamic of the civil law tradition presents an alternative approach to the distinction between civil and criminal law in terms of jurisdiction and the various remedies available for breaches of human rights norms. While common law practice generally allows and encourages civil and criminal claims to proceed independently of each other, on the basis of different standards of proof and the unique jurisdictional foundations for each system of liability, the civil law tradition tends to attach civil claims to criminal prosecutions of the same offending conduct.<sup>21</sup>

This type of civil liability will normally develop as a result of a criminal prosecution, allowing victims or otherwise affected parties to bring an attendant civil claim in respect of the same subject matter.<sup>22</sup>

Attaching civil claims to criminal prosecutions has both positive and negative implications for victims of human rights abuses. It can serve to accelerate the process of litigation, as criminal prosecutions will generally be resolved in a more expedient fashion than claims that proceed exclusively on the basis of civil liability. From a more practical perspective, it can also enfranchise otherwise resource-poor victims of human rights abuses through reliance on state-funded bodies for the investigation and prosecution of cases.

This approach, however, also presents various drawbacks for victims of human rights violations. A corollary of the connection between civil litigation and criminal liability is that a civil claim can depend on the state's willingness or ability to initiate a criminal prosecution in relation to the offending conduct.<sup>23</sup> Although human rights abuses are often also treated as crimes, some abuses may for various reasons fall outside the purview of the criminal law, which will in turn preclude the commencement of civil litigation in a system where the latter depends upon the former. Furthermore, in situations imbued with diplomatic or political considerations, the state may interfere or be reluctant to proceed with criminal cases that would prosecute breaches of

<sup>16</sup> For further commentary on the American cultural tradition of public interest litigation and its effect on IHRL claims, see: Stephens, Beth, *op. cit.*, pp. 12-14; see also: Aceves, William, *op. cit.*, pp. 139-141.

<sup>17</sup> For example, a claim in the UK House of Lords from foreign defendants against a UK-based parent company for tortious liability and human rights abuses committed by its subsidiary in South Africa: *Lubbe v Cape Plc* [2000] UKHL 41 ("*Lubbe*"); a claim from a Namibian employee against a UK firm for failure to protect against exposure to uranium in one of its mines: *Connolly v RTZ Corporation plc* [1997] 3 WLR 373.

<sup>18</sup> See, for example, a claim against a Canadian mining company for claims alleged in the course of its operations in Guyana: *Recherches Internationales Québec v Cambior Inc* [1998] QJ No 2554 (Quebec Superior Court) ("*Recherches Internationales*"). Note, however, that this claim was ultimately defeated by the successful application of *forum non conveniens* (see relevant section below).

<sup>19</sup> For example, a claim against an Australian mining company brought by a plaintiff in Papua New Guinea on the basis of physical and environmental damage caused by the defendant: *Gagarimabu v Broken Hill Proprietary Co Ltd an Another* [2001] VSC 517.

<sup>20</sup> For a comparative analysis of non-US, common law systems of civil liability, see: Choudhury, Barnali (2005): "Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses", *Northwestern Journal of International Law and Business*, 26, pp. 51-56. On the cultural basis on which the US legal system has emerged as the most useful forum for such litigation, see: Stephens, Beth, *op. cit.*, pp. 10-17.

<sup>21</sup> On civil claims and their function in continental and civil law systems generally, see: Stephens, Beth, *op. cit.*, pp. 19-21; Mostajelean, Bahareh (2009): "*Foreign Alternatives to the Alien Tort Claims Act: The Success (or is it Failure?) of Bringing Civil Suits Against Multinational Corporations that Commit Human Rights Violations*", *George Washington International Law Review* 40, pp. 511-512.

<sup>22</sup> For example, in Spain, France and Germany, this procedure joins the victim as a 'civil party' to proceedings, which offers certain rights and procedural advantages, see: van Schaack, Beth, *op. cit.*, 145-146.

<sup>23</sup> For a judicial analysis of this notion, see the comments of Lord Justice Mance in *Jones v Al-Mamlaka Al-Arabiya As Saudiya (The Kingdom of Saudi Arabia) Ministry of Interior & Anor* [2004] EWCA Civ 1394 ("*Jones (Court of Appeal)*"), § 80.

international human rights law. Accordingly, victims' autonomy can often be diminished by the linkage between criminal and civil liability that regularly occurs in civil law systems.<sup>24</sup> Despite these drawbacks, enhanced victim participation in criminal and ancillary proceedings can represent an important means of reconciliation for victims and their families.

## 2. Useful features of civil litigation mechanisms

Domestic civil litigation has emerged as an alternative means to litigate breaches of IHRL as it has the potential to circumvent many of the barriers presented by traditional enforcement mechanisms in the domestic, regional and international spheres. This section will survey the various advantages that civil litigation presents for victims of human rights abuses and how the system can overcome many of the problems experienced in human rights litigation.

### a. Jurisdiction *ratione personae*

The initial development of IHRL as an independent body of international law suggested that, because the protection and conferral of human rights were to be guaranteed by the state, any claims for breaches thereof would have proceeded against the state. Although this perspective was rather innovatively divorced from the classical theory of international law, which ob-

served that States could be the only actors on the international plane,<sup>25</sup> the protection of human rights within the framework of international law was still only concerned with the individual's reciprocal relationship with the state.<sup>26</sup> Notwithstanding this conventional perspective, recent decades have witnessed the emergence of a variety of non-state actors in human rights discourse and jurisprudence, challenging the notion that IHRL would only entertain claims against States. While the reasons for this expansion of jurisdictional scope are manifold,<sup>27</sup> there has been an underlying trend to account for the impact that various non-state actors can have on individuals within the context of human rights. This approach has sought to recognise the way in which actions of powerful individuals and large corporations can affect the enjoyment of human rights.

The various established complaint mechanisms and other sources of human rights jurisprudence have in some respects expanded their jurisdictional reach to account for these developments. Some other, more contemporary enforcement regimes of IHRL have also emerged. For instance, the development and enforcement of individual criminal responsibility for international crimes has been an important milestone for the attribution of liability to individuals for their participation in breaches of IHRL. This has resulted in the foundation of many international and hybrid criminal tribunals throughout the 1990s including the ICTY and ICTR, culminating in the establishment of a permanent International Criminal Court in The Hague.<sup>28</sup> However, current policies at these bodies dictate that only those individuals who 'bear the greatest responsibility' for serious violations of inter-

<sup>24</sup> For an excellent commentary on these drawbacks of civil liability for human rights abuses in continental systems, see: Stephens, Beth, *op. cit.*, 19-21.

<sup>25</sup> For domestic judicial analysis of this classical perspective and its relevance for modern human rights law, see the comments of Lord Millet in *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)* (1999) 2 All ER 97, 170 (English House of Lords) ('*Pinochet*').

