

Corporate civil liability for violations of international humanitarian law

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Abstract

The fact that international humanitarian law violations are in the vast majority of cases prosecuted in criminal courts does not mean that a civil liability for these violations does not exist. This article seeks to explore the concept of civil liability of corporations involved in violations of international humanitarian law by providing an overview of the different legal issues raised by this concept and its implementation in both common law and continental law systems.

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In recent years there have been much discussion and media reporting about international humanitarian law violations by states and the question of individual criminal liability for such violations. The issue of corporate liability is likewise now attracting broad media attention. Civil liability of companies¹ and violations of international humanitarian law are therefore familiar concepts not only for legal specialists but also for the public. However, they are rarely addressed together. And yet companies are increasingly operating in places which would have been inconceivable only a few years ago, namely in areas of armed conflict. Although companies working in conflict areas or in support of armed forces do not constitute an entirely new phenomenon, the conflict in Iraq, where foreign companies providing security and other support services appeared on the scene

* The author wishes to thank Professors Marco Sassòli and Eric David for their invaluable comments on the various drafts of this article.

almost at the same time as the US army, is an extreme example of the role private entities can play during hostilities.

Companies can play many different roles in an armed conflict and may be called upon to take part in it in various ways. In the early stages they can be a source of revenue for the belligerents, and this can cause the fighting to go on longer than it might have done otherwise. In Colombia, for example, oil companies were obliged to pay a special contribution towards restoring law and order, which took the form of a special tax of \$1.25 a barrel. In 1996 this tax brought the Colombian government a total revenue of \$250 million.² In Angola, during the last ten years of the conflict, it could be claimed that the parties were able to go on fighting only because of the revenues derived by the government side from the oil companies working the offshore oil deposits, and those derived from De Beers by the then rebel force UNITA, which controlled the diamond mines.³

Another way in which companies can take indirect part in an armed conflict is by financing security forces specially mandated to protect the company and its facilities. This type of financing can be arranged either by the signing of contracts between the company and the Ministry of Defence, for example, or tacitly, through the company's free provision of services to the military units in charge of its security.⁴ In such a case, are companies liable if their equipment is used by the army to commit violations of international humanitarian law? That is one of the questions this paper sets out to answer.

Finally, a company can be considered to take part in a conflict when it engages private security firms or is itself a private military company that has signed a contract with the government to supply military services. If a company can be deemed to have committed a breach of international humanitarian law, what does that mean in practice? What liability does the company have in such a case?

Serious violations of international humanitarian law are often associated with criminal liability. It should not be forgotten, however, that a number of countries do not recognize the criminal liability of legal persons and, moreover, civil liability offers certain advantages. If civil actions are brought against companies and the courts award large sums of money in damages and interest against them, this could make them more accountable and induce them to change

1 In this article, the terms “companies”, “firms”, “corporations” and “multinationals” are used interchangeably. We do not wish to enter into the legal definitions thereof; they are used to mean any legal person exercising a commercial activity. The term “corporate” is also used here with this general connotation.

2 “Colombia: Human rights concerns raised by the security arrangements of transnational oil companies”, Human Rights Watch, <<http://www.hrw.org/advocacy/corporations/colombia/Oilpat.htm>> (consulted on 28 May 2006).

3 BBC, “Fuelling the war: diamonds and oil”, 28 January 1999, <http://news.bbc.co.uk/1/hi/special_report/1999/01/99/angola/264228.stm> (consulted on 28 May 2006).

4 For example, in Colombia a consortium of oil companies concluded a contract with the Colombian army for \$2 million a year to be paid in cash or in kind in the form *inter alia* of equipment, troop transports and helicopter flying hours. Human Rights Watch, above note 2.

their corporate culture; shareholders, too, would become more aware of their responsibilities on seeing their profits thus dwindle and fearing the loss of their investments. There is also the practical aspect of civil action, which enables victims or their representatives to set in motion a judicial inquiry. This is particularly important in legal systems without a mechanism for victims to initiate criminal proceedings. A civil action furthermore enables victims to obtain material compensation for their sufferings, whereas some legal systems do not allow for this possibility in criminal proceedings. Finally, the standard for a decision in a civil case is the preponderance of evidence, whereas in a criminal trial, the existence of reasonable doubt is sufficient to prevent a guilty verdict. A civil suit therefore provides an easier route for victims to obtain the moral compensation afforded by recognition of liability by a court.

To examine the question of corporate civil liability, three aspects must be considered: the legal bases of corporate civil liability, in particular, the extent to which international law can create obligations for companies and whether there is a general obligation to make reparation for violations of international humanitarian law; the establishment of liability for a violation of international humanitarian law; and the enforcement of that liability before the national courts, that is, the determination of the law applicable and domestic courts' jurisdiction for corporate violations of international humanitarian law.

The legal bases of corporate civil liability for violations of international humanitarian law

In any legal system the failure to respect a commitment, contract or treaty creates a liability on the part of the defaulting party; generally, there arises a duty to provide compensation for any resulting damage. Several contemporary authors consider that responsibility can be viewed today as a general principle of law.⁵ Both the Permanent Court of International Justice and its successor, the International Court of Justice, confirmed very early on that the consequence of an unlawful harmful act was the duty to provide compensation.⁶ This general principle has recently been codified in the International Law Commission's Draft Articles on

5 "Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties", I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford University Press, Oxford, p. 420. See also Q. D. Nguyen, P. Dallier and A. Pellet, *Droit international public*, Paris, LGDJ, p. 762: "Tout ordre juridique suppose que les sujets engagent leur responsabilité lorsque leurs comportements portent atteinte aux droits et intérêts. Cette idée est équitable et irréfutable."

6 *Case concerning the Factory at Chorzów*, Permanent Court of International Justice, 1927: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in adequate form", *Corfu Channel Case*, [1949] ICJ Rep., p. 23: "these grave omissions involve her [Albania's] international responsibility. The Special Agreement asks the Court to say whether, on this ground, there is "any duty" for Albania "to pay compensation" to the United Kingdom. ... The Court answered in the affirmative."

Responsibility of States for Internationally Wrongful Acts (hereinafter the ILC Draft),⁷ subsequently adopted by the General Assembly of the United Nations.⁸

The specific case of international humanitarian law

Well before it was codified by the ILC, the principle that there is an obligation to make reparation was expressly formulated in the specific context of international humanitarian law, in Article 3 of the 1907 Hague Convention IV.⁹

On examining the reports of the Hague Peace Conference, it can be seen that the delegates' intention was not to create a principle but rather to extend the existing precept of private law that a principal is responsible for acts of his agents in regard to breaches of the laws and customs of war.¹⁰ The first part of that article is no more than a reiteration of the general principle of state responsibility. Its provisions were later confirmed by Article 91 of 1977 Additional Protocol I, which is essentially a repetition of the said Hague Convention's Article 3.¹¹ The 1949 Geneva Conventions, which place the emphasis in terms of prosecution and punishment on the criminal liability of individuals, nevertheless contain an article referring to state responsibility.¹²

Pursuant to the general principle of state responsibility and the various relevant provisions of international humanitarian law, there is therefore an obligation on the part of a state to make reparation for an internationally wrongful act committed by it or resulting from the conduct of its agents.

Corporate obligations under international law

The question here is whether, under international law, non-state entities can be held responsible for violations of international humanitarian law and, if so,

7 Article 1 of the ILC Draft stipulates that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”

8 Adopted in 2001, annexed to General Assembly Resolution 56/83, A/RES/56/83.

9 Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

10 The report of the Second Committee which studied this article reveals that Germany's proposal (future Article 3) was to extend to international law, for all violations of the Hague Regulations, the private law principle to the effect that a principal is responsible for his subordinates or his agents. This principle appears to have been accepted, since, according to the report, Germany's proposal went unopposed. F. Kalshoven, “State responsibility for warlike acts of the armed forces”, *International and Comparative Law Quarterly*, Vol. 40, 1991, p. 832.

11 It should be noted that Article 91 extends the scope of this principle to other breaches of international humanitarian law and to the “wars of self determination” mentioned in Article 1(4) of the Protocol.

