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Terrorism litigation as deterrence under international law – from protecting human rights to countering hybrid threats

by Sascha-Dominik Bachmann

INTRODUCTION

This article provides a brief overview of the current state of anti-terrorism litigation under US federal law for the adjudication of international torts such as terrorism and other serious human rights violations. Corporate terrorism litigation focuses on the role and impact of both corporate and individual financial aiders and abettors of international terrorism and explores the desirability and feasibility of subjecting these non-state actors to transnational human rights litigation.

The threat of international terrorism represents one of the most severe "hybrid threats" which NATO attempts to counter: hybrid threats are those posed by adversaries, with the ability to simultaneously employ conventional and non-conventional means adaptively in pursuit of their objectives (see https://transnet.act.nato.int/WISE/ACTIPT/JOUIPT/20102011CH/Experiment/PlanningCo/CHTExperim. The author took part in this experiment in May 2011 as NATO Rule of Law SME participant). Combating terrorism requires a holistic approach which combines hard kinetic security operations with the options of criminal prosecution and civil reparations through litigation.

So called "bankrupting terrorism" lawsuits (cf Shurat HaDin Israel Law Center which uses this term to refer to US-Israeli terrorism litigation, see http://www.israellawcenter.org) refer to civil litigation which is directed against "funding" activities (eg direct payments to terrorist groups) and other forms of aiding and abetting (such as the provision of material support) qualifying as "indirect" or secondary liability of the corporate actors. Much in this area focuses on responsibility and liability of corporations such as banks (see the case *Arab Bank I*, 384 F.Supp. 2d 580), NGOs and religious charity organisations within their respective litigation context (cf the case of *Boim v Quranic Literacy Inst,* 291 F.3d 1000, 1001 –1003 (7th Cir.2002), also referred to as *Boim I*). Such "indirect liability" litigation should not be confused with litigation which is directed against the terrorist group itself such as al Qaeda or Hamas (See *Boim* litigation cases consisting of the cases *Boim I*, *Boim v Holy Land Found. for Relief Dev,* Nos. 05-1815,05-1816,05-1821,05-1822 (7th Cir. 2007) and *Boim* III 549 F.3d 685, 687 97th cir.2008). This short article aims to provide a brief overview of the potential role US styled terrorism litigation can play in countering threats of terrorism as one of the more serious hybrid threats.

1. CRIMINAL AND CIVIL CORPORATE ACCOUNTABILITY UNDER INTERNATIONAL LAW

Corporate accountability for aiding and abetting acts of international terrorism is based on the (evolving) notion of civil corporate responsibility for basically a tort (delict) which qualifies as both an international crime as well as a "gross" human rights violation. An early and well documented example of corporate complicity in the commission of gross human rights violations can be seen in the so called Industries cases before the US Military Tribunals at Nuremberg: *US v Friedrich Flick* (VI *Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10* (1952), 1217, 1222), *US v Alfred Krupp* (*Vol. X Law Reports of Trials of War Criminals* (1949) *130-159*) and *Bruno Tesch and others* (I *Law Reports of Trials of War Criminals* (1947) 93 – 103).

These trials established criminal responsibility of the individual officer and agent of a corporation for their actions of aiding and abetting in the crime of the *Shoa/ Holocaust*. However, corporate criminal responsibility supplementing individual criminal responsibility never found its way into the Nuremberg principles (Principles of

International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, 2 *International Law Commission Year Book 1950* (1957) 374 – 78) nor did the statutes of the two UN ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda contain such a provision. This omission continues to this day with the International Criminal Court (ICC) in The Hague failing to add corporate criminal responsibility to Article 25 of its Rome Statute of 1998. Consequently, there is to date no recognition under international law of a distinct principle of corporate criminal responsibility for the commission of gross human rights atrocities and terrorism.

The increasing of business activities of multinational corporations (with a particular focus on exploitation industries) in the emerging (developing) world (P Blumberg, "Asserting human rights against multinational corporations under United States law: Conceptual and procedural problems'", (2002) 50 *American Journal of Comparative Law*, 493) has also led to an rise in reports on corporate collusion in gross human rights atrocities (see for example O De Schutter *Transnational Corporations and Human Rights* (Hart Publishing, Oxford, Portland, 2006); A Ramasastry and R Thompson, "Commerce, crime and conflict – Legal Remedies for Private Sector Liability for Grave Breaches of International Law", (Fafo Institute of Applied International Studies 2006)) leading to well publicised transnational lawsuits before US federal courts (*John Doe I v Unocal Corp,* 403 *F.3d* 708 an for an overview B Stephens, et al *International Human Rights Litigation in US Courts*, Martinus Nijhoff Publishers 2008).