<sup>26</sup> On the human rights discourse, state responsibility and the attendant distinction from concepts of liability in private domestic litigation, see: Scott, Craig, "Translating Torture into Transnational Tort", in Scott, Craig (ed.) (2001): *Torture as Tort*, 1st ed., Hart Publishing, Oxford, pp. 45-53. For commentary on the development of the individual as a subject of international law in the context of IHRL violations, see: Bachmann, Sascha-Dominik (2007): *Civil Responsibility for Gross Human Rights Violations: The Need for a Global Instrument*, 1st ed., Pretoria University Law Press, Pretoria, pp. 6-9.

<sup>27</sup> For commentary on the shared social interest in preventing human rights abuses by non-state actors, and an overview of the underlying causes of the recognition of the non-state actor in the IHRL framework, see: Reinisch, August, "The Changing International Legal Framework for Dealing with Non-State Actors", in Alston, Philip (ed.) (2005): *Non-State Actors and Human Rights*, 1st ed., Oxford University Press, Oxford, pp. 60-61, 74-78. For further analysis and an excellent study of the liability of corporations and other non-state actors for human rights abuses, see: Ratner, Stephen (2001): "Corporations and Human Rights: A Theory of Legal Responsibility", *Yale Law Journal*, 111, p. 443.

<sup>28</sup> For commentary on the early development of the system of International Criminal Law and its relationship with domestic litigation of IHRL, see: Murphy, John (1999): "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", *Harvard Human Rights Journal*, 12, p. 1.

national law will be pursued,<sup>29</sup> leaving other individual perpetrators to be prosecuted by domestic criminal systems.

Other human rights enforcement bodies such as the UN Human Rights Committee ('UNHRC'), the entity charged with monitoring state compliance with the *International Covenant on Civil and Political Rights* ('ICCPR'),<sup>30</sup> and the *Committee Against Torture*,<sup>31</sup> are only empowered to entertain complaints against states per se and lack the expansive personal jurisdiction enjoyed by international and domestic courts. The absence of jurisdiction over non-state actors renders these treaty-monitoring bodies ill equipped to deal with the changing dynamic of the global human rights landscape.

Civil litigation has surfaced as the most prominent forum in which to bring actions against the most diverse categories of defendant. Perhaps the most fundamental reason for the utility of civil litigation systems is that they are generally accustomed, and indeed designed, to deal with a dynamic range of litigants and parties. The goal of civil dispute resolution mechanisms is to indemnify an aggrieved party by restoring the position they were in before their loss or damage was sustained through the attribution of responsibility to another party and the provision of a remedy.<sup>32</sup> A major advantage of this conceptual framework is that it is flexible in terms of its scope of application. In opposition to the restrictive jurisdiction of international law, domestic civil litigation systems have developed to expansively ac-

count for a diverse range of actors. As the tradition of domestic civil litigation accepts a greater variety of litigants than traditional IHRL dispute resolution mechanisms, it offers a more dynamic and inclusive litigation environment for victims to seek redress for human rights abuses against non-state actors. In the context of human rights abuses, domestic civil litigation of IHRL has included suits brought against individuals,<sup>33</sup> governments,<sup>34</sup> international organisations<sup>35</sup> and juridical persons such as corporations.<sup>36</sup>

The acceptance of claims against transnational corporations for their participation in human rights abuses has been one of the most notable jurisdictional features of domestic civil litigation of IHRL. Within the US, this commenced with the case of *Doe v Unocal*,<sup>37</sup> which sought to establish the liability of an American oil company for its complicity in forced labour and other human rights abuses during the construction of a major oil pipeline in Burma.<sup>38</sup> This jurisdictional advancement is one of the only means by which corporate entities have been held accountable for their business activities in the developing world and represents a significant advancement in the attribution of responsibility to private corporations for their involvement in human right abuses.

The inclusion of the corporate defendant in such claims has attracted powerful criticism from the business community and remains controversial even in the US, where most claims against

<sup>29</sup> On this element of prosecution policies at the ICC, see: Schabas, William (2010): *Introduction to the International Criminal Court*, 4th ed., Cambridge University Press, Cambridge, pp. 35-36.

<sup>30</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ("ICCPR"). This jurisdiction is conferred pursuant to the *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), art 2.

<sup>31</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Conduct or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ("Torture Convention"), arts 17-24.

<sup>32</sup> On the goal of domestic systems of tortious liability, see: van Schaack, Beth, *op. cit.* 13, 156-157.

<sup>33</sup> See, for example: *Filártiga; Kadic v Karadzic*, 70 F 3d 232 (2nd Cir, 1995) ("Kadic"), an action filed against Bosnian-Serb leader Radovan Karadzic on behalf of victims of the Bosnian Genocide.

<sup>34</sup> See, for example: *Tel Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir, 1984) ("Tel Oren"), an action brought of behalf of Israeli victims of a

terrorist attack allegedly perpetrated by proxies of the Libyan Government; *Re South African Apartheid Litigation* 617 F Supp 2d 228 (SD NY, 2009); and *Jones* (Court of Appeal).

<sup>35</sup> For example, a recent class action against the United Nations Stabilisation Mission in Haiti has been brought by 5,000 victims of an outbreak of Cholera which, it has been argued by the plaintiffs, was negligently brought to Haiti by Nepalese UN peacekeepers; see: 'Petition for Relief', Institute for Justice and Democracy in Haiti (8 November 2011), available at <<http://ijdh.org/wordpress/wp-content/uploads/2011/11/englishpetitionREDACTED.pdf>>, accessed 11 March 2012.

<sup>36</sup> Note that some commentators have suggested that NGOs may also be held liable for their actions under international law, through the mechanism of domestic litigation, see: Kamminga, Menno, "The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?", in Alston, P. (ed.), *op. cit.*, pp. 107-109.

<sup>37</sup> 395 F 3d 932 (9th Cir, 2002).

<sup>38</sup> Although this matter was eventually settled out of court, it laid the foundations for future litigation in the US against major corporations, pursuant to the ATS.

corporations for human rights abuses have taken place.<sup>39</sup> A 2010 decision of the US Court of Appeals for the Second Circuit in *Kiobel v Royal Dutch Petroleum*<sup>40</sup> has challenged the ability of victims to bring actions against transnational corporations for complicity in human rights abuses. The Court in that instance determined by majority that corporations could not be sued under the ATS for want of an apparent norm of customary international law that ascribes liability to corporations for breaches of IHRL.<sup>41</sup> The fallout of this decision in the US is yet to be seen, as the case is currently on appeal at the US Supreme Court; however, the outcome of the decision could prove fatal for future claims against corporations in US courts.<sup>42</sup>

Notwithstanding these recent developments in US domestic jurisprudence, corporate liability for international crimes and breaches of IHRL remains at the forefront of the international agenda and the human rights discourse.<sup>43</sup> As the most effective forum in which victims can bring actions against transnational corporations, domestic civil litigation remains an important feature of the global trend to attribute liability to non-state actors for human rights abuses.