12 “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.” Article 51, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Article 52, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; Article 131, Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; Article 148, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949. The authors' intention in including this provision was not to repeat Article 3 of the Hague Convention but to specify that compliance with the obligation to prosecute the perpetrators of serious breaches did not relieve states of their obligations under Article 3 of the Hague Convention.

whether there is a concomitant duty to make reparation. We therefore need to consider the extent to which international law creates obligations for non-state entities.¹³

In the nineteenth century, international law was addressed exclusively to states: according to the traditional view, only states and their agents could be liable under international law. However, the proliferation of non-state actors on the international scene, two examples being armed groups and multinational companies, which wield ever-greater economic and social power, has prompted international law to take an interest in this type of entity.¹⁴ Individuals certainly had particular obligations under international law well before the Second World War, but since then instances of new rights and duties being created for individuals by international law have increased exponentially. The great expansion of international human rights law in the two post-war decades is a clear indication that the aim of international law is not only to regulate relations between states but also those between states and individuals.

An examination of the Universal Declaration of Human Rights would seem to indicate that international law can confer duties on non-state actors. The use of the expression “every individual and every organ of society”¹⁵ in its preamble is interpreted by some¹⁶ as evidence that the authors intended the provisions of the Declaration to be applicable to all non-state actors and hence also to companies.¹⁷ Similarly, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which are binding treaties, contain in the first paragraph of their common Article 5¹⁸ wording that clearly places “groups” under the obligation not to “engage in any activity or perform

13 Legal persons and hence companies, firms, etc. are non-state entities. Non-state entities can also include armed groups. Other non-state actors are armed individuals. An important part of the debate on the place of non-state actors in the international legal system focuses on the question of their legal personality, i.e. whether or not they are subjects of international law. I shall not address this question here as it does not have much bearing on the question of obligations under international law.

14 P. Muchlinski, “Human rights and multinationals: is there a problem?”, *International Affairs*, Vol. 77, 2001, p. 31.

15 “... Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

16 Louis Henkin argues that the expression “every organ of society” used in the Preamble to the Universal Declaration of Human Rights includes legal persons, and hence companies, and that the Universal Declaration therefore applies to them. Cited in *Beyond Voluntarism: Human Rights and the Developing International Legal Obligations of Companies*, International Council on Human Rights Policy, Versoix, 2002, p. 58.

17 It should be noted that, although the Universal Declaration of Human Right is not as such a legally binding instrument, it is the most important soft law instrument in that it has an uncontested moral value as the very foundation of modern international law on human rights.

18 “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.”

any act aimed at the destruction of any of the rights and freedoms” recognized in the Covenants. Referring to the right to adequate food, the Committee on Economic, Social and Cultural Rights stipulated that all members of society, including the private sector, had responsibilities with respect to that right.¹⁹ If the Committee’s interpretation is accepted, non-state entities have responsibilities under the Covenant even though they are not party to it.

The evolution of international criminal law and international humanitarian law since the Second World War has likewise demonstrated that international law applies not only to states but also to non-state entities and, in particular, to individuals.²⁰ This trend has continued over the past ten years with the creation of the International Criminal Tribunals for the former Yugoslavia and for Rwanda²¹ by the UN Security Council and the adoption of the Rome Statute establishing the International Criminal Court (ICC). In the context of non-international armed conflicts, international humanitarian law imposes obligations not only on individuals but also on other non-state actors, in particular armed groups. Article 3 common to the four Geneva Conventions and the provisions of Additional Protocol II apply directly and automatically to all parties to such a conflict, provided that the conditions for their application are met.

The idea that international law applies to non-state actors, and hence to companies, and that they have duties and responsibilities under that law consequently does not pose any conceptual problem. Moreover, there are a number of other conventions that explicitly create obligations for companies in specific areas.²² The first is the International Convention on the Suppression and Punishment of the Crime of Apartheid, Article 1 of which refers to “organizations, institutions and individuals committing the crime of apartheid”.²³ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal contains a provision to the effect that the Parties shall prohibit “all persons” from transporting or disposing of hazardous waste unless authorized or allowed to do so.²⁴ Another convention, this time of a maritime nature, imposes civil liability on shipowners for oil pollution damage.²⁵ Finally, provision is made for the liability of legal persons in Article 10 of the more recent United Nations Convention against Transnational Organized Crime,²⁶ adopted by the General

19 Committee on Economic, Social and Cultural Rights General Comment 12: The right to adequate food, 12/05/1999, E/C.12/1999/5.

20 E.g. the International Military Tribunals for Germany (Nuremberg) and the Far East (Tokyo) and the adoption of the four 1949 Geneva Conventions, which include an article on criminal prosecution of those who commit grave breaches of the Conventions.

21 The International Criminal Tribunal for the former Yugoslavia was set up pursuant to Security Council Resolutions 808 and 827 (S/RES/808 and S/RES/827) and the International Criminal Tribunal for Rwanda pursuant to Resolution 955 (S/RES/955).

22 B. Stephen, “The amorality of profit: transnational corporations and human rights”, *Berkeley Journal of International Law*, Vol. 20, 2002, p. 69.

23 Article 1, para. 2: “The States Parties to the present Convention declare criminal those organizations institutions and individuals committing the crime of apartheid.”

24 Article 2: “Person means any natural or legal person.”

25 International Convention on Civil Liability for Oil Pollution Damage (CLC), 29 November 1969.

26 A/RES/55/25.

Assembly in 2000. All these treaties bear out the proposition that the international legal system can define what constitutes a crime or a civil wrong on the part of a company.²⁷

In addition there are a number of “soft law” instruments that deal exclusively with the responsibility of transnational corporations in respect of human rights. I shall refer here to three of these. The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy²⁸ is unusual in that it is not an expression of the will of states alone, for it was adopted by consensus by the Governing Body of the International Labour Organization, which includes representatives of the member states’ employers and workers and thus also of the private sector. The Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises, drawn up in 1976 and revised in 2000, emphasizes the duty of enterprises to respect the human rights of those affected by their activities.²⁹ Finally, the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights,³⁰ adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights at its 55th session in 2003, are particularly pertinent since they stipulate that companies “shall not engage in nor benefit from” violations of international humanitarian law.³¹

Corporate obligation to make reparation under international law

Legal persons can therefore have obligations under international law, or at least there is a strong tendency to that effect. However, virtually none of the above instruments provides for a mechanism for the enforcement of any liability that may arise or lays down any obligation for non-state entities to make reparation; they leave it to the states party to the treaties to choose how to apply the rules. Thus while it is possible to conclude that companies do have a duty under international law to make reparation for damage resulting from breaches of their international obligations, it is more difficult to assert that this duty is implemented by a mechanism established by international law. Nonetheless, a number of recent international texts which refer explicitly to the duty to make reparation do seem to support such a claim. One example is the Norms on the

27 A. Clapham, “The question of jurisdiction under criminal law over legal persons: lessons from the Rome Conference on an International Criminal Court”, in Menno T. Kamminga and Saman Zia-Zarifi, *Liability of Multinational Corporations under International Law*, Kluwer Law International, The Hague, 2000, p. 178. See also B. Stephen, above note 22, p. 70.

28 Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Board of the International Labour Organization at its 204th Session (Geneva, November 1977). See in particular Article 8.

29 OECD Guidelines for Multinational Enterprises, para.1. See also *Policy Brief: The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument*, OCDE, September 2003, available at <<http://www.oecd.org/dataoecd/52/38/2958609.pdf>> (consulted 7 February 2006).

30 E/CN.4/Sub.2/2003/12/Rev.2.

31 *Ibid.*, para. 3.

Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, stipulating that “transnational corporations ... shall provide ... reparation to those ... that have been adversely affected by failures [by the corporations] to comply” with the norms in question.³² Two other instruments also appear to confirm the hypothesis that, under international law, non-state entities are bound to make reparation for damage resulting from a breach of international law.

The first is the Basic Principles and Guidelines on the Right to a Remedy and Reparation,³³ the aim of which is to define the mechanisms that allow victims of gross violations of international human rights law and serious violations of international humanitarian law to obtain reparation. According to these basic principles, states are obliged to provide victims with “effective access to justice”, irrespective of who may ultimately be responsible for the violation,³⁴ and to enforce “judgments for reparation against individuals or entities liable for the harm suffered”.³⁵ These entities may include companies.

