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COLLECTIVE LIABILITY FOR THE COMPENSATION OF VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS

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ABSTRACT

The more we adapt a human rights approach to *compensation*, the less its realisation as a *collective liability* of the citizens is justified. In order to include compensation soundly into the normative human rights framework, I apply theories of *responsibility* to whole states and citizens individually that do not violate principles of *individualism* as popular sovereignty and individual responsibility; namely *corporate responsibility*, *criminal responsibility* and *negative responsibility*. This approach is not only valid for the domestic context but has also impact on the international community. Thus the result of my research is multiple: I can give an affirmative answer to the question if it is justifiable to hold individuals belonging to a state-collective liable for the *compensations of victims of gross and systematic human rights violations* of a former regime within an approach that satisfies human rights claims. Therefore, I can justify the right to compensation as an element of the human rights norm system in its realisation by re-establishing its consistency and making the whole human rights system *persuasive as a non-metaphysical moral theory*. Additionally I demonstrate that this justification transcends borders and delivers a true reason to hold true democracies liable for not preventing extraterritorial human rights violations, thus establishing a duty for an *active role in foreign policy*.

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INTRODUCTORY CHAPTER

The Emergence of the Reparation Discourse

Until the Second World War compensation was exclusively the domain of states in the form of war reparations as a retributive concept. The winning party of a war would oblige the losing party to pay war reparations. The enormous reparations imposed on Germany after losing the First World War in the Treaty of Versailles have been heavily criticised in the aftermath, since the instability and fall of the Weimarer Republik is frequently interpreted as a result of the heavy financial burden on the state-economy. In the aftermath of the Second World War the notion of reparation perceived as a past-oriented concept, gained a more future-orientated connotation.[2]

The end of the Second World War gave birth to two new concepts regarding the behaviour of states after a war: First, with the experience from Versailles, the Allies did not impose monetary reparations on Germany. The Marshall-Plan established the modern concept of restitution by not exploiting enemy resources, thereby delaying the re-establishment of the defeated state, but rather supporting its reconstruction and development.[3] Second, the atrocities of the Holocaust shifted the attention of the international community from the state actor to the individual actor. As a result not only did the human rights movement gain strength which is manifested in the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948, but also Germany, in the past decade, driven by different motivations, *voluntarily* decided to pay reparations to the victims with the aim of restoring damages, placing victims in a position comparable to that before violence occurred. It took a long time for this concept to be accepted as a right of the victim against the state. [4]

In 1988 the first attempts were made to make the notion of reparations for victims of human rights violations within the international legal framework more explicit. With resolution 1989/13 the UN-Sub-Commission on prevention and protection of minorities, which later became the Sub-Commission on promotion and protection of human rights, authorised Theo

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[2] See G. Ulrich and L. Krabbe Boserup (Eds.), *Reparations: Redressing Past Wrongs,* Human Rights in Development Yearbook 2001, The Hague/London/New York: Kluwer Law International/Oslo: Nordic Human Rights Publications, 2003, p. 411.

[3] Although after the Gulf War of 1991 Iraq has been found responsible for the damage committed in Kuwait and by UN Security Council Resolution 687 had to pay reparations.

[4] See J. Torpey, Victims and Citizens: The Discourse of Reparations at the Dawn of the New Millennium, in M. Bossuyt, K. De Feyter, P. Lemmens and S. Parmentier (Eds.), Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations, Antwerp and Oxford, Intersentia, 2006, pp. 35-50.

van Boven as a special rapporteur to do a research on the right to restitution, compensation, and rehabilitation for victims of gross human rights violations of human rights and fundamental freedoms in existing legal treaties. It took until 1997 for the basic principles of his studies to be accepted, including a duty of the state to redress consequences for victims of human rights violations by the commission. The resolution 1998/43 asked independent expert Cherif Bassiouni to revise the Van Boven principles by including the views of states, and intergovernmental and non-governmental organisations. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law were first presented in august 2003, but the commission adopted this draft not until 2004, after three revising consultations between Bassouni, Van Boven and UN officials and without the agreements of Germany and the USA who were against the inclusion of provisions from Humanitarian Law. The "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" have, however, been adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.[5] Besides soft-law, the right of the victim to reparation is included in several regional and international human rights treaties, such as for example the International Covenant on Civil and Political Rights, the European Convention of Human Rights and the United Nations Convention against Torture.[6]