In addition to the various categories of defendant that have been the subject of civil litigation of IHRL, another less conspicuous advantage of the domestic civil framework is that it allows for certain flexibility in terms of the plaintiff who institutes proceedings. Most established regimes of human rights litigation, including regional systems and treaty monitoring bodies that are competent to handle individual complaints, require any claim to be brought to the forum directly by the aggrieved individual. While some of these entities are able to hear claims brought by victims' groups and NGOs, jurisdiction is restricted and does not give rise to full party status before such com-

plaint bodies.<sup>44</sup> Domestic litigation can provide more scope for individuals and organisations to commence litigation on behalf of an aggrieved party, which has proved fruitful for claimants who find themselves remotely dislocated from the jurisdiction in which the claim is being heard (typically the US) and provides more scope for NGOs and other victims groups to engage in litigation on their behalf. The mass tort feature of some domestic systems such as the US, which allows groups of victims to bring class actions against defendants, can also operate to expedite the litigation of large-scale abuses and simplify the litigation process for victims.<sup>45</sup> This can allow the effective management of a dispute in respect of a particular class of litigants against whom human rights breaches have been committed, thus providing a forum for the resolution of wide-scale, protracted or endemic abuses.

#### b. Types and categories of rights capable of litigation

Another significant advantage of pursuing IHRL claims in a domestic civil jurisdiction is that there is little restriction on the type of rights that are capable of litigation before domestic courts. Rather than being confined to specific and discrete rights, domestic civil litigation of IHRL operates according to the various categories of tortious liability that exist in domestic law. These different categories are often broad and expansive, thus being able to account for an extensive range of breaches of IHRL. In the US, tortious liability claims have proceeded on the basis that the conduct engaged in by the defendant constitutes a violation of international law and has included such breaches as genocide; war crimes; crimes against humanity; torture; cruel, inhuman or degrading treatment; summary execution;

<sup>39</sup> On the inappropriateness of the ATS as a source of transnational corporate regulation, see: Ku, Julian (2011): "The Curious Case of Torture Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking", *Virginia Journal of International Law*, 51, p. 353.

<sup>40</sup> 621 F 3d 111 (2nd Cir, 2010).

<sup>41</sup> *Ibid.*

<sup>42</sup> Some recent literature suggests that the issue of corporate liability for extraterritorial human rights abuses will and should remain alive under US law; see: Murray, Odette et al (2011): "Exaggerated Rumours of the Death of an Alien Tort? Corporations, Human Rights and the Remarkable Case of *Kiobel*", *Melbourne Journal of International Law*, 12, p. 57; however, cf. Ku, Julian, *op. cit.*

<sup>43</sup> See, for example: Ruggie, John (2007): "Business and Human Rights: The Evolving International Agenda", *American Journal of International Law*, 101, pp. 830-832.

<sup>44</sup> Note, for example, that the European Court of Human Rights can receive petitions from groups claiming to victims of a violation of the European Convention of Human Rights. For commentary on the limited availability of victims' groups and NGOs to bring claims on behalf of individuals in IHRL forums, see: Kamminga, Menno, *op. cit.*, pp. 105-107.

<sup>45</sup> For further commentary on mass tort claims and class actions in relation to IHRL, see: Bachmann, Sascha-Dominik, *op. cit.*, pp. 36-39.

prolonged arbitrary detention and forced disappearance.<sup>46</sup> One clear advantage to this approach is that can provide plaintiffs with a comprehensive system of redress for victims who have been subjected to multi-dimensional breaches of IHRL.<sup>47</sup> In domestic systems which possess the capacity to hear IHRL claims under their civil litigation framework, litigants are able to group many different causes of action together in the one claim. This consolidation of human rights claims can serve to simplify the process for victims, helping to avoid the labyrinth of IHRL forums which would otherwise have to be navigated.

### c. Types of awards available

An obvious feature of civil litigation as a mechanism to address human rights abuses is the remedies at the disposal of domestic courts in their resolution of such disputes, the most relevant of which is the right to seek financial compensation from the defendant to account for damage suffered. This right to compensation is not unique in the domain of human rights enforcement, as many regional and international enforcement mechanisms are equipped to grant financial compensation to victims. Such provisions indeed exist before the European Court of Human Rights<sup>48</sup> ('ECtHR'), the Inter-American Court of Human Rights<sup>49</sup> ('IACHR') and the UNHRC,<sup>50</sup> and also have the potential to apply for victims at the ICC.<sup>51</sup> However, the availability of compensation in domestic litigation may be distinguished from these regimes in a number of ways. Although they all con-

template the awarding of compensation, the actual realisation of these awards is rarely forthcoming. Most regimes rely on the offending State to enforce the award of compensation in accordance with their own domestic law, which will not necessarily be effective in the case of human rights abuses committed by the State and can result in further litigation being referred back to the international or regional body if the victim feels that the domestic remedy is inadequate.<sup>52</sup> More fundamentally, the reliance on a separate legal forum to provide a remedy renders such regional and international regimes superficial in their enforcement of IHRL. While the judgment of a court is certainly one feature of human rights enforcement, the lack or deferral of an effective remedy for the victim must also be recognised as an essential element of any effective framework. The effective provision of reparations for human rights abuses is indeed a feature of many human rights treaties and is thus understood to be an actionable right under international law.<sup>53</sup>

The awarding of damages in domestic litigation presents various advantages for victims of human rights abuses. Financial compensation must be understood as an essential component of any comprehensive system of human rights enforcement, which will, in its most primitive form, address the financial loss that the victim has encountered at the hands of the defendant. In addition to this compensatory function, courts in some domestic systems can make orders for the award of exemplary, or 'punitive', damages, which specify an amount that is calculated to punish the defendant, often many times that which is required to compensate the victim. This type of damages features

<sup>46</sup> See: Stephens, Pamela, *op. cit.*, 5. To trigger the universal civil jurisdiction of the ATS, the tortious conduct must also have been 'committed in violation of the law of nations', which has been held to encompass a wide range of human rights abuses; see: Menon, Jaykumar (2006): "The Alien Tort Statute: Blackstone and Criminal/Tort Law Hybridities", *Journal of International and Criminal Justice*, 4, p. 372.

<sup>47</sup> Note, however, that US Courts have excluded ATS claims based on economic, social and cultural rights, as well as derogable rights, see: below note 92.

<sup>48</sup> The ECHR provides for an effective remedy to be available to victims once a breach of their rights under the convention has been established (art 13), which, if such domestic remedy is not fully effected by the member state, can be substituted by the Court itself (art 41).

<sup>49</sup> Article 63(1) of the American Convention similarly authorises the Court to rule that compensation is paid to the party whose rights have been infringed.

<sup>50</sup> The UNHRC has recognised that individuals who have had their rights infringed under the ICCPR should be afforded an effective remedy: *Ann Maria Garcia Lanza de Netto v Uruguay*, Communication No. 8/1977, U.N. Doc. CCPR/C/OP/1 at 45 (1984).