Finally, Article 75 of the Rome Statute of the ICC seems to confirm the tendency towards recognition of an obligation under international law for non-state entities to make reparation. Article 75 states that “[t]he Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims”. According to the Rules of Procedure and Evidence, the Court may award reparations taking into account the scope and extent of any damage, loss or injury; awards for reparations must be made directly against a convicted person.³⁶ Although such awards for reparations are made in the context of criminal proceedings, it follows from the above that they require the same elements as an award for compensation in a civil suit. The person against whom an award for damages is made must have committed a wrongful act and that act must have given rise to the damage. The debate that took place during negotiation of the Rome Statute illustrates the delegations’ differing points of view concerning the nature of the duty to make reparation. Some delegations perceived reparations as a way for victims to bring a civil claim via the Court against the person responsible for the crimes, while others saw reparations as an additional sanction pronounced by the Court. The former interpretation carried the day, that is, reparations are awarded on an individual basis except where the Court deems the award of reparations on a collective basis or a combination of the two to be more appropriate.³⁷

32 Ibid., para. 18: “Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken.”

33 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147.

34 Ibid., Principles 1 and 3.

35 Ibid., Principle 17.

36 Articles 97 and 98 of the Rules of Procedure and Evidence.

37 P. Lewis and H. Friman, “Reparations to victims”, in R. S. Lee, *The International Criminal Court*, Transnational Publishers, Ardsley, 2001, p. 483.

Prior to the Rome Statute of the ICC there was no international legal mechanism that enabled victims to make claims for reparation against the person directly responsible for a violation.³⁸ Although as imposed by international law this duty to make reparation applies only to individuals convicted of a crime, there is nothing to indicate that such a duty could not be imposed on a legal person. France had tabled a proposal to the effect that the Court should have jurisdiction over legal persons, but withdrew it after long negotiations because of the conceptual debate as to whether legal persons can incur criminal liability.³⁹ If that proposal had been accepted, and if the Court had been given jurisdiction over legal persons, the obligation to make reparation under Article 75 would have applied to them *ipso facto*. This provision cannot be overlooked since it is part of an instrument that has both definite legal force and an implementation mechanism; moreover, the Rome Statute can be considered as expressing the states' *opinio juris* in a number of areas,⁴⁰ given the large number of signatures and ratifications it has received.⁴¹

From the above it may be concluded that international law can establish, by treaty, rules that govern companies' activity, inasmuch as they impose certain obligations on them. In all treaties that address the question of corporate liability, responsibility for taking legislative measures to enforce companies' criminal or civil liability lies with the states. Despite the absence of international enforcement mechanisms, there appears to be a tendency on the part of international law to consider that non-state entities that breach obligations deriving from international human rights law or international humanitarian law are indeed under an obligation to make reparation.

Imputability of a violation of international humanitarian law to a company

As we have seen, a company can have obligations under international humanitarian law. However, before it can be found liable, a violation of that law must be attributable to it. This is one of the three fundamental elements required for civil liability, namely a wrong, damage and the causal relationship between the two. A violation of international humanitarian law which constitutes a wrong can be the result of the company's own actions or, in some cases, of the actions of others.

Liability for its own actions

At first sight it is difficult to imagine how a company – which is an abstract, non-physical entity – could commit a violation of international humanitarian law

38 Ibid., pp. 474–5.

39 For greater detail on the course of those negotiations and the French proposal, see A. Clapham, "The question of jurisdiction under criminal law over legal persons", in Kamminga and Zia-Zarif, above note 27.

40 *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 227.

41 As at 28 May 2006, 139 states had signed the Rome Statute and 100 states had ratified it.

directly, that is by its own acts. In the majority of cases violations of international humanitarian law are attributable either to a party to the conflict⁴² or jointly to an individual and a party to the conflict.⁴³ A company can also be held responsible for acts committed by its employees, but this question will be examined later.

So what type of acts are directly attributable to a company? The best place to look for an answer to this question is in the judgments of the US Nuremberg Military Tribunals (NMT) set up in after the Second World War. Allied Control Council Law No. 10 empowered any of the occupying authorities to try all persons suspected of crimes, including war crimes, in their respective occupation zones.⁴⁴ The tribunals could not therefore punish corporations as such for any crimes they might have committed. However, in order to be able to condemn their senior managers, the Tribunal had to examine the companies' actions. Three cases⁴⁵ concerning German industrialists were heard by a US military tribunal under Allied Control Council Law No. 10, two of which are of particular interest here as they constitute precedents for holding companies responsible for a violation of international humanitarian law.

In the first of these cases twelve top managers of the German industrial conglomerate Krupp were accused of, *inter alia*, war crimes for spoliation and plunder of public and private property in occupied territory and of war crimes and crimes against humanity for employing prisoners of war, foreign civilians and concentration camp inmates in arms factories in inhumane conditions. On several occasions the tribunal had to examine the acts of the company itself in order to be able to establish the criminal liability of the individuals who had been running it. The tribunal first examined the question of the company's acquisition of properties in France, Alsace and the Netherlands. In the judgment the tribunal several times refers to actions by the company in contrast to the individual conduct of an employee or a top manager.⁴⁶

In connection with the acquisition of a French company, the tribunal even appears to have attributed a particular intent to Krupp as legal person: "the correspondence between the Krupp firm and the Paris office shows the avidity of the firm to acquire the Austin factory and the Paris property".⁴⁷

42 It is difficult to imagine how failure to respect the fundamental guarantees set out in Article 75 of Protocol I, or other obligations that are the sole responsibility of the High Contracting Parties, could be ascribed to a company.

43 E.g. all acts that can be committed by combatants, in particular grave breaches of the law that give rise to individual criminal liability for their perpetrators and entail the state's responsibility.

44 Allied Control Council, Law No 10, 20 December 1945.

45 *Trial of Friedrich Flick and Five Others*, US Military Tribunal, Nuremberg, 20 April–22 December 1947, *Law Reports of the Trials of War Criminals*, Vol. IX, pp. 1–68; *The I.G. Farben Trial, Trial of Carl Krauch and Twenty-two Others*, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, *Law Reports of the Trials of War Criminals*, Vol. X, pp. 1–68; *The Krupp Trial, Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others*, US Military Tribunal, Nuremberg, 14 August 1947–29 July 1948, *Law Reports of the Trials of War Criminals*, Vol. X, pp. 69–181.

46 A. Ramasastry, "Corporate complicity: from Nuremberg to Rangoon – an examination of forced labor cases and their impact on the liability of multinational corporations", *Berkeley Journal of International Law*, Vol. 20, 2002, p. 109.

47 *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. IX, United States Government Printing Office, Washington, 1950, p. 1351.

The tribunal's conclusion on the acquisition of that company shows its view that the Krupp firm had the capacity to act as such and thus to take part in a crime:

We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German-inspired anti-Jewish laws and its subsequent detention by the Krupp firm constitute a violation of Article 48 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected; that the Krupp firm, through defendants Krupp, Loeser, Houdremeont Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations ... and that there was no justification for such action.⁴⁸

Finally, in examining evidence relating to acts of plunder committed in the Netherlands, the tribunal again referred to acts by the company:

We conclude that it has been clearly established by credible evidence that from 1942 onward illegal acts of spoliation and plunder were *committed by, and on behalf of, the Krupp firm* in the Netherlands on a large scale, and that particularly, between about September 1944 and the spring of 1945 certain industries of the Netherlands were exploited and plundered for the German war effort, in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.⁴⁹

These passages from the judgment certainly suggest that the tribunal recognized that the Krupp firm as such had itself committed the act of plunder.