In the Basic Principles, the victims' rights to remedies are represented as a triad of (a) right to equal and effective access to justice, (b) adequate, effective and prompt reparation for harm suffered and (c) access to relevant information concerning violations and mechanisms.[7] Concerning the reparations the state has to guarantee that they are proportionate to the gravity of the violations and the harm suffered,[8] and it should in cases where the party liable does not pay provide national programmes for reparation.[9] The content of reparation is laid down in Articles 19 to 23 covering the forms of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

[5] See Dinah Shelton, *The United Nations Principles and Guidelines on Reparation: Context and Content*, in M. Bossuyt, K. De Feyter, P. Lemmens and S. Parmentier (eds.), *Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp and Oxford, Intersentia, 2006, pp. 11-18.
[6] For further instruments, see Ibid., pp. 18-23.
[7] See *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*, Article 11.
[8] See Ibid., Article 15.
[9] See Ibid., Article 16.

This paper will treat the monetary costs that reparation measures generate for the state and the society and although basically all forms of reparation are interdependent and will cost money – including even the symbolic means - it is the easiest to restrict the analysis to compensation as mentioned in Article 20:

> "Compensation should be provided for any economical assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law (…)"[10]

This includes of course physical and mental harm but also the loss of opportunities and material gains from employment, education or social benefit and in some circumstances also moral damages. Additionally costs arising from legal or expert assistance, medicine and medical services, psychological and social services are to be covered by the state. In Article 25 it is stated that any application and interpretation of the Basic principles has to be consistent with existing international human rights law and should be without any discrimination without exception. Additionally Article 26 says that nothing in the Basic Principles justifies a derogation from any right or obligation under domestic and international law and - as explicitly laid down in Article 27 - from internationally or nationally protected rights of others, in particular the right of an accused person to benefit from applicable standards of due process.

The Relevance of Philosophy for the Human Rights Discourse

As a legal system, human rights are valid by the empirical reality of their compliance leaving aside that this enforcement could be more satisfying. But the argumentation of many human rights advocates does not only rely on the actual implementation of human rights as a rule by compliance and coercion in order to justify them. They often implicitly argue that human rights are valid because they are inherently worthy of being followed. This moral assertion is not often expressed explicitly but rather hidden behind backdoors. The perceived wrongness of the Holocaust and other experiences in human history can definitely be a valid psychological motivation for establishing a system in which those cruelties will not reoccur, but none the less it is no valid justification for the moral rightness of human rights. This is the moment when philosophy comes in to play because it can be useful for the human rights discourse in two ways: First it can help to prove the validity of human rights as an *absolute*

[10] Ibid., Article 20.

moral claim. Second, philosophy can help to establish human rights as a *minimalist persuasive* theory.

But moral claims cannot easily be proven without metaphysical reasoning, i.e. in the end, the grounds for the validity of human rights are beyond the possibility of univocal empirical verification. According *to moral scepticism*, natural law, the ability to reason of human beings etc., are all possible strategies to justify the validity of human rights but they are neither sufficient nor exclusionary, since they themselves are assumptions which cannot be proven.[11] Another weakness of the validity of human rights as an absolute moral claim can be found in a certain immunity from critique. For Karl Popper, the immunity of a theory is a sign of its being unscientific.[12] As Michael Ignatieff notes, the power of human rights does not lie in their moral truth, on the contrary: when it comes to the proliferation of human rights, insisting on their absolute and unquestionable validity on metaphysical grounds can be counterproductive since in that case human rights have to compete with other metaphysical beliefs and concepts all over the world. Such a competition makes it easier for defenders of behaviour that is incompatible with human rights, to raise the argument of cultural and moral relativism, arguing that any culture had it own way of defining right and wrong, thereby rejecting the absolute validity of human rights.[13] It is not so much the relativist claims that are missing in various attempts to construct a persuasive theory, since in most cases they just oppose the absoluteness of the whole concept while presenting another concept instead.[14] Jürgen Habermas states that, since the enlightenment, Western rationalism has been embossed by self-critique and thus a moral human rights claim should be the aim of critique. If human right advocates deny this critique by claiming absoluteness, they not only weaken the democratic values of embracing a plurality of opinions, but in insisting on their moral validity, they weaken the functional establishment of human rights as a practical and persuasive framework of human rights. The force of human rights also lies within their *pragmatic utility* which is suppressed by reducing them to a metaphysical concept.