<sup>51</sup> *Rome Statute*, art 75, empowers the ICC to make an order for a convicted person to pay an amount of compensation to victims as reparations.

<sup>52</sup> For commentary on the shortcomings of compensation awards in regional and international human rights enforcement mechanisms, see: Bachmann, Sascha-Dominik, *op. cit.*, pp. 11-13.

<sup>53</sup> On the right to cover reparations under various IHRL treaties, see: Hall, Christopher (2006): "UN Convention on State Immunity: The Need for a Human Rights Protocol", *International and Comparative Law Quarterly*, 55, pp. 412-414.



prominently in the US tradition and can play an important role in the enforcement of IHRL, particularly in relation to non-state actors.<sup>54</sup> The punitive aspect to the remedy recognises the gravity of the conduct involved, indicating to the victim and society that the judgment is designed to punish the defendant. Furthermore, the mere prospect of punitive damages awards can act as a powerful deterrent for potential human rights abusers, for whom a compensatory award of damage would be an insignificant penalty.<sup>55</sup>

Albeit an important aspect of the enforcement of IHRL, financial compensation cannot be seen as a complete or satisfactory remedy for human rights abuses. Rather, effective access to compensation and the potential for significant awards of punitive damages should be understood as an essential feature of a universal and integrated system of human rights enforcement, which must encompass a comprehensive regime of civil and criminal remedies and recognise the interdependence of international and domestic jurisdictions.

#### d. *Victims' ownership of litigation process*

A crucial advantage of civil litigation from the perspective of victims' rights is that, as litigants, they are able to exercise a significant degree of control and influence over the litigation process. This may be contrasted with international and domestic criminal prosecutions as a form of enforcement of IHRL against individuals, in which a prosecutorial agency and other state-controlled bodies dominate the investigation and litigation of human rights abuses. This alienation from the resolution of the dispute can lead to a dissatisfaction with the legal process and human rights enforcement in general.

<sup>54</sup> Note that the awarding of punitive damages outside the US will also be possible, albeit in more limited circumstances than under US law. For a comparative analysis of punitive damages under various common law and civil law legal traditions, see: Koziol, Helmut et al (2009): *Punitive Damages: Common Law and Civil Law Perspectives*, 1st ed., Springer, New York; Wagner, Gerhard, 'Punitive Damages in European Private Law', in Jürgen Basedow et al (eds.) (2011), *Handbook of European Private Law*, Oxford University Press, Oxford.

<sup>55</sup> On punitive damages in US ATS litigation, see: Stephens, Beth, *op. cit.*, 15. On the awarding of compensation and the prospect of liti-

There have been some recent advancements to better account for victims' rights and interests within some criminal systems involving the prosecution of IHRL abuses. The most notable example of such a development has been at the ICC, where victims are afforded the right to participate as a party to proceedings, which involves many aspects of the litigation process and gives victims the right, through their legal representative, to make submissions to the Court and to question witnesses.<sup>56</sup> This is certainly an encouraging development for victims of human rights abuses; however, it is arguable that criminal prosecutions are not the most effective place for such extensive mechanisms of victim participation.<sup>57</sup> As an alternative to prosecutions, domestic civil litigation offers a system of human rights enforcement which is traditionally accustomed and designed to hearing claims directly from victims as plaintiffs. Domestic litigation practitioners working with victims of human rights abuses have observed that 'this active participation within the legal system can be empowering and can restore a sense of justice within victims of grave human rights abuses for whom the courts of their countries provided no recourse'.<sup>58</sup> Through the active role that is occupied by the victims in civil litigation, they become the drivers of not only the legal process, but also the reconciliation and finality that is represented by the effective enforcement of IHRL.

### 3. Limitations of Civil Litigation

While the domestic litigation of IHRL can operate to provide victims with an effective forum to resolve their dispute, bringing claims in domestic civil jurisdictions can present various drawbacks for claimants. The following section will identify some of the jurisdictional and other barriers which can inhibit the litigation of IHRL disputes in domestic courts.

gation as a deterrent to the commission of human rights abuses, see: Ryngaert, Cedric (2007): "Universal Tort Jurisdiction Over Gross Human Rights Violations", *Netherlands Yearbook of International Law* 37, pp. 11-12.

<sup>56</sup> See: *Rome Statute*, art 69(3).

<sup>57</sup> Also note that while victims are provided with opportunities to participate in various stages of the process, they are unable under the framework of the *Rome Statute* to initiate claims, see: Aceves, William, *op. cit.*, 131.

<sup>58</sup> See: van Schaack, Beth, *op. cit.*, 156.

### a. Universal Jurisdiction

Perhaps the greatest challenge facing the domestic civil litigation of international human rights abuses is the inability or unwillingness of most domestic courts to exercise universal civil jurisdiction over such claims. The general approach of international law permits a state to exercise jurisdiction in relation to its own affairs but prohibits the exercise of jurisdiction which would entail the undue interference in the affairs of another state.<sup>59</sup> However, various measures exist under international law by which states can exercise jurisdiction over matters with an international dimension, according to such mechanisms as extraterritorial jurisdiction and various nationality principles.<sup>60</sup> It is in fact these permissive jurisdictional mechanisms which can assist litigants of IHRL claims in domestic courts, where the alleged conduct takes place outside the forum jurisdiction, but retains some other jurisdictional connection. For instance, where the defendant is a national of, or a corporate entity registered in, a particular state, but the offending conduct took place in the territory of another state.

International law further recognises a rule of universal jurisdiction; that is, where a state is permitted to exercise jurisdiction over a particular category of conduct despite the absence of any connection by way of territory or nationality. The restrictions on this manner of jurisdiction are, however, comparatively onerous. Historically, universal jurisdiction was permitted over acts such as piracy on the high seas, as it was understood that these kinds of acts often took place in international waters and it was therefore the duty of states to exercise jurisdiction to prosecute such acts, notwithstanding a lack of any other connection with the

conduct. Modern customary international law has also recognised that certain categories of severe international crimes permit states to exercise universal jurisdiction to prosecute conduct such as genocide, torture, crimes against humanity and some serious war crimes.<sup>61</sup> It has been argued that universal jurisdiction can be triggered in this manner to give effect to states' obligation to provide fair and adequate compensation to victims of human rights abuses under certain treaties, such as the Torture Convention.<sup>62</sup> However, the generally accepted approach to universal jurisdiction is that its exercise will be authorised by international law in the case of criminal conduct which constitutes such serious offences, rather than any civil dispute between two private parties that is based on the same offending conduct.<sup>63</sup>

While universal jurisdiction has been utilised in this manner by a variety of states as the impetus for domestic criminal prosecutions of human rights abuses,<sup>64</sup> universal civil jurisdiction remains decidedly unpopular outside the US. Various attempts by victims of IHRL abuses to initiate claims in the domestic courts of other states have been met with scepticism or a flat rejection of the concept of universal civil jurisdiction. State practice appears to indicate that universal civil jurisdiction is at best only permitted according to international law and, absent explicit legislative measures designed to confer universal jurisdiction on domestic courts, states have been unwilling to recognise any such customary domestic jurisdiction. For instance, domestic courts in the UK, Canada, New Zealand and Australia, as well as the ECHR, have remarked that legal instruments that mandate compensation under domestic law for breaches of IHRL, such as article 14 of the Torture Convention, do not provide the basis for universal jurisdiction in respect of exclusively civil claims.<sup>65</sup>

<sup>59</sup> See: Donovan, Donald & Roberts, Anthea (2006): "The Emerging Recognition of Universal Civil Jurisdiction", *American Journal of International Law* 100, p. 142.