In connection with the third charge concerning the Krupp group's use in its factories of the labour of prisoners of war, foreign workers and civilian concentration camp inmates, the tribunal referred both to their treatment by the company and its employees and to their use in armaments factories. On the latter point, the accused pleaded in their defence that they were forced to use those workers in the group's factories since, if they had refused, they risked forfeiting the group's factories and property.⁵⁰ In order to rebut this defence, the tribunal had to consider the acts of Krupp as a firm. The tribunal noted that "it was not a matter of refusing to accept an allocation. It was up to the enterprises to put in requests. Many armament firms refused. The Krupp firm sought concentration camp labor because of the scarcity of manpower then prevailing in Germany."⁵¹

The tribunal concluded that the Krupp firm had an "ardent desire" to use forced labour. In arriving at that conclusion, it is plain that the tribunal sought to impute the intention to the legal person of the firm in order to demonstrate that it emanated from the top management. The fact that the tribunal found that the Krupp firm planned and intended to use prisoners of war to work in its

48 Ibid., pp. 1351–2.

49 Ibid., p. 1370 (emphasis added).

50 Ramasastry, above note 46, p. 112.

51 *The Krupp Trial*, above note 47, p. 1412.

armaments factories, in breach of the law and customs of war already in force at the time,⁵² shows that a company can be held responsible for a breach of international humanitarian law.⁵³

In the *I.G. Farben* case, twenty-three members of the German chemical and pharmaceutical company's board were accused of, *inter alia*, war crimes, the plundering and spoliation of public and private property in occupied territory, and war crimes and crimes against humanity for having used forced labour. The tribunal based a number of its findings on the role of I.G. Farben as a corporate body. While it made no reference to the acts of the company in connection with the charge of using forced labour, confining itself to the direct role of the accused in negotiations and meetings on that matter,⁵⁴ it did so extensively when it addressed the charges of plunder:

With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace Lorraine and France, we find that the proof established beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 *were committed by Farben*, and that these offences were connected with, and an inextricable part of the German policy for occupied countries as above described.⁵⁵

Moreover, the tribunal held the company responsible for a specific violation of Article 47 of the Hague Regulations, which forbids pillage.⁵⁶ This violation was not interpreted by the tribunal as being able to be committed solely by the occupying power. The tribunal considered that a legal person had the capacity to breach the laws and customs of war⁵⁷ and *ipso facto* that international humanitarian law was applicable to a company.⁵⁸

It can therefore be deduced from the US military tribunal's judgment that the war crime of pillage could be imputed directly to I.G. Farben as a company, even though the tribunal did not have jurisdiction over legal persons.⁵⁹

These two judgments show that companies can be held responsible for violations of international humanitarian law, particularly war crimes, as exemplified in this case by pillage and use of forced labour.

52 Article 6 of the Regulations respecting the Laws and Customs of War on Land (hereinafter the Hague Regulations).

53 Ramasastry, above note 46, p. 112.

54 *The I.G. Farben Trial, Trial of Carl Krauch and Twenty-two Others*, above note 45, pp. 53–61.

55 *Trials of War Criminals before the Nuremberg Military Tribunals*, Vol. VIII, above note 47, p. 1141 (emphasis added).

56 "Such action *on the part of Farben* constituted a violation of rights of private property, protected by the Laws and Customs of War" (emphasis added), *Trials of War Criminals*, above note 47, p. 1140.

57 "Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. ... Where a private individual *or a juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations" (emphasis added), *ibid.*, p. 1132.

58 Clapham, above note 27, p. 169.

59 *Ibid.*, p.171, and Ramasastry, above note 46, p. 107.

Secondary liability

A legal person can be held responsible for a violation of international humanitarian law, not only for its own acts but also, in certain cases, for the acts of its employees or of other entities, companies, armed groups or even a state. In order for a company to be held at least partially liable, certain conditions have to be met. I shall analyse here the various cases in which a violation can be ascribed to it.

Vicarious liability. It is a principle of private law that a principal is responsible for the acts of his agents. In domestic law systems this is known as the principle of vicarious liability. This type of liability also exists in international law in the form of state responsibility for internationally wrongful acts. The second chapter of the ILC Draft⁶⁰ addresses responsibility for acts of organs of a state or persons or entities exercising public functions. However, as regards corporate liability for violations of international humanitarian law committed by others, the fact that the law is implemented at national level means that the attribution of liability will be governed by the civil-law rules of domestic legal systems.⁶¹ Under Quebec law, for example, the relevant principle is to be found in Article 1463 of the Quebec Civil Code: “The principal is liable to reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains his recourses against them.” This article creates a presumption of liability on the part of the principal, that is, the company in this case, for acts of others; no wrong on the part of the principal is therefore needed to establish such liability.⁶² Under common law, the tort system, which deals with non-contractual liability, also recognizes this principle, known as the principle of *respondeat superior*. The standards to be met before the principle can apply are more or less the same as in the civil-law system described below.⁶³ For liability to arise, three conditions must be cumulatively met, namely a wrongful act on the part of the employee, a relationship of subordination and the existence of damage caused by the agent in the exercise of his functions. At first sight these standards appear relatively clear, but the second and third warrant closer examination. The contractual link is not particularly important in determining the existence of a relationship of subordination. What has to be established is rather the authority of the

60 See note 13 above.

61 See below.

62 J. L. Baudouin, *La responsabilité civile*, 4th edn, Les Éditions Yvon Blais, Cowansville, 1994, p. 342. This principle is codified in almost all civil-law systems; see for example Article 2049 of the Italian Civil Code.

63 “As with natural persons, the corporate employer will be held responsible where an agent’s tortious act is committed within the scope of the agent’s authority and in the course of the agent’s employment.” B. Stephen, “Corporate accountability: International human rights litigation against corporations in US courts”, in Kamminga and Zia-Zarifi, above note 27, p. 219. See also V. Oosterveld and A. C. Flah, “Holding leaders liable for torture by others: command responsibility and respondeat superior as frameworks for derivative civil liability”, in C. Scott, *Torture as Tort*, Hart Publishing, Oxford, 2001, pp. 450–1.

principal over the agent and his work and the method used in the performance of his duties.⁶⁴ The principal must have power of supervision, authority and control over the way in which the agent's work is carried out. The relationship of subordination between a company and a sub-contractor can therefore be more difficult to establish. The independence of the sub-contractor to whom certain tasks are entrusted is often incompatible with the degree of control required for the presumption of the principal's liability to apply.⁶⁵ Obviously, if it can be proved that the principal retains a degree of control over his sub-contractor's activities that satisfies the above standards, the principal may be held liable.

The notion of the performance of duties also raises some difficulties. The standard considered safest for the purposes of determining whether the act was committed in the performance of the agent's duties is the "purpose of the employee's activity" test. If the wrongful act was performed in the interests of the agent and the principal or solely in the latter's interests, it will be presumed to have been committed in the course of the agent's duties. However, if the act is deemed to have been for the sole benefit of the agent, it will not be so presumed.⁶⁶ It has been suggested that, when the employee deliberately disobeys or disregards his employer's orders, the employer will incur no liability. However, that is not necessarily so. The standard that applies is always the purpose of the act, as "disobedience on the part of the agent is not necessarily incompatible with performance of his duties".⁶⁷ The same applies to a criminal act, as the perpetration of a criminal act does not presuppose *per se* that the agent is acting outside the scope of his duties.⁶⁸ These clarifications are of particular importance when it comes to establishing the civil liability of a company for violations of international humanitarian law, since such violations are often crimes. A company operating in a conflict zone may well instruct its employees to comply with human rights law and international humanitarian law, but the fact of giving such instructions will not alone provide a basis for the company to avoid liability for the act of its agent, where that act is performed for the furtherance of its business and where it has benefited from that act.

Complicity (aiding and abetting). Complicity is primarily a criminal law concept with strict rules of application. According to Schabas, three conditions have to be met: (i) a crime must be proved to have been committed by another person; (ii) the accomplice must have performed a material act of assistance to the perpetrator of the crime; and (iii) this act must have been performed with intent and with knowledge of the act of the perpetrator of the crime.⁶⁹ As the concept of complicity

64 Baudouin, above note 62, p. 353.

65 *Ibid.*, pp. 361–3.

66 *Ibid.*, pp. 383–6.

67 *Ibid.*, p. 375.

68 *Ibid.*, pp. 373–4.

69 W. A. Schabas, "Enforcing international humanitarian law: Catching the accomplices", *International Review of the Red Cross*, Vol. 83, No. 842, June 2001, pp. 447–8.

does not exist as such in extra-contractual civil liability law, either in tort or civil law, we now need to ask how the concept is expressed in private law.

In a number of situations where companies have been accused of violations of international humanitarian law, the violations in question were in fact committed by government forces and hence the state. In some very particular cases, a contract is concluded between a company and the authorities under the terms of which government forces guard the company's facilities; often a specific military unit is assigned to the task.⁷⁰ In most of such cases, these units can be regarded as independent contractors since they are not under orders. The principle of vicarious liability described above is therefore applicable.