Corporate accountability leading to financial remedies and reparations as a consequence can be seen in the United Nations' *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* of 2003 (U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2) which constitute a future set of non-voluntary norms for corporations. Adopted by the Sub-Commission on the Promotion and Protection of Human Rights, they were not recognised by the UN Human Rights Commission (as the predecessor of the Human Rights Council until 2006 was known). Since then, the UN's Special Representative of the Secretary General, Ruggie, has been working on the *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (*John Ruggie – Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* of March 21, 2011, UN Doc A/HRC/17/31). It has to be seen whether such initiatives will be successful.

2. US HUMAN RIGHTS AND TERRORISM TORT LITIGATION

US human rights litigation against the individual and corporate defendant, as perpetrator or aider and abettor of human rights violations as well as international terrorism has developed as a notion of accountability over the last 30 years.

Such litigation, which became otherwise known as transnational litigation, began with seminal case of *Filartiga v Pena- Irala* (630 F.2d 876) in 1980, which concerned acts of (state sponsored) torture which were committed outside the territory of the USA with non-US citizens as both victim and perpetrator. The court established US federal jurisdiction in this extraterritorial case by utilizing a statute from 1789 which had been dormant for nearly 220 years, the so called Alien Torts Claims Act (ATCA, now being referred to as the Alien Tort Statute (ATS)).

This piece of legislation confers subject matter jurisdiction to a US federal court when: (1) an alien plaintiff sues, (2) for tort only (3) based on an act that was committed in violation of either the law of nations or a treaty of the US. The range of possible torts (arising "of mutual, and not merely several, concern, by means of express in international accords, that a wrong generally recognized becomes an international law violation within the meaning of the (ATCA) statute" (*Filartiga* at 888)) as case law arising from such international law violations developed over the last 30 years certain norms and criteria whose breaches qualify as violations of the law of nations and are therefore actionable as ATS/ATCA torts.

Lawsuits against corporate and state sponsors of terrorism can be brought under the Alien Tort Statute (ATS/ATCA – 28 USC Section 1350), the Torture Victim Protection Act (TVPA-28 USC Section 1350), the Anti-Terrorism Act (ATA-18 USC Sections 2331-2338) as an amendment to the above ATS, the "State Sponsors of Terrorism" exception to the Foreign Sovereign Immunities Act (FSIA Exception-28 USC section 1605 (a) (7), which allows lawsuit against so called state sponsors of terrorism), and finally the Racketeer Influenced and Corrupt Organizations Act (RICO).

In order to determine whether a violation of international human rights and international humanitarian law may qualify as an actionable violation of the law of nations as required under the ATS, the so called "law of nation" test was developed in the case *Forti v. Suarez-Mason* (672 F Supp 1531 (ND Cal 1987)) whereas any violation had to be "universal, definable and obligatory" (The so called *Forti* test consists actually of two parts, *Forti I* and *II* with the former outlining the requirements for the *jus cogens* nature of actionable torts and the latter defining the "universality" criteria thereof). Generally speaking, the following human rights violations can establish US federal jurisdiction under the ATS: torture, summary execution or extrajudicial killing, genocide, war crimes and crimes against humanity, disappearances, arbitrary detention and cruel, inhuman or degrading treatment, as well as international terrorism and hostage-taking (B Stephens 63 – 92). The TVPA grants jurisdiction for legal actions brought by US citizens for acts of (state) torture and/or extra-judicial killings. Section 2 (a) TVPA states that:

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

The Anti-Terrorism Act of 1994 makes provisions for civil lawsuits for injuries and losses sustained through an act of international terrorism which would otherwise not pass the above *Forti* test and closes a litigation gap where acts of terrorism did not qualify as an actionable tort under the ATS, as highlighted in the *Tel-Oren v Libyan Arab Republic* litigation of 1984 (726 F.2d 774 (D.C. Cir. 1984)). The Foreign Sovereign Immunities Act (FSIA) Exception of 1996 limits the defense of state immunity in cases of state sponsored terrorism and can be seen as a direct judicial response to the growing threat of acts of international state sponsored terrorism directed against the USA and her citizens abroad, as exemplified in the case of *Flatow v Islamic Republic of Iran* (76 F. Supp. 2d 28 (D.D.C. 1999)). It amends the original FSIA (28 U. S. C. §§ 1602 – 1605) in order to permit a civil suit against designated state sponsors of terrorism (Currently there are four countries designated as such: Cuba, Iran, Sudan and Syria, see http://www.state.gov/s/ct/c14151.htm) for acts of torture, extra-judicial killing, aircraft sabotage, hostage-taking, or the provision of material support or resources for such an act if the act or provision of support is engaged in by an official agent of the foreign state while acting within the scope of his or her duties.

In 2001 the Racketeer Influenced and Corrupt Organizations (RICO) Act was amended under the 2001 PATRIOT Act to allow lawsuits for acts of terrorism against groups alleged to have engaged in racketeering activity, including murder, kidnapping, arson, robbery and fraud, as well as acts of terrorism. So far, RICO has not been used successfully in a lawsuit against alleged 'sponsors' of international terrorism and terrorist groups like al Qaeda, see the case of *Rux v Republic of Sudan* of 2007 (WL 2127210 (E.D.Va.)).

3. CORPORATE TERRORISM LAWSUITS

The wider, non terrorist – related, litigation of corporate collusion in violations of international human rights and international humanitarian law has seen cases for corporate collusion in the commission of crimes against humanity, war crimes, widespread torture: the case of *Doe I v Unocal* (403 *F.3d* 708) in 2005 concerned alleged corporate complicity in forced labour and torture, *Wiwa v Royal Dutch Petroleum Company* (226 F.3d 88, 157 (2d Cir 2000)) alleged an involvement of the Royal Dutch/Shell oil group in human rights abuses in Nigeria, including the 1995 torture and murder of the environmental and community leader Ken Saro-Wiwa, the case of *Sarei v Rio Tinto* (487 F.3d 1193, 1198 (9th Cir. 2007)) involved corporate complicity in the commission of war crimes by Security Forces in Papua New Guinea.

Corporate terrorism litigation is essentially a new form of the already well established notion of corporate collusion in human rights violations and centers around the question of corporate aiding, abetting and the overall facilitating of such terrorist activities: thus raising the question of what standard of liability should be applied. In the *Arab Bank* cases, it was alleged that such corporate support could take the form of providing material support such as financial services, providing funds or collecting funds for different terrorist organizations operating in Israel, such as terrorist groups such as Hamas, the Palestinian Islamic Jihad, the Al-Aqsa Martyrs' Brigade and the Popular Front for the Liberation of Palestine (See *Oran Almog, et al, v Arab Bank, PLC* ((04-CV-5564(NG)(VVP), *Gila Afriat-Kurtzer, et al, v Arab Bank PLC* ((05-CV-0388(NG)(VVP)), *Linde v Arab Bank, PLC* (384 F Supp 2d 571 (E.D.N.Y 2005)) and *Almog v Arab Bank*, *PLC* (471 F. Supp. 2d 257 (E.D.N.Y 2007)). The case *In re Terrorist Attacks on September 11, 2001* (349 F.Supp 2d 765 (S.D.N.Y. 2005)) set as a guiding threshold and standard for such collusion the evidence of "substantial assistance or encouragement to the primary wrongdoer."

The liability standards in corporate aiding and abetting lawsuits follow the overall precedent set in the litigation of so called "historical justice claims" (B Stephens, 23-24.): *In re Holocaust Victim Assets Litigation* ((*Swiss Gold Bank* case) 105 F Supp 2d 139 (EDNY 2000)) and *In re Nazi Era Cases Against German Defendants Litig* (198 FRD 429 (DNJ) MDL No 1337 DNJ Lead Civ No 98-4104 (WGB) (2000)) and the ongoing Apartheid lawsuits (*In re South African Apartheid Litigation*, 02 MDL 1499 (S.D.N.Y. 2009) which continues the original 2004 case of *In re South African Apartheid Litigation* (346 F. Supp. 2d 538 (S.D.N.Y. 2004)).