<sup>60</sup> On the various means of extraterritorial immunity under international law in the context of IHRL civil claims, see: McConville, Anne, "Taking Jurisdiction in Transnational Human Rights Tort Litigation: Universality Jurisdiction's Relationship to Ex Juris Service, Forum Non Conveniens and the Presumption of Territoriality", in Scott C, *op. cit.*, pp. 160-174.

<sup>61</sup> For an excellent study on the development and application of universal jurisdiction in the context of gross human rights abuses, see: Bassiouni, Mahmoud (2001): "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 42, p. 81.

<sup>62</sup> See: *Torture Convention*, art 14. See also: Hall, Christopher, *op. cit.* 53.

<sup>63</sup> See: McConville, Anne, *op. cit.*, p. 172.

<sup>64</sup> As a result of implementing legislation of the Rome Statute, for example, many states have now adopted the concept of universal jurisdiction within their domestic criminal frameworks. On the challenges of universal criminal jurisdiction in the European context, see: Kaleck, Wolfgang (2009): "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008", *Michigan Journal of International Law*, 30, p. 927.

<sup>65</sup> See, for example: *Al-Adsani v United Kingdom* (2002) 34 EHRR 111 ('*Al-Adsani* (ECtHR)') and *Kalogeropoulou v Greece and Germany*, Judgment on Admissibility 12 December 2002 (ECHR) (Europe); *Bouzri v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (Canada); *Jones* (House of Lords); *Fang v Jiang* [2007] NZAR 420 (New Zealand).

In addition to this scepticism outside the US, other states have actively lobbied against the recognition of universal civil jurisdiction under the ATS in US courts. In amicus curae submissions to prominent ATS litigation, Australia, Switzerland, the United Kingdom and the European Commission have argued for a reform of the ATS framework to limit or exclude claims based on universal civil jurisdiction.<sup>66</sup>

The reality of IHRL litigation is that claimants are often from jurisdictions where human rights enforcement is for various reasons limited or non-existent and will therefore depend on a domestic forum to litigate their dispute. Where such extraterritorial claims cannot be founded on the nationality of the plaintiff or defendant, they can only proceed on the basis of universal civil jurisdiction. The absence of an effective universal civil jurisdiction outside the US certainly limits the effectiveness of civil litigation as a means to remedy international human rights abuses, especially in the context of large-scale, multijurisdictional claims.

#### b. *Forum non conveniens*

Notwithstanding the proper exercise of jurisdiction and an established cause of action, domestic courts in some legal systems may decline to entertain a civil claim on the basis that there is a more appropriate jurisdictional forum in which to bring the action. This doctrine, known as *forum non conveniens*, has a principally common law heritage and will often be invoked by defendants in legal action where they argue that the claim is more suitably or appropriately heard in a different jurisdiction. The doctrine has proved obstructive for litigants in the context of IHRL claims in foreign domestic courts, as *forum non*

*conveniens* can operate to exclude claims in favour of the domestic courts of the state in which the human rights abuses actually took place.

While different variants of the doctrine exist throughout the common law world,<sup>67</sup> the general application of *forum non conveniens* will first seek to determine whether in fact an alternative forum exists to hear the case then balance the interests of both the parties to the suit then the public at large in hearing the case in the forum or an alternative jurisdiction.<sup>68</sup> A variety of factors may be considered by domestic courts to render a forum appropriate, which have included the enforceability of the judgment in the alternative forum, the costs and availability of effective legal representation and the practicalities of hearing witnesses and gathering evidence.<sup>69</sup> Generally, when dealing with IHRL claims, courts in the US have been more inclined to accept forum jurisdiction and deny the application of *forum non conveniens* on the basis of public policy considerations when compared with other jurisdictions.<sup>70</sup> This is encouraging for IHRL claimants under the ATS and TVPA, as the US position explicitly recognises a duty incumbent upon its domestic courts to act as a forum to receive and hear claims of human rights abuses from throughout the world, a factor which has occupied a prominent position when considering the application of *forum non conveniens* in human rights litigation.<sup>71</sup>

Despite this perspective, defendants of IHRL claims are still able to advocate an alternative jurisdiction to hear the action on the basis of *forum non conveniens*, even in US courts. For victims of human rights abuses, a decision to exclude a claim on the basis of the availability of a more appropriate jurisdiction can severely impede the effective resolution of their dispute. Al-

<sup>66</sup> For commentary, see: Donovan, Donald & Roberts, Anthea, *op. cit.*, pp. 146-147; O'Rourke, Anne & Nyland, Chris (2006): "The Recent History of the Alien Tort Claims Act: Australia's Role in its (Attempted) Downfall", *Australian Yearbook of International Law*, 25, p. 139.

<sup>67</sup> For instance, see: *Frymer v Brettschneider* (1994) 19 OR (3d) 60, 79: 'In all cases, the test is whether there clearly is a more appropriate jurisdiction than the domestic forum chosen by the plaintiff in which the case should be tried. The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties. All factors pertinent to making this determination must be considered' (Canada); *Lubbe* (United Kingdom); *Regie Nationale Renault v Zhang* (2002) 210 CLR 49 (Australia).

<sup>68</sup> For an introductory analysis of the *forum non conveniens* doctrine as it applies to IHRL litigation, see: Baldwin, Jeffrey, *op. cit.*, pp. 754-758. On the different applications of *forum non conveniens* throughout the common law world see: Gray, Anthony (2009): "Forum Non Conveniens in Australia: A Comparative Analysis", *Common Law World Review*, 38, p. 207.

<sup>69</sup> See: Baldwin, J., *op. cit.*, p. 755.

<sup>70</sup> Cf., for example: *Lubbe*, 50: 'the principles on which the doctrine of *forum non conveniens* rest leave no room for considerations of public interest or public policy which cannot be related to the private interests of any the parties or the ends of justice in the case which is before the court.' See also: *Recherches Internationales*.

<sup>71</sup> See, for example: *Wiwa v Royal Dutch Petroleum Co*, 226 F 3d 88 (2d Cir, 2000), 105-106.

though alternative jurisdictions may prove to be more practically appropriate in terms of the facility of gathering evidence, hearing witnesses and dealing with its own nationals (be they defendants or plaintiffs), they will often lack the extensive procedural and other abovementioned advantages that IHRL plaintiffs enjoy in forum jurisdictions such as the US.