However, it can be considered in a general manner that if a company deliberately contributes in some way, active or passive, to the committing of a breach, it could be held liable for that breach by virtue of its own act, provided that a sufficiently strong link of causality can be established between the company's wrongful act and the violation.⁷¹

US law is somewhat more specific. It defines the types of conduct that give rise to joint and several liability for a tort. Such liability arises where a person "orders or induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own, or (b) conducts an activity with the aid of another and is negligent in employing him, or (c) permits the other to act upon his premises or with his instrumentalities. Knowing or having reason to know that the other is acting or will act tortiously."⁷² Moreover, the US courts, applying the Alien Tort Claims Act (ATCA),⁷³ have devised two further tests that would allow a form of complicity to apply in civil cases.

In cases of complicity between companies and governments, the theory of "joint action" can be applied using the joint action test. In such cases, it must be shown that there was an agreement between the parties with a view to achieving a common design.

Doe v. Unocal Corp. is a good example of case-law illustrating the application of this theory.⁷⁴ In this case, which was heard at first instance in a US federal district court, the company Unocal was sued by citizens of Myanmar for aiding and abetting the Myanmar military in committing grave breaches of human rights. Several of the breaches referred to (torture, rape, forced displacement, etc.) would be violations of international humanitarian law if they were to take place in the context of an armed conflict, hence the relevance of this judgment here. These breaches were perpetrated in the context of oil and

70 See the remarks on the situation in Colombia in the introduction.

71 *Beyond Voluntarism*, above note 16, p. 126.

72 Restatement (Second) of Torts 877 (1965), cited in C. Shaw, "Uncertain justice: Liability of multinationals under the Alien Tort Claims Act", *Stanford Law Review*, Vol. 54, 2002, p. 1382.

73 The Alien Tort Claims Act (hereinafter ATCA) allows a foreign national to bring a civil suit against a party that has caused damage resulting from a breach of international law. "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

74 *Doe v. Unocal Corp.*, 110F. Supp. 2d. 1294 (C.D. Cal. 2000), US Federal District Court, judgment of 31 August 2000.

gas extraction operations and the building of a pipeline. The government had a mandate, *inter alia*, to provide security and manpower for the project, a joint venture involving Unocal, Total and the government of Myanmar. In its analysis the Court found that for the breach to be imputable to the company under the joint action theory, the plaintiff had to show that the parties participating in the joint action, namely Unocal and the government of Myanmar, had the specific common design of violating the victims' rights. The Court found that the two bodies had only one common design, namely that of running the project profitably.⁷⁵ The Court also applied the "proximate cause" test to determine whether a breach committed by a state was imputable to a company. To satisfy this test the plaintiff had to show that the company exercised control over the government's decision to commit a violation.⁷⁶ In this case, although the evidence showed that Unocal was aware of the use of forced labour and that the project benefited from it, this was not sufficient to hold the company liable for the breach under the joint action theory. This judgment was appealed and was overturned. However, the appellants challenged not the joint action theory *per se* but only its applicability in this case.

In the second-instance judgment in the case,⁷⁷ the Court of Appeals for the Ninth Circuit found that the district court should have applied a complicity theory borrowed from criminal law, namely that of aiding and abetting. In the grounds for its judgment the Court of Appeals said that, according to the conflict of laws theory in international private law, it was preferable to use international law standards to decide legal questions in cases based on a rule of the law of nations.⁷⁸ The Court of Appeals provided three arguments in favour of the use of international criminal law standards in a civil case in domestic law: (i) international human rights law has been developed largely in the context of criminal prosecutions rather than civil proceedings; (ii) the distinction between a crime and a tort is of little help in ascertaining the standards of international human rights law because what is a crime in one jurisdiction is often a tort in another;⁷⁹ and (iii) the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law.⁸⁰ On the basis of this theory and the fact that Unocal had knowledge of the human rights violations before becoming party to the joint venture, the Appeals

75 D. Betz, "Holding multinational corporations responsible for human rights abuses committed by security forces in conflict-ridden nations: an argument against exporting federal jurisdiction for the purpose of regulating corporate behavior abroad", *DePaul Business Law Journal*, No. 14, 2001, p. 176.

76 *Ibid.*, p. 177.

77 *Doe v. Unocal Corp.*, U.S. Court of Appeals for the Ninth Circuit, Judgment of 18 September 2002.

78 T. Garmon, "Domesticating international corporate responsibility: holding private military firms accountable under the Alien Tort Claims Act", *Tulane Journal of International and Comparative Law*, Vol. 11, 2003, pp. 347–8.

79 The Court appears to be mistaken in citing this reason, at least as far as violations of international humanitarian law are concerned, since states are obliged under the Geneva Conventions to classify serious violations as criminal acts. Any difference of classification for these types of conduct is therefore impossible.

80 Garmon, above note 78, p. 348.

Court found that there was sufficient evidence to hold Unocal liable under the ATCA.

This application of the aiding and abetting standard was followed by a district court of New York State in the *Talisman* case,⁸¹ in which a Canadian oil company was sued for collaborating with the Sudanese government in violations of human rights and war crimes committed in the context of the international armed conflict taking place in Sudan. *Talisman* challenged the use of the aiding and abetting standard, arguing that this theory did not apply to a civil claim under the ATCA.⁸² The Court ruled that this argument was unfounded:

Talisman's contention is incorrect. Its analysis misapprehends the fundamental nature of the ATCA. The ATCA provides a cause of action in tort for breaches of international law. In order to determine whether a cause of action exists under the ATCA, courts must look to international law. Thus, whether or not aiding and abetting and complicity are recognized with respect to charges of genocide, enslavement, war crimes, and the like is a question that must be answered by consulting international law.⁸³

The theory of aiding and abetting seems therefore to be applicable in civil claims for violations of international humanitarian law, at least in the United States under the ATCA. It is interesting to note that, in order to determine the degree of participation required if a party is to be regarded as a member of a "joint enterprise", the English and Australian courts have used a concept similar to the theory of aiding and abetting.⁸⁴ It will therefore be helpful to define "aiding and abetting".

The *Furundzija* case, heard before the International Criminal Tribunal for the former Yugoslavia, offers the fullest definition of the standards for establishing complicity in the form of aiding and abetting. The assistance given must have a substantial effect on the perpetration of the crime, and the person aiding or abetting must have been aware that the assistance provided is contributing to the perpetration of a crime, even if he did not have a common design with the person who directly committed it:

81 *Presbyterian Church of Sudan v. Talisman Energy*, 244 f. Supp. 2d 289, US District Court for the Southern District of New York, 19 March 2003.

82 *Ibid.*, p. 320.

83 *Ibid.* Arguing that new standards had been set by the Supreme Court decision in the *Alvarez-Machain* case (*Sosa v. Alvarez-Machain et al.*, 542 US Supreme Court, 29 June 2004), *Talisman* sought relief of this decision by contending that the existence of secondary liability in particular aiding and abetting liability was not supported by sufficient evidence and that the concept was not sufficiently defined in international law. The District Court rejected the arguments by upholding the 2003 decision that found that secondary liability existed in international law. Furthermore, the court found that *Talisman's* claim that aiding and abetting was not sufficiently defined in international law, as required by the *Alvarez-Machain* case, was misguided. *Presbyterian Church of Sudan v. Talisman Energy*, 374 f. Supp. 2d 331, US District Court for the Southern District of New York, 13 June 2005.

84 *Beyond Voluntarism*, above note 16, p. 130.

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the actus reus consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The mens rea required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the actus reus consists of participation in a joint criminal enterprise and the mens rea required is intent to participate.⁸⁵

Companies can therefore be held liable for violations of international humanitarian law where these violations are the result of their own acts or of acts of others, inasmuch as a sufficiently strong link can be established between an act or omission by the company and the violation, or if the company's conduct amounts to complicity. Having established that companies do have responsibilities in relation to violations of international humanitarian law and that they can be held liable for such violations, we now need to consider what means are available for enforcing this type of corporate liability.

Enforcing corporate civil liability

As ascertained in the first section, companies have obligations under international law. There also seems to be a tendency to consider that they have a concomitant obligation under international law to make reparation. However, as international law does not provide for any mechanism whereby corporate civil liability can be enforced, we must look to domestic law to see what possibilities, if any, it provides for enforcing corporate liability for violations of international humanitarian law.