Corporate aiding and abetting liability breaks with the stricter liability standard of the *Kadic v Karadzic* (70 F3d 232 (2d Cir 1995)) rule, whereas the corporate defendant had to exercise some form of control over state perpetrators' actions (*cf Symposium* on "Corporate liability for violations of international human rights law" in 114 *Harvard Law Review* (2001), 2039) The judgment in the above discussed *Wiwa* case clarifies that corporate "aiding and abetting" takes place simply by financing and supporting knowingly state sponsored human rights violations. It does therefore not follow the stricter "overall control" test of *Tadic* (*Prosecutor v Dusko Tadic, Judgment Appeals Chamber* (ICTY), 38 *ILM* 1518, 1549) and the "effective control" test of *Nicaragua* (*Military and Paramilitary Activities in and against Nicaragua, ICJ Rep* 1986, 62 *et seq*).

The 2010 case of *Kiobel v. Royal Dutch Petroleum* (No. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010)) concerns the question whether the ATS can be applied to aiding and abetting activities of corporations: to what extent this case will limit or even exclude such

torts/delict action against the corporate colluder in human rights violations and acts of terrorism will have to be seen.

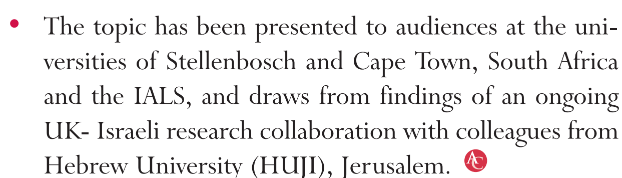
4. CONCLUSION

Human rights litigation in the USA has altered existing perceptions of the role of corporations in the commission of human rights atrocities: the assertion that only states (and non – state actors of a *Kadic* nature) could commit such crimes has been changed through the emergence of the new notion of civil corporate accountability: the two Holocaust lawsuits as well as the ongoing Apartheid litigation are examples hereof. The key principles of corporate complicity in gross human rights violations do also apply in cases of liability for aiding and abetting in acts of international terrorism. US transnational litigation acknowledges the new standing of the victim of such human rights abuses as well as terrorism as an individual claims holder (as evident for example under the European Convention of Human rights, see eg the individual application procedure under Art 34 of the ECHR) acknowledging his/her own right i*us standi*. Traditional concepts of interstate reparations for breaches of international law are supplemented by a new, hybrid form of liability which combines elements of private civil tort litigation with elements of international law.

In Europe, the absence of such human rights/terrorism litigation is an unfortunate fact; nevertheless, the *dicta* of US styled *Filartiga* litigation have already influenced our domestic jurisprudence, as the House of Lord's ruling in *Ronald Grant Jones v The Ministry of the Interior Al-Mamlaka Al-Arabiya as Saudiya (The Kingdom of Saudi Arabia) & Anor* ([2004] EWCA Civil 1394 et seq, paras 61-68) shows where the Law Lords reflected on the universal nature of the crime of torture. It has to be seen what the further ramifications of such a form of litigation are for the development of alternative means of accountability and deterrence.

Directly linked to this observation is the question to what extent aiding and abetting or so called "donor liability" of the corporate colluder in acts of terrorism can fall under the jurisdiction of US federal courts established under the ATS and ATA.

The use of US human rights litigation as an additional means of fighting international terrorism globally as part of a wider anti – terrorism strategy has its limitations if not developed further into an internationally recognised institute of granting legal and remedial redress to victims of terrorism and gross human rights abuses.



- The topic has been presented to audiences at the universities of Stellenbosch and Cape Town, South Africa and the IALS, and draws from findings of an ongoing UK- Israeli research collaboration with colleagues from Hebrew University (HUJI), Jerusalem.

Dr Sascha-Dominik Bachmann

Assessor Jur, LLM LLD, Senior Lecturer in Law, School of Law, University of Portsmouth. The author works as an international law lecturer with the School of Law, University of Portsmouth. Outside academics his professional experience includes working in various capacities as an Army reserve officer (Lieutenant Colonel) and taking part in peacekeeping missions in operational and advisory capacities.
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