### c. State immunity

Various international and domestic immunities and other jurisdictional barriers can also apply to invalidate IHRL claims in domestic civil litigation. In particular, the international law of state immunity can operate to prevent litigants bringing claims against states in foreign courts for their participation in human rights abuses. This rule precludes states and their property from becoming the subject of litigation in the domestic courts of a foreign state.<sup>72</sup> There have been recent attempts to codify the relevant principles of customary international law in the *United Nations Convention on Jurisdictional Immunities of States and Their Property*,<sup>73</sup> which preserves the right of states to claim immunity in foreign courts.<sup>74</sup> While there are certain specified exceptions to state immunity in various, typically commercial, contexts,<sup>75</sup> neither customary principles nor the recent convention permit an exception to state immunity based solely on the commission of international human rights abuses.<sup>76</sup> This failure of the current international framework on state immunity has attracted much criticism<sup>77</sup> and remains a clear impediment to the effective resolution of human rights claims in domestic civil courts. Accordingly, where civil claims are brought against foreign states for involvement in human rights abuses, the

international law of state immunity will apply to preclude domestic courts from entertaining such claims.

### d. Sovereign and other immunities

Claims brought against representatives or organs of foreign states in domestic courts will also be met by assertions of sovereign immunity purportedly enjoyed by such defendants. Historically a doctrine of customary international law, the application of sovereign immunity will depend on the position of the individual or government organ in the apparatus of the state. For instance, heads of state and other senior state officials enjoy immunity *ratione personae*, or 'absolute immunity', for each and every act undertaken while in office, regardless of whether such acts are done in a public or private capacity. This may be contrasted with the lower species of state immunity *ratione materiae*, otherwise known as 'functional immunity', which operates to protect lower officials for acts which are undertaken to carry out the official functions of the state.<sup>78</sup>

The distinction between these two categories of immunity can be decisive in the context of IHRL litigation. When considering the application of sovereign immunity to criminal prosecutions of human rights abuses, domestic courts have recognised that severe international crimes could not form part of the accepted functions of the state to which immunity *ratione materiae* would normally attach.<sup>79</sup> Contrast this, however, with the application of immunity *ratione personae* to the commission of international human rights abuses, which has been upheld in international and domestic jurisprudence.<sup>80</sup>

<sup>72</sup> For an example of the successful enjoyment of foreign state immunity in the context of human rights abuses, see: *Al-Adsani* (Court of Appeal).

<sup>73</sup> Note, however, that there has been an attempt to codify some of the rules of state immunity in the *United Nations Convention on Jurisdictional Immunities of States and Their Property*, opened for signature 2 December 2004 (not yet in force).

<sup>74</sup> *Ibid*, art 5. Note, however, that this treaty is yet to enter into force.

<sup>75</sup> For examples of commercial activity exceptions to state immunity, see: *State Immunity Act 1978*, ss 3-4 (UK); *Foreign Sovereign Immunities Act*, 28 USCA § 1330 (1976), s 1605(a)(2) United States). For an analysis of some of these commercial activities exceptions, see relevant discussion in: Bröhmer, Jürgen (1997): *State Immunity and the Violation of Human Rights*, 1st ed., Martinus Nijhoff, The Hague.

<sup>76</sup> This position has been recently upheld by the ICJ, where it was determined that a state will receive jurisdictional immunity in respect of its non-commercial acts, even if such acts constitute international crimes: *Jurisdictional Immunities of the State (Germany v Italy) (Judgment)* (International Court of Justice, 3 February 2012). Note, however, that some domestic legislation permits civil claims against states based on personal injury or death where the alleged conduct took place in the territory of the state, see, for example: *State Immunity Act 1978* (UK), s 5.

<sup>77</sup> See, for example: Hall, Christopher, *op. cit.*

<sup>78</sup> On the definition and scope of application of immunity *ratione materiae*, see: *Pinochet; Jones* (House of Lords).

<sup>79</sup> See: *Pinochet*, 164.

<sup>80</sup> See: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* [2002] ICJ Rep 3 ('Arrest Warrant'); *Jones* (House of Lords).

Proceedings against state officials for the commission of breaches of IHRL have most notably proceeded as criminal prosecutions in courts where universal jurisdiction is available for such offences. In the context of civil claims against this category of defendant, courts have been unwilling generally to limit the application of sovereign immunities. This appears puzzling in the context of serious human rights abuses that constitute breaches of *jus cogens* norms; that is, peremptory rules of international law from which no derogation is permitted, such as genocide, torture and slavery. To permit the application of sovereign and other immunities to alleged breaches of *jus cogens* norms, even in the context of civil disputes, contradicts their superior position in the hierarchy of international law.<sup>81</sup> Nonetheless, allegations of *jus cogens* breaches have not prevented defendants from enjoying sovereign immunity in civil claims against state representatives in a variety of domestic jurisdictions.<sup>82</sup>

Leaving aside the normative or practical considerations of whether sovereign immunity should render such claims invalid, the doctrine continues to apply under international law and various domestic immunity instruments. Accordingly, plaintiffs in IHRL disputes may find their claims struck out on the basis of the immunity of the defendant, which will be obviously prohibitive in cases brought against foreign state agencies and senior officials who remain in office.

In US litigation, IHRL claims may also be inhibited by the application of the domestic ‘act of state’ and ‘political question’ doctrines. Utilised in a similar fashion to immunities as a bar to the jurisdiction of US federal courts, these principles will generally render a claim non-justiciable if the subject matter of the litigation is concerned with an act of a foreign state within its

territory,<sup>83</sup> or an issue sensitive to the political interests of the US in the course of its foreign relations.<sup>84</sup> Although not explicitly set forth in the US Constitution, these principles are said to be closely linked to the concept of the separation of powers, according to which the judiciary will not consider matters it believes should be addressed by the executive or legislative arms of government.<sup>85</sup> While appropriate in principle, these doctrines are liable to misuse by courts as a means to avoid hearing matters of political or international import and have indeed lead to a ‘broad based objection to the ATS on the basis of separation of powers concerns’.<sup>86</sup> Where IHRL disputes concern the actions of states or the arousal of foreign state interests, the act of state and political question doctrines may be enlisted to prevent courts in the US from hearing such claims.

#### e. Enforcement of judgments

The typically international dimension of IHRL claims may prove problematic for successful claimants who will seek to enforce the judgment of a domestic court in a foreign jurisdiction. As most IHRL claims in domestic civil courts will involve a variety of actors from foreign jurisdictions, the enforceability of the judgment will inevitably be a factor for litigants to consider. When defendants are not nationals of, or do not have sufficient assets located in, the forum jurisdiction, they may be able to avoid compliance with the final orders of the court if a satisfactory enforcement of judgements regime is not in place between the forum state and the unsuccessful defendant’s state of nationality or residence.<sup>87</sup> In the case of awards of monetary damages, the delivery of compensation to a successful plaintiff can

<sup>81</sup> Alexander Orakhelashvili (2008): “State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong”, *The European Journal of International Law*, 18, p. 955. A human rights exception to state immunity in such cases has been suggested by some commentators: Hall, Christopher, *op. cit.* See also discussion in Fox, Hazel (2008): *The Law of State Immunity*, 2nd ed., Oxford University Press, Oxford, p. 749, where the author cites developments including the introduction of the *Torture (Damages) Bill* to the British Parliament and the report of the Secretary-General of the Council of Europe, which proposed that the Council establish ‘clear exceptions to State Immunity in cases of serious human rights abuses’.