Who is the subject of the right to reparation provided for under international humanitarian law?

This question is crucial to the next stages of the analysis. As claims for reparation are made through civil proceedings, it is essential to determine who can bring a civil action on the basis of international law. The first step in answering this question is to investigate what the states' intention was when they adopted Article 3 of the Hague Convention IV of 1907. An examination of the preparatory proceedings leads to the conclusion that Article 3 was intended, *inter alia*, to confer a right to reparation on individuals.⁸⁶ The aim of the article was to set up a

85 *Prosecutor v. Anto Furundzija*, above note 40, para. 249.

86 “[I]t would be unacceptable if a victim could claim damages only from the officer or soldier guilty of the infraction”, cited in Kalshoven, above note 10, p. 834. “If in this case the persons injured as a consequence of a violation of the Regulations could not demand reparation from the Government and were obliged to look to the officer or soldier at fault they would fail in the majority of cases to obtain the indemnification due”, cited in Pierre D’Argent, *Les Réparations de guerre en droit international public: la*

new mechanism, as an alternative to diplomatic protection which was non-existent or ineffective in a context of belligerent occupation, to enable victims of violations of international humanitarian law to obtain reparation. It was therefore necessary to confer the right to reparation on the victims themselves. Various domestic courts have expressed opinions on this question and it is important to take a brief look at their conclusions.

On several occasions since the 1960s, when considering claims for compensation from victims of violations of international humanitarian law that occurred during the Second World War, the Japanese courts have had to examine the question as to who is the subject of the right to reparation. After analysing Article 3 and customary law, the Tokyo District Court, in two recent judgments⁸⁷ concerning former prisoners of war and civilian internees, dismissed the actions on the grounds that the individuals did not have a personal right to reparation at the time of the violations.⁸⁸ They reached this conclusion on the basis of the standards established in the *Shimoda* case brought by five Japanese plaintiffs to recover damages for injuries sustained from the US atomic bombings.⁸⁹ According to that judgment, in order for an individual to claim compensation from states these individuals must be subjects of rights in international law. The test set out in that case to determine if one is subject of rights is the following : individuals must be able to have rights and assume duties for and in their own names. For a person to seek reparations from a state, he must be a subject of a right in international law.⁹⁰

However, the Japanese courts' interpretation seems to be mistaken. Correct application of the standards should lead to a conclusion quite different from theirs, for international humanitarian law *is* directly applicable to individuals and does create obligations, for example in the area of criminal law. Consequently, even according to the test applied by the Japanese courts themselves, individuals should be subjects of the right to reparation.

responsabilité internationale des États à l'épreuve de la guerre, Brussels, Bruylant, 2002, p. 508. These two statements, which went unchallenged, demonstrate by their wording and the use of the terms "victims" and "persons injured" that the parties wished to confer the right to reparation on individuals and not on the states.

87 In both cases, each plaintiff claimed compensation of US\$22,000 for damage resulting from ill-treatment inflicted by the Japanese army. The fact that the victims had suffered ill-treatment was not contested. The main question was whether or not the victims had a right of redress. *Arthur Titherington and others v. State of Japan*, Civil Division No. 31, Tokyo District Court, 26 November 1998, and *Sjoerd Lapré v. State of Japan*, Civil Division No. 6, Tokyo District Court, 30 November 1998, cited in Fujita Hisaku, Suzuki Isomi and Nagano Kantoro, *War and the Rights of Individuals: Renaissance of Individual Compensation*, Nippon Hyoron-sha, Tokyo, pp. 104, 118.

88 "Article 3 of the Hague Convention is nothing more than a provision which clarifies a state's international liability to compensate a victim nation for violations of the Hague Regulations And in the courts of Japan, individuals suffering injury from conduct of members of armed forces who violate international humanitarian law may not seek compensation from the country of their violator." *Sjoerd Lapré v. State of Japan*, *ibid.*, p. 124.

89 *Shimoda* case, 7 December 1963, *Japanese Annual of International Law*, Vol. 8, 1964.

90 Hisaku Fujita, "Introduction: post-war compensation litigation from the viewpoint of international law", in Hisaku et al., above note 87, p. 19.

The US courts traditionally did not recognize an individual right of redress for a violation of international humanitarian law because the Hague Convention was not deemed to be self-executing.⁹¹ Yet this traditional interpretation seems to be changing. In the *Karadzic* case, the Court of Appeals of the Second Circuit acknowledged the possibility that individuals could be subjects of a right to reparation.⁹² This tendency seems to be confirmed by other recent judgments, at least as regards claims for reparation under the ATCA for violations of international humanitarian law.⁹³

Finally, the right of victims to sue for reparation for damage resulting from violations of international humanitarian law has been recognized in a recent case in Greece. According to the court of first instance, the claim for reparation did not need to be lodged by the state of which the victims were nationals, since there was no rule of international law that prevented the individuals from lodging such a claim themselves.⁹⁴ This judgment was confirmed by the Aereios Pagos (Supreme Court), whose conclusion presents a cogent summary of the state of jurisprudence on the right of victims to sue for reparation:

In our opinion we are at the stage of emergence of a practice of founding jurisdiction of the courts of the forum (most appropriate) to adjudicate compensation claims brought by individuals against a foreign state for breaches of *jus cogens* rules and especially those safeguarding human rights, provided that there exists a link between such breaches and the forum state.⁹⁵

Recent developments in both human rights law and international criminal law also indicate that states acknowledge that individuals are subjects of the right to reparation. The Basic Principles and Guidelines on the Right to a Remedy and Reparation,⁹⁶ for example, recognizes that individuals are subjects of the right to reparation for serious violations of international humanitarian law. The right of individuals to claim reparation has also been recognized by one of the most important organs of the United Nations, namely the Security Council, which, in its Resolution 827 establishing the International Criminal Tribunal for the former Yugoslavia, stated that:

91 *Goldstar (Panama) S.A. v. United States*, US Court of Appeals 16 June 1992, *International Law Reports*, 96, 1992, p. 58. See also *Hugo Prinz v. Federal Republic of Germany*, Court of Appeals for the District of Columbia 1 July 1994, *International Legal Materials*, 33, 1994, p. 17: “nothing in the Hague Convention, even implied, grants individuals the right to seek damages for violations of its provisions.”

92 “The law of nations generally does not create private clauses of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations.” *Kadic v. Karadzic*, 70 F. 3d 232, 1995, p. 246.

93 See, for example, *Presbyterian Church of Sudan v. Talisman Energy*, above note 81, in which the Court dismissed Talisman’s claim but recognized individuals’ right to claim reparation.

94 *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997; Court of First Instance of Leivadia, 30 October 1997, *American Journal of International Law*, Vol. 92, 1997, p. 767.

95 *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, Aereios Pages, 4 May 2000, *American Journal of International Law*, vol 95, 2001, p. 203.

96 Above note 33. Principle 13 also highlights the importance of giving victims access to the justice system to present claims for reparation.

the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violation of international humanitarian law.

Finally, although it does not address claims against civil liability, Article 75 of the ICC Statute recognizes victims' right to reparation. This is certainly an indication that a large part of the international community considers that individuals are the subject of the right to reparation.

Is a violation of international humanitarian law a civil wrong or a tort in domestic law?

If they are to establish corporate liability for violations of international humanitarian law, domestic courts must have jurisdiction to pronounce on such violations. That means that violations of international humanitarian law must form part of domestic law;⁹⁷ in other words international humanitarian law must be incorporated into domestic law. Domestic law must also recognize that a violation of international humanitarian law constitutes a wrong for the purposes of civil liability.

The requirement that international law be incorporated into domestic law is met in the great majority of states. But does a violation thereof constitute a civil wrong for the purposes of private law?