[11] See J. L. Macky, *Inventing Right and Wrong*, London, Penguin Books, 1990, pp. 10-24.
[12] See K. R. Popper, *Ausgangspunkte. Meine intellektuelle Entwicklung*, Hamburg, Hoffmann und Campe Verlag, 1994, p. 53.
[13] See M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton, Princeton University Press, 2003, pp. 77-87.
[14] J. Habermas, *Zur Legitimation durch Menschenrechte*, in H. Brunkhorst and P. Niesen (Eds.), *Das Recht der Republik*, Frankfurt/Main, Suhrkamp, 1999, pp. 392-393.

Human Rights as a persuasive normative theory

Dieter Birnbacher states that normative theories are never beyond doubt since they are always grounded on weak reasoning that is not stringent but only plausible. This is reasoning without a demand of absolute truth and leaves space for a choice either to follow or not to follow it.[15] Thus besides attempting to prove the absoluteness of human rights, rather than presenting them as unquestionable truth, but by persuasion, making them a plausible norm system to accept. This *minimalist* approach represents on the one hand a much weaker moral claim to the validity of human rights but implies on the other hand a wider framework of application: An absolute moral validity strongly votes for one, and only one value system to be correct and thereby marginalising all competing systems. Since the bases for any moral system are non-verifiable assumptions, in principle there is no hierarchy among them. But in philosophy some criteria are being established for evaluating the plausibility of a norm system, and therefore, without implying truth, it is possible to rationally prefer one norm system over the other. Birnbacher mentions universability, impartiality and coherence in itself and towards other norms.[16]

The most important criteria are credible universal validity and coherence. In order to be universal a system has to be acceptable for everyone, especially for those being affected by it in a negative way. Therefore a moral norm should respect the interests of all individuals affected by its consequences of it, and itself be impartial; for example discrimination is not a norm defined as universal, since certainly those who profit from it would not accept this norm being the unprivileged themselves. Coherence means that the norms within a norm system are consistent: i.e. are not logically contradictory with each other. New norms have to match harmoniously the old system and approve its soundness. This coherence-criterion does not only have theoretical reasons such as the unification and the systematisation of various single norms to a system. As a practical norm, the system has to be motivating and comprehensible; an incoherent system without internal logic is hard to apply to individual cases and prevent its intuitive use.[17]

A theory of human rights with the claim of universality thus has to be sound towards its own application, in order to be a persuasive theory. Human rights advocates should try to adapt

[15] See D. Birnbacher, *Analytische Einführung in die Ethik*, Berlin, Walter de Gruyter, 2003, pp. 406-407.
[16] See Ibid., pp. 407-426.
[17] See Ibid., pp. 406-427.

human rights theory to the minimalist criteria mentioned above as much as possible if they want them to be persuasive towards new addressors, credible towards their own followers, and to be easily applicable. For practical reasons human right advocates should aim at establishing human rights as the best theory of human civility available instead of insisting that it is the only one. Of course not all conflicts between the consequences of norms can be avoided, but simply ignoring them significantly disturbs the quality and persuasive force of a non-metaphysical norm-system which is supposed to be credible. Proponents of a convincing theory should deal with those contradictions and try to show that those contradictions can be solved in a satisfactory manner i.e. coherently with the existing principles of a given norm system and with a pragmatic outcome. This thesis will attempt to show that the norm "compensation of victims of gross and systematic human rights violations" can be soundly integrated into the human rights norm system.

The coherent inclusion of Reparation in the Human Rights norm system

The individual claims of reparations for gross and systematic human rights violations are not only being made but more and more are being heard throughout the world. It is an immense topic coming up including even challenges to reparations for historic injustices such as slavery and colonialism stretching back some 300 years.[18] The reality of moral claims eventually becomes visible within the international legal framework. New instruments are being established, and already existing human right treaties are being reinterpreted in a way that one can say that generally speaking the international community agrees on the right of a victim of human rights violations to be compensated.