<sup>82</sup> Some domestic examples of litigation where state and sovereign immunities have operated to exclude a civil claim where a violation of a *jus cogens* norm has been alleged include: *Al-Adsani* (Court of Appeal) (UK);

*Zhang v Zemin*: [2010] NSWCA 255 (Australia). For further commentary on the application of state immunities to cases of *jus cogens* violations, see: Forcese, Craig (2007): “De-Immunizing Torture: Reconciling Human Rights and State Immunity”, *McGill Law Journal*, 52, p. 127.

<sup>83</sup> See: *Kadic*, 250.

<sup>84</sup> See: *Tel Oren*, 824-825.

<sup>85</sup> For more detail on the application of political question doctrine and act of state doctrine, see: *Baker v Carr*, 369 US 186 (1962) (US Supreme Court) and *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964) (US Supreme Court).

<sup>86</sup> Stephens, Pamela, *op. cit.*, pp. 5-6.

<sup>87</sup> For further discussion of the international enforceability of judgments under the ATS, see: Murphy, John, *op. cit.*, pp. 31-32.

depend upon the effectiveness of international enforcement of judgment mechanisms or bilateral enforcement agreements between states.<sup>88</sup> Despite the apparent simplicity of this barrier to effective domestic litigation of IHRL, inadequate international enforcement of domestic judgments represents one of the most significant hurdles for victims to achieve redress against foreign defendants in domestic courts.

#### f. *Suitability of civil litigation and available remedies*

The different nature of remedies available in civil claims can act as a double-edged sword for victims of human rights abuses. Although civil remedies such as awards of damages can be encouraging for victims and are indeed understood as rights under various IHRL treaties,<sup>89</sup> they also represent a limitation of the civil dispute resolution process. In certain disputes, particularly those involving individual defendants, financial compensation will only be one component of the reparations required to properly satisfy victims and their families. The incapacity of civil courts to dispense criminal penalties, principally the incarceration of defendants, can render civil litigation an inefficient or incomplete mechanism to resolve IHRL disputes when individual criminal responsibility might otherwise be established. Many victims will demand that the perpetrators of their crimes be imprisoned, which is simply beyond the ambit of civil dispute resolution mechanisms.

During the course of the litigation process there will often be opportunities for the parties to participate in alternative dispute resolution practices, such as negotiation, mediation and pre-trial settlement. Although quite a reasonable aspect of normal civil disputes in common law systems, mechanisms which would require victims to literally sit down at a negotiating table with their attackers (or at least their legal representatives) may appear quite

frightening to many claimants or be viewed as an affront to the suffering they have endured. In addition, the mere potential for civil disputes to reach a point of settlement before the final judgment of a court may seem unreasonable to victims. Judgments are often seen as the most symbolic aspect of the legal process and represent the ultimate disposal of justice. Unlike criminal prosecutions or traditional human rights complaint bodies, the nature of civil dispute resolution encourages the settlement of claims prior to the commencement of litigation, which will normally engender the most expedient and cost-effective resolution of the dispute. Accordingly, claimants may be presented with the decision of accepting a negotiated award of compensation or continuing the proceedings with the risk of losing at trial. In some jurisdictions, claimants can face financial ruin if they lose their dispute and will often be pressured into accepting settlement agreements, especially in the context of human rights litigation, which regularly deals with novel and inherently risky areas of law.<sup>90</sup> These settlement agreements are typically confidential, do not necessarily admit the liability of the defendant and can stipulate conditions on the awarding of damages. Although financially efficient and expedient, such agreements cannot match the public judgment of a court as a means to achieve finality and justice for victims.<sup>91</sup> Another prohibitive aspect of the settlement process is that it will inevitably frustrate a final ruling by a court on a matter which, in the context of IHRL litigation, will often deal with novel or untested subject matter. This inhibits the value of such litigation to set a precedent for future claims and establish principles which would otherwise have been important developments of human rights jurisprudence.

Courts in the US have also deemed that domestic civil litigation cannot appropriately deal with alleged breaches of economic, social and cultural ('ESC') rights as it was understood that they were too indeterminate to be recognised as actionable under the ATS.<sup>92</sup> Although prominent examples of ESC civil liti-

<sup>88</sup> On the failure of such enforceability mechanisms, see: van Schaack, Beth, *op. cit.*, pp. 169-170.

<sup>89</sup> See: Hall, Christopher, *op. cit.*, pp. 412-415.

<sup>90</sup> Although this is the case in most modern civil litigation systems, the US overcomes this hurdle through not penalising the losing party by requiring them to pay their opponents fees, see: Stephens, Beth, *op. cit.* 10, p. 14. On the disincentive of the 'loser pays' system to human rights litigation, see: Byers, Michael, "English Courts and Serious Human Rights Violations Abroad: A preliminary Assessment", in Kamminga, Menno &

Zia-Zarifi, Saman (eds.) (2000): *Liability of Multinational Corporations Under International Law*, 1st ed., Kluwer Law International, Alphen aan den Rijn, p. 244.

<sup>91</sup> ATS claims have often ended in settlement. For some noteworthy examples of settled claims and on the value of settlement procedures in the context of IHRL litigation generally, see: Bachmann, Sascha-Dominik (2007): "Human Rights Litigation Against Corporations", *Journal of South African Law*, 2, pp. 303-305.

<sup>92</sup> See: *Flores v Southern Peru Copper Corp*, 414 F 3d 233 (2003).

gation are yet to surface in other jurisdictions, the justiciability of this species of rights remains furiously debated in the human rights discourse. The recent adoption of the optional protocol to the *International Covenant on Economic Social and Cultural rights*,<sup>93</sup> which establishes an individual complaints procedure for victims, seeks to challenge the notion that ESC are too broadly defined to be justiciable. Given the innately political and economic dimensions of ESC rights enjoyment, whether domestic civil courts will be suitable venues for the effective enforcement of any such individual complaints remains to be seen.

#### 4. Civil Litigation of IHRL in Crisis Situations

As an aside to the general promotion of human rights or enforcement of norms of IHRL that may be accomplished by domestic civil litigation, situations of crisis provide a separate context to the enjoyment and protection of IHRL. The effects that crises can have on both the enjoyment of rights under IHRL and the needs of victims of human rights abuses should also be examined to determine the efficacy of civil litigation as a means to enforce IHRL. This section will briefly review how domestic litigation has dealt with rights that are derogable under international law at times of crisis and the ways in which domestic litigation can empower victims of human rights to seek more effective redress during and after such situations.