In civil-law systems, a civil wrong is defined as failure, by violating a prescribed standard of behaviour, to fulfil the general duty imposed on each individual not to cause harm to others. An eminent Quebec author has defined a civil wrong as a violation of conduct deemed acceptable in terms of legislation or case-law such that it gives rise to a duty to repair the harm caused.⁹⁸ International humanitarian law is in the vast majority of cases implemented through national legislation; as such, conduct that transgresses the standards of behaviour it defines can constitute a civil wrong. This observation applies *a fortiori* to grave breaches, since they are classified as criminal acts.⁹⁹ He goes on to say that a transgression of a specific obligation imposed by law or regulation, particularly if it is intentional, constitutes a civil wrong in principle because there is a violation of a standard of conduct imposed by the legislator.¹⁰⁰ There does not therefore appear to be any

97 Except in the United States, where Federal Courts have jurisdiction to hear cases based on international law under the Alien Tort Claim Act, which we shall examine in greater detail below.

98 “[C]’est donc la violation de la conduite jugée acceptable législativement ou jurisprudentiellement qui emporte l’obligation de réparer le préjudice causé”. Baudouin, above note 62, p. 82. This definition is similar to that given by a number of French legal authors.

99 E.g. in Canada, Article 3 of the Geneva Conventions Act, note 113: “Every person who, whether within or outside Canada, commits a grave breach ... is guilty of an indictable offence....”; and in India, Article 3, Chapter II, of the 1960 Geneva Conventions Act.

100 “[O]bligation spécifique imposée par la loi ou le règlement, surtout si elle est intentionnelle, constitue en principe une faute civile, puisqu’il y a alors violation d’une norme de conduite impérativement fixée par le législateur”. Baudouin, above note 62, pp. 91–2.

conceptual obstacle to the classification of a violation of international humanitarian law as a wrong in civil proceedings under the civil-law system. However, as there is no case-law on this point, it is difficult to predict how a court would react to a claim based on a violation of international humanitarian law.

In common-law systems the question has to be framed in different terms. The definition of a “tort” in common law is much less clear-cut than that of a “wrong” in civil law. Common law has created a number of categories of conduct that can be considered as torts, the most common being negligence and intentional offences against the person or property. Unlike civil law, common law does not define failure to comply with a legislative provision as a general tort *per se*. Breach of an obligation imposed by the law may be adduced as evidence that the defendant has been negligent, but is not actionable in itself. In *R. v. Saskatchewan Wheat Pool*,¹⁰¹ the Supreme Court of Canada rejected the idea of an automatic tort based solely on damage resulting from breach of a law. However, the Court did stipulate that failure to comply with the law was a factor in determining whether or not the defendant was negligent.¹⁰²

Clearly, for a number of violations of international humanitarian law, particularly grave breaches, a claim could be lodged against the violating party on the basis of recognized torts. Torture, serious assaults on physical integrity, inhuman treatment or intentional infliction of intense suffering are violations that would come under the torts of battery, intentional infliction of physical harm or intentional infliction of emotional distress. Similarly, murder could be actionable in tort as wrongful death. A violation of international humanitarian law could also fall under the tort of negligence if the violating party did not intend to cause damage. To establish negligence, it is necessary to show that the defendant had a duty of care towards the victim and that he or she did not fulfil that duty. Defining the duty of care of a company towards the victims in the context of an armed conflict is more complex, however. According to the Supreme Court of Canada, for there to be a duty of care there first has to be a relationship of proximity between the company and the victim such that it is foreseeable that negligence by the company could have as a consequence the loss or damage suffered by the victim. Second, the company must have been negligent, that is, it must have acted in a way that objectively created an unreasonable risk of loss or damage.¹⁰³

Finally, there seems in theory to be nothing to prevent the development of new torts; the fact that a claim is novel or cannot be classified under an existing named tort does not operate as a bar to a civil claim. Common law allows a court to recognize new causes of action. The creation of new torts depends on judges’ willingness to develop common law in order to take changes in individuals’ rights

101 *R. v. Saskatchewan Wheat Pool*, [1983] Supreme Court of Canada, 1 RCS 205.

102 E. M. Hyland, “International human rights law and the tort of torture: what possibility for Canada?”, in Scott, above note 63, pp. 413–14.

103 See the analysis of the judgments in *Kamloops (City) v. Nielsen*, [1984] Supreme Court of Canada, 2 RCS 2, and *Ryan v. Victoria (City)* [1999] Supreme Court of Canada, 1 RCS 201, in C. Forcese, “Deterring “militarized commerce”: the prospect of liability for “privatized” human rights abuses”, *Ottawa Law Review*, Vol. 31, 1999/2000, pp. 209–10.

and duties into account.¹⁰⁴ It is therefore quite possible that we may one day see a court in a common-law jurisdiction find a company liable for a tort based on international humanitarian law.

It is also important to note that the question of conflict of laws in international private law may arise in this type of case. If a company is sued in the state in which it is domiciled for an act committed in another state, it is necessary to determine which laws are applicable, those of the state where the claim has been brought or those of the state where the alleged wrong took place. There is a general rule of international private law to the effect that the law applicable is the *lex loci delicti*, in other words the law of the place where the wrong was committed.¹⁰⁵

To sum up, on the basis of legal theory – as there is currently no case-law on these questions – violations of international humanitarian law constitute civil wrongs in accordance with the definitions given by domestic law in civil-law systems and can, in a number of cases, be classified as existing torts in common-law systems. Moreover, there is no reason why, at least in theory, a new tort should not be created for such violations.

The jurisdiction of the domestic courts

Our analysis has shown that violations of international humanitarian law can be imputed to companies and can serve as the basis for civil claims. The next question to be addressed is before what forum a victim or group of victims can bring an action to claim redress for damage suffered as a result of a wrong committed by a company.

General rules of jurisdiction

In international private law, the basic principle for establishing what judicial instance has jurisdiction in a given case is that of the *actor sequitur forum rei*, that is, the competent court is that of the defendant's place of domicile.

This general principle allows the courts of a given jurisdiction to hear any case as long as the defendant is domiciled in that jurisdiction, even if the alleged wrong took place in another state. A further, universally recognized principle of

104 Hyland, above note 102, pp. 411–13. In his exploration of the question, the author cites Professor Prosser on the creation of torts: “There is no necessity whatever that a tort must have a name. New and nameless torts are being recognised constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none has existed before ... [T]he law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.”

105 In Quebec civil law, this rule is to be found in Article 3126 of the Quebec Civil Code: “The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred.” For a long time the courts in common-law jurisdictions had tended to take the opposite approach, applying *lex fori*, i.e. the local law of the court. However, in Canada, the Supreme Court's *Tolofson*¹⁰⁵ judgment clearly indicated that the rule to be followed was that of *lex loci delicti*. In England, the Private International Law Act passed in 1995 also established this rule for questions of conflict of laws.

jurisdiction is that of the place where the act that gave rise to the litigation, in this case the violation of international humanitarian law, took place.¹⁰⁶ However, in most cases it is hard to imagine bringing a civil action against a company before the courts of the state in which the violation of international humanitarian law took place as, in the majority of cases, either the judicial system is virtually non-existent or the government is an accomplice to the alleged violations.

Finally, in the majority of common-law states, the courts have jurisdiction over people who are present on their territory, even if they are there only on a temporary basis.¹⁰⁷ One of the conditions to the exercise of this jurisdiction is that the defendant has to be notified of the action while he is on the territory.¹⁰⁸ For companies, presence on the territory has been defined under US law as the simple fact of having a presence in a state or having continuous and systematic business there. If these criteria are met, the US courts have jurisdiction.¹⁰⁹

There are different types of jurisdiction, particularly extraterritorial jurisdiction. However, these differ from one system to another and I shall not consider them here.¹¹⁰ The only point they have in common is the need for the litigation to have a real and substantial connection with the jurisdiction where the case is brought.

The special case of the Alien Tort Claims Act

The Alien Tort Claims Act¹¹¹ dates from 1789. After a long period of dormancy, it has experienced a renaissance since the case of *Filatiga v. Pena-Irala* in 1980.¹¹² This unique law creates universal civil jurisdiction for violations of international law. The US federal courts therefore have jurisdiction to hear any civil case based on a violation of international law, irrespective of where the violation took place. The Supreme Court recently handed down a judgment concerning a challenge to the scope of this law in the *Alvarez-Machain* case.¹¹³ In its first opinion on this law,

106 *International Business Machines Corporations (IBM) contre Gypsy International Recognition and Compensation Action (GIRCA)*, Arrêt du Tribunal Fédéral Suisse, 4C.296/2004 du 22 décembre 2004. In this case the Swiss Supreme court upholds the finding by the Geneva appeals court that Geneva courts have jurisdiction to hear the case because there exists the likelihood that preparatory acts of complicity for genocide were committed by IBM at its European Headquarters in Geneva.