There are still significant shortcomings in the implementation of such reparations and I argue that this is not only because of practical barriers such as missing domestic legal frameworks or difficulties of identifying victims etc. In what follows I will show that there are considerable gaps in the *theoretical moral justification of the ideal realisation of the right to compensation* in international human rights politics which hinders its effective implementation. In order to include the right to compensation of victims of gross and systematic human rights violations as a valid right in the human rights catalogue those gaps have to be addressed and clarified. Otherwise the implementation of this right will be morally

[18] See the discourse in and after the 2000 Durban World Conference against Racism, Racial Discrimination, Xenophobia and related Intolerance.

dubious and with this the human right system as a whole will lose consistency and thereby persuasive power in the international discourse. The research questions thus will centre on how to justify the ideal realisation of compensation of victims of human rights violations within *an approach that does not contradict the underlying principles of the human rights norm system itself.*

The inclusion of the claim of the compensation of gross and systematic human rights violations into the human rights catalogue as a *theoretical* norm is not that controversial: the Basic Principles didn't introduce new principles but found them in already existing treaties. Problems occur when it comes to the realisation of the reparation of human rights violations as a *practical* norm. Non-discrimination is one of the core-norms of the human rights catalogue, and is very much unjustifiable in its circumvention. It is also part of the Basic Principles.[19] Additionally another important principle says that every individual is equal before the law and is supposed to be treated in the same way as any another. In order for the human rights norm system to be coherent, these principles also have to be valid on the meta-level; i.e. when it comes to the application of human rights themselves: The human rights guaranteed are valid for every human being. So every victim of a gross and systematic human rights violation on earth has the right to be compensated by its own state.

The reality of the legal framework for compensation of victims of gross and systematic human rights violations lacks efficiency and coherence: Differing national and international legal systems factually don't assure reparation to *every* victim of human rights violation. Described by Sarkin, typically in the national context, compensation for human rights violations is very hard to achieve. The courts usually are prepared for traditional crimes and not for human rights violations. Additionally the distinct procedures are interlocked; i.e. the outcomes are influencing each other. As in criminal trials compensation is not regularly foreseen and civil procedures are the main means for compensation the following scenarios are possible: Amnesties hinder criminal procedures which are necessary condition for a civil trial or the acquittal in a criminal procedure in most cases means also a failure in the civil procedure. A failure in a criminal procedure against the perpetrator with the high standard of evidence without doubt can decide on the outcome of a following civil procedure. Moreover the access to court is not a matter of course since lawsuits are expensive. Sometimes there is

[19] *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*, Article 25.

not even sufficient evidence to start a trial or perpetrators are not within reach or not solvent.[20]

So with the current national system of compensation by court-procedure which was not implemented for the compensation of human rights violations, the existing norms within the human rights system are not successfully met in order to be coherent. A better solution is offered by compensation programmes, often based on the recommendations for taking action and law-enactment made by truth commissions. To abandon the approach of individualised claims in favour of compensation programmes is a good strategy since it allows dealing with a high number of potential claimants and covering the shortcomings of a case-by-case litigation: long delays, high costs and unequal chances of success.[21] In principle every victim that falls under the definition of this law is entitled to compensation then. But a major shortcoming here is that the available funds for those compensations are usually very little and the number of victims compensated is almost insignificant.

If a state is unwilling to compensate the victims, there is only a very small probability for compensation at the international level. Civil and criminal procedures can take place in other states according the principle of universal jurisdiction. But usually the result of extraterritorial procedures is more symbolic than really effective.[22] Another opportunity to seek compensation is offered by the Trust Fund established by the ICC Statute in Article 79.[23] But until now, the rules of procedure are unclear and the budget is considerably small compared with the number of victims who are in the need of compensation.