##### a. Derogable rights in the context of civil litigation

As explained earlier, the civil litigation of human rights norms has generally been concerned with the most serious breaches of IHRL, such as torture, genocide, forced disappearances, slavery and the like. The rules of human rights law that proscribe

this conduct will typically belong to the category of *jus cogens* norms, from which no derogation is permitted. Accordingly, the application of such norms will generally prevail in all circumstances under consideration by domestic courts.<sup>94</sup> However, when rules of IHRL belong to a lesser category of international law norms, various treaty provisions will permit states to displace, or derogate from, these norms at times of crisis or public emergency which threaten the life of the nation.<sup>95</sup>

Jurisprudence from the United States provides ample guidance in relation to the enforcement of derogable human rights through the apparatus of the ATS. As a more recent interpretation and limitation of the ATS, judges in the US have begun to only entertain claims of human rights violations that constitute breaches of *jus cogens* rules of international law,<sup>96</sup> which will therefore render claims based on derogable human rights unenforceable under the ATS. The perspective of US courts in this respect is founded on the notion that derogable rights do not meet the threshold of a norm which is 'universal, definable and obligatory' and cannot therefore constitute a rule of the law of nations in respect of which the ATS will provide a forum for adjudication.<sup>97</sup>

Although the restriction of the ATS to breaches of *jus cogens* norms may at first glance appear obstructive to some claimants, the following two considerations should be recognised. First, this restriction has been developed by judges as a mechanism to limit the application of the ATS and has no explicit foundation in the statutory framework. Accordingly, it is liable to be challenged in subsequent litigation and adapted according to the future role that US courts will play in the domestic application and enforcement of IHRL. Second, this limitation should be understood in the context of the ATS as a statutory mechanism of universal civil jurisdiction. The fact that judges in the US are disinclined to entertain claims in respect of breaches of deroga-

<sup>93</sup> On the adoption and drafting of the Optional Protocol, see: Vandenberg, Arne & Vandenhoe, Wouter (2010): "The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process", *Human Rights Law Review*, 10(2), p. 207.

<sup>94</sup> Note, however, some of the discrepancies in the domestic application of *jus cogens* in the context of international law immunities as mentioned above.

<sup>95</sup> The framework of derogation from certain rights at times of crisis may be found in: ICCPR, art 4; ECHR, art 15; and ACHR, art 27.

<sup>96</sup> See, for example, commentary to that effect in: *Doe v Unocal Corp*, 110 F Supp 2d 1294 (2000); *Xuncax v Gramajo*, 886 F Supp 162 (1995).

<sup>97</sup> *Xuncax v Gramajo*, 184. On the establishment of the 'universal, definable and obligatory' standard, see: *Forti v Suarez-Mason*, 672 F Supp 1531, 1540 (1987). For commentary and criticism on this limitation of the ATS framework, see: Dodge, William (2001): "Which Torts in Violation of the Law of Nations?", *Hastings International and Comparative Law Review*, 24, pp. 358-360.

ble rules of IHRL will not necessarily defeat the enforcement of such claims in other domestic and jurisdictional contexts. For instance, where extraterritorial claims are brought in domestic courts (in the US and elsewhere) on the basis of the nationality of the plaintiff or the defendant, such courts may be entitled to hear claims which allege breaches of rights derogable in crisis situations.

### b. *Publicity of civil litigation*

In the environment of military and other crises, where human rights abuses are often ongoing and widespread, civil litigation can offer victims a different dimension to human rights promotion and enforcement when compared to more typical avenues of redress. What is perhaps the most significant aspect of domestic litigation in this respect is its capacity to disseminate the struggle of victims to the public at large. Unlike often tedious and technical human rights complaint mechanisms, the institution of large-scale litigation sends an instant and indeed very public message that claimants are willing to go to great lengths to have their situation heard before a judicial forum. Such publicity can be crucial in ending the suffering of many victims. In the case of large, corporate defendants the negative publicity of having litigation commenced against them can serve to prevent or deter further abuses.<sup>98</sup> The exposure generated by this publicity can also put pressure on governments to better engage in diplomatic solutions or improve their own practices to end the suffering of victims.<sup>99</sup> Even if the litigation of a dispute cannot resolve or remedy human rights abuses in the short-term, the mere commencement of proceedings and attendant publicity can greatly assist victims in bringing their mistreatment to an end.

## 5. Concluding Remarks

Domestic civil litigation has emerged as a novel and unique means by which victims of human rights abuses can seek redress

in foreign jurisdictions. Perhaps the most important feature of this process is that civil litigation, especially in the common law tradition, is a litigant-driven activity where the parties retain considerable control over much of the process. This offers victims a satisfying measure of autonomy in the resolution of their grievance and can operate to restore communities' confidence in domestic legal systems and the rule of law as a means to uphold the value of international human rights. Domestic litigation has also proved highly flexible in managing the changing dynamic of international law to incorporate both the interests and contributions of non-state actors in the framework of human rights regulation.

Probably the most important challenge that inhibits the future success of domestic civil litigation as a means to enforce IHRL is the broad scepticism towards universal civil jurisdiction that prevails in many domestic systems throughout the world. The exercise of universal civil jurisdiction has the potential to empower already functional domestic systems of dispute resolution to effectively and appropriately deal with breaches of IHRL. However, the suspicion outside the United States towards the use of domestic litigation to resolve international human rights disputes places a heavy burden on US Federal Courts to act as a forum for international human rights litigation. The failure of other states to utilise their own domestic legal systems in this fashion could potentially dissuade the US from continuing to hear claims of IHRL abuses, which might in turn serve to further disenfranchise victims of human rights abuses for want of an appropriate venue to litigate their dispute.

While domestic dispute resolution mechanisms should certainly be recognised for the variety of unique and necessary ways in which they can assist victims of human rights abuses, civil litigation and the attendant remedies available to litigants cannot fulfil all the requirements of a comprehensive system of human rights enforcement. Civil litigation must therefore be understood as one element of a holistic and multi-dimensional fabric of human rights regulation, which operates in public and private spheres and throughout international and domestic jurisdictions.

<sup>98</sup> For example, claims against Royal Dutch Shell in respect of its conduct in Nigeria have triggered new corporate responsibility standards and various other mechanisms, see: Zia-Zarifi, Saman (1999): "Suing Multinational Corporations in the US for Violating International Law", *University of California Los Angeles Journal of International Law and Foreign Affairs*, 4, p. 146.

<sup>99</sup> On the publicity generated by domestic IHRL lawsuits, see: Duruigbo, Emeka (2004): "The Economic Cost of Alien Tort Litigation: A Response to *Awakening Monster: The Alien Tort Statute of 1789*", *Minnesota Journal of Global Trade*, 14, pp. 33-34.



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