107 A. C. McConville, "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, above note 84, p. 161: "This "jurisdiction as of right" extends to defendants who are not residents but are physically present in England, even on a transient basis."

108 See *Kadic v. Karadzic*, above note 92, p. 238. In this case the defendant was notified of the suit in 1993 in the lobby of a New York hotel while Karadzic was in New York for discussions at the UN.

109 J. L. Heil, "African private security companies and the Alien Tort Claims Act: could multinational oil and mining companies be liable?", *Northwestern School of Law Journal of International Law & Business*, Vol. 22, 2002, p. 306.

110 By way of example, Article 3136 of the Québec Civil Code provides that "[E]ven though a Québec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Québec, where proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required."

111 Alien Tort Claims Act, 28 United States Code section 1350 (1789).

112 *Filatiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

113 Above note 83.

the Supreme Court confirmed that it conferred jurisdiction on the district courts for violations of international law, but specified that such jurisdiction was limited to violations of international law norms that did not have less definite content than the paradigms familiar when the law was passed in 1789. This would appear to include serious violations of international humanitarian law. As regards the parties, the very nature of the law requires that those who seek relief be foreign nationals, but the same requirement does not apply to those who are sued under the act.¹¹⁴ This universal jurisdiction is not absolute, however, as the court must have jurisdiction *ratione personae* over the defendant. This criterion is easy to meet, as the simple fact of the company's having business in the US means that the US courts have jurisdiction *ratione personae*. Application of the ATCA is facilitated as a result.¹¹⁵

Since the *Filartiga v. Pena-Irala* case a large number of lawsuits have been instigated by victims of human rights violations. There have also been a smaller number of cases arising from violations of international humanitarian law.¹¹⁶ Although in the first case, which concerned acts of torture that took place in Paraguay, the defendant was an individual, many companies have also been sued under the ATCA. In only one case was a company accused of violations of international humanitarian law, namely the *Talisman* case referred to above.¹¹⁷ In that case the court decided that it did have jurisdiction over *Talisman* *ratione personae* because the company had business in New York through two wholly owned subsidiaries.¹¹⁸

The forum non conveniens doctrine

The common-law doctrine to the effect that a judge can decline a case on the grounds that another jurisdiction is more competent to hear it is known as *forum non conveniens*. It is almost always relied on when the litigation has its origin in a jurisdiction other than that of the *forum*, that is, the court's own jurisdiction. This is often likely to be the case in suits concerning violations of international humanitarian law.

Although this is a common-law principle, it was codified in Quebec's civil law when the Civil Code was reformed in 1994.¹¹⁹ Its first test was the *Cambior*

114 It should be noted that in several ATCA cases the courts have examined the "act of state" theory which holds that the courts of one state cannot judge the conduct of another state by virtue of the principle of the sovereignty of states. Since the focus of this paper is on companies I shall not address this question here.

115 B. Stephen, "Translating *Filartiga*: a comparative and international law analysis of domestic remedies for international human rights violations", *Yale Journal of International Law*, Vol. 27, 2002, pp. 11–12.

116 See, e.g., *Kadic v. Karadzic*, above note 92, and *Doe v. Unocal Corp.*, above notes 74 and 77.

117 Above note 81.

118 *Ibid.*, pp. 329–30. See also the analysis of the Second Circuit in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F 3d 88, Second Circuit, 2000.

119 Article 3135, Quebec Civil Code: "Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in a better position to decide."

case,¹²⁰ in which the non-governmental organization (NGO) *Recherches internationales Québec* brought a class action on behalf of 23,000 residents of Guyana who had suffered damage as a result of a disaster in a mine operated by a company of which Cambior was the main shareholder. The judge upheld Cambior's argument based on *forum non conveniens* and decided that the courts of Guyana were in a better position to hear the case. The judge established a test based on eight factors: (i) the residence of the parties and witnesses; (ii) the location of the elements of proof; (iii) the place where the fault occurred; (iv) the existence and substance of pending litigation abroad; (v) the location of the defendants' assets; (vi) the law applicable to the litigation; (vii) the advantages to the plaintiff of suing in the chosen jurisdiction; and (viii) the interests of justice.¹²¹

The judge decided that since the plaintiffs, the witnesses and the elements of proof were, for the most part, in Guyana and the defendant had assets there, and since the law of Guyana applied in the case and the legal system of Guyana offered the possibility of a fair trial, Guyana was a better forum for the case, although the Quebec courts also had jurisdiction. The last factor (the interests of justice) is particularly pertinent to cases based on international humanitarian law, since countries emerging from a recent armed conflict or still involved in one may often be unable to offer the necessary guarantees. In that event, even if all the other factors pleaded in favour of the forum of the place where the fault occurred, it would not be in the interests of justice for the case to be judged in that forum.¹²²

The US courts' examination of the *forum non conveniens* doctrine in proceedings brought under the ATCA is also very interesting. In the *Talisman* case, the company relied on this doctrine, alleging that Sudan and Canada – Talisman was a Canadian company – were alternative fora. The court decided that Sudan was not an appropriate forum for the case because the action was based on violations of human rights and humanitarian law committed by Sudanese government forces. In addition, the court took the view that application of sharia law would have been prejudicial to the plaintiffs, since they were not Muslims and therefore had reduced rights under Islamic law.¹²³ The court was not convinced that Canada was a suitable forum either, since the relevant torts recognized under Canadian law did not reflect the serious nature of the alleged violations. Moreover, because of the theory of conflict of laws, a Canadian court might have considered itself duty bound to apply Sudanese law, and hence sharia law.¹²⁴ However, since the plaintiffs had not challenged Talisman's arguments concerning the Canadian forum, the court did not decide the question and took it as read that Canada was

120 *Recherches internationales Québec v. Cambior*, Superior Court, 1998, JE 98 1905.

121 A. Durocher, "Revue de la jurisprudence en droit de l'environnement en 1998", *Revue juridique Thémis*, Vol. 34, 2000, p. 909.

122 Forcese, above note 103, p. 206.

123 *Presbyterian Church of Sudan v. Talisman Energy*, above note 81, pp. 335–6.

124 *Ibid.*, p. 337. On the issue of the severity of torts the Court stated that "While plaintiffs may be able to obtain the same relief in Canadian courts that they seek in this jurisdiction, it is evident from the affidavits provided that Canadian courts will only be able to treat plaintiffs' allegations as violations of Canadian, rather than international law. Because this treatment fails to recognize the gravity of the plaintiffs' allegations, the Court questions whether Canadian courts would be adequate alternative fora."

an alternative forum. But since there was nothing to indicate that Canada was a better forum than the New York court, the judge decided that his court was the appropriate forum.¹²⁵

The *forum non conveniens* principle may represent an obstacle to jurisdiction of domestic courts for cases whose origin lies in another state. But its application is limited by the factors established by the courts, in particular the interests of justice, as it is often far from certain that the interests of justice will be served by the transfer of a case involving violations of humanitarian law to the forum of the place where the wrongful acts in question occurred.

Conclusion

The aim of international humanitarian law is to reduce the suffering caused by armed conflict. To that end, it establishes rules that all parties to an armed conflict have to respect. These rules were originally formulated for states, but as a result of developments in the law in this area since the Second World War, they now also address non-state entities. The judgments of the US Nuremberg Military Tribunals and in the *Talisman* case confirm that companies can commit and be sued for violations of international humanitarian law.

In theory, domestic law provides the possibility of enforcing this corporate liability for violations of international humanitarian law, since the causes of action giving the right to judicial redress already exist. However, reality still lags far behind theory, and in practice judges are rarely open to cases based on international humanitarian law. There is not much case-law on this subject, and the US judgment in the *Talisman* case may be an indication of an emerging practice. Corporate civil liability exists but is difficult to enforce; at the moment it is necessary to turn to advances in international criminal law in order to punish those who violate international humanitarian law. The development of international criminal law, like the recognition of universal jurisdiction in criminal cases, took fifty years. Effective enforcement of corporate civil responsibility for violations of international humanitarian law will doubtless take time, but, it is to be hoped, not quite so long.

125 Ibid., pp. 337–41.