It might be an exaggeration, but in principle the non-universal realisation of a human right is in itself a violation of a human right, i.e. the equal treatment and non-discrimination provisions. People might say that this is the case with many human rights and take a

[20] J. Sarkin, *Reparations for Gross Human Rights Violations as an Outcome of Criminal versus Civil Court Proceedings*, in M. Bossuyt, K. De Feyter, P. Lemmens and S. Parmentier (Eds.), *Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp and Oxford, Intersentia, 2006, pp. 151-173.
[21] See P. de Greiff and M. Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in M. Bossuyt, K. De Feyter, P. Lemmens and S. Parmentier (Eds.), *Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp and Oxford, Intersentia, 2006, pp. 237-239.
[22] See H. Rombouts, P. Sardaro, S. Vanderginste, *The Right to Reparation for Victims of Gross and Systematic Human Rights Violations*, in M. Bossuyt, K. De Feyter, P. Lemmens and S. Parmentier (Eds.), *Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp and Oxford, Intersentia, 2006, pp. 436 – 445.
[23] See *Rome Statute of the International Criminal Court*, Article 79.

pragmatic approach by claiming that still a partly realised right is still better than none at all. But there is a special imbalance about the right of reparation for gross and systematic human rights violations having impact on the national and the international context: First, it is a secondary right which only comes into play if other rights are violated. Second, compensation, by definition costs money and therefore is a significant financial burden for the state's budget. The burden of duty owed this right is unequally balanced. An ideal state without any human rights violations, in practise would not have to do anything for guaranteeing this right. It would be enough to provide a framework for compensation which is never used in reality. A state, by contrast, where massive human rights violations have been occurring, is confronted with a large number of potential right holders.

As mentioned earlier the Basic Principles postulate a non-binding duty for the state to establish national programmes for reparation and other assistance regardless whether the severe human rights violations have been committed by the state party or by someone else.[24] Setting aside the missing will of countries to really compensate victims of human rights violations, the currently available means of court procedures, even if ideally accessible for everyone, would still leave considerable gaps of compensation. It does not satisfy the criterion of non-discrimination of victims if compensation is only granted by current domestic legal systems. Additionally the burden of compensation for the states and the amount of compensation for victims is unequally allocated and depends on the size of the national budget. So the contemporary system of compensation does not meet the theoretical exigencies of the norm to compensate human rights violations and due to their unequal practical execution is in contradiction with the human rights norm catalogue claiming equal treatment.

If double standards in treating victims are to be avoided a non-discriminatory way of compensation has to be found. Concerning the procedural inequalities within the national context the most practical solution seems to be compensation by law and from funds and not one from court procedures. Suppose an *ideal world* in which neither defining and locating the victims is a problem nor are budget restrictions, as in an idealistic practical situation there are sufficient funds to compensate every member of the victim group. As the duty bearer of compensation is by international law the state, it is no legal problem to hold the state liable for any compensation of victims of human rights violation within its territory. But whereas the

[24] See *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*, Article 16.

justification of the compensation of human rights victims by the state is unproblematic within the international legal framework it could be controversial from the perspective of the taxpaying individual living within this state:

To make the problem comprehensible, it is reasonable to first explain the concept of liability. In philosophical theory, liability for an outcome is either ascribed due to a causal responsibility for an outcome or by a commitment, taking over liability voluntarily. Only the first possibility implies an obligation, a duty to be liable.[25] So applied to the state liability for the compensation of victims of gross and systematic human rights violations to be justified, the state either has the duty because of its actions or voluntarily takes over the costs. International law states a continuity of responsibility that transcends a change of regime, thus, it is sound to hold a state liable for human rights violations of the former regime. But is the state at al an entity responsibility can be ascribed to? And should individuals living in this state be liable for everything the regime does on grounds of reasons that contradict the individualism of human rights, such as the mere belonging to a collective?

As collective punishment is prohibited within International Humanitarian law it is not possible to pass the duty to reparation onto individuals as punishment for the consequences of the misbehaviour of a regime. The duty of an individual to be liable for compensation must not be detached from a behaviour that connects the individual to the outcome. The human rights norm system goes along the same lines with the procedural rights: Everyone has the right not be sentenced without a hearing. The right to property is mentioned in the UDHR and the three regional treaty systems. Additionally, the debate on collective human rights alludes to the fact that the individual perspective remains the primary perspective and at least it is not evident that duties are treated differently so that collective duties trump individual duties. Last but not least the Basic Principles themselves mention that other state-duties are not derogated by them. Thus if we think of the implication of reparations on the state-budget, i.e. a diminished state-budget for public expenses other than human rights obligations, especially those that are one the one hand known for their empowering potential of individuals but also for the primary costs, such as right to education, right to food, it is possible to construct a conflict between human rights, namely the right for compensation of the victims and other human rights of the individuals forming the population of a state.

[25] This will be further explained in chapter 1.

From a liberal social contract perspective the state gets its existence from the individuals living within it and therefore cannot be seen as an entity independent from the individuals legitimising its power. Within a legitimate state the political decisions should somehow reflect the will of the people, its right to inner sovereignty and guarantee individual rights. Since the state budget is composed of the taxes of individuals living inside of a certain territory who in principle gave the state/politics the task to invest this collective capital as wisely as possible to realise collective goods, it has to be proven that compensation for the victims of human rights violation either is a desirable aim for every individual in the sense of a voluntary, vicarious liability or that each citizen is causally responsible for the outcome and thus has an obligation to compensate. An uncritical support or commitment towards the norm of compensation of victims of gross human rights violations without taking into account or even overriding the will of the individual s within a state who actually pays for it, not only endangers the legitimisation of the state power but the coherence of the human rights norm system.

The Lacuna in the Compensation Discourse and how it will be addressed

The foregoing theoretical remarks have shown that the coherence of legal human rights as a normative system is important for them to be persuasive and of practical value, and that an ideal fulfilment of the duty for a state to compensate victims might be at odds with some basic characteristics of human rights. *Coherence* has to be present on two different levels: *within the theoretical framework* and *within an ideal practical implementation*. The first level satisfies the criteria for a persuasive normative theory since the right to compensation of human right violations is coherent with the existing human rights framework. But what about the probable practical outcomes of a realisation of this normative theory: are they still acceptable for every individual who is affected? It is not enough to contend that every victim of human rights violation has to be compensated, thereby implicitly formulating a duty to compensate for the collective of the state just for pragmatic reasons since no one else covers the costs. This thesis will deliver a theoretical approach to the practical outcomes which are to be expected with an ideal application of existing principles. Instead of using the framework of international law to justify compensation I will use a true human rights approach that is coherent with respect to the application of its own principles in theory and practise, focussing

on the right of the individual. This thesis will concentrate on a small section of the right of victims of gross and systematic human rights violations to get reparation: compensation.
A thought experiment in which every victim gets compensation from the state the violations have taken place shows contradictions at second sight: Human rights are mostly individual rights and connected to the idea that an individual is only responsible for its own behaviour. Thus compensation as a financial duty for the whole society whose members have not all been involved in the human rights violations causes problems of justification. But as one the one hand compensation is desirable from a human rights standpoint and on the other hand the coherence of the normative framework should be stable in the praxis, too, it is important to legitimize the decision to hold individuals collectively liable for human rights violations committed by a former regime or other individuals. If this turns out to be possible not only the value of human rights as a normative theory is justified. It is also possible to think about new, trans-border responsibilities for the compensation of human rights violations having an important practical effect: the long-term stability of new democratic regimes.

This thesis will not deal with the justification for compensation for the victims of gross and systematic human rights violations, but takes this for granted and as a basis to start. Further, it will not talk about the question if human rights violations can be compensated at all or the practical difficulties of reparation such as finding victims or formulate rules of allocation. There is nothing about practical aspects on how to compensate, and for practical reasons this paper will not deal with other forms of victim claims than financial ones, such as symbolic measures, apologies, truth seeking, etc. The thesis is not victim orientated but generally speaking is concerned with the responsibilities of those not being victims. The range of actors will exclusively be focussed on the individual agent and the state agent although I' am aware that the duty of companies and supranational organisation might be interesting, too. I will not deal with historic injustice such as slavery or colonialism but stay within the framework of states during transitional justice. Responsibility will be the main notion for the link to liability since the notion of guilt is not only highly morally connoted but also a rather inconsistent concept.

The paper is neither an empirical research paper on how compensation is done, nor a legal paper analysing jurisprudence concerning the right to reparation. It is a practical philosophical paper; i.e. it is using existing philosophical concepts to analyse practical situations and circumstances and offering a view that helps to find, understand and solve contradictions.

Further, practical consequences arising from a certain view within a sound framework will be formulated. The thesis will mainly rely on a literature survey on theories of collective responsibility. It will analytically identify the differences and similarities of theories on responsibility and consequences of the ideal practical implementation of the right to compensation and finally test them on soundness with the claim underlying the human rights normative system.

Keeping in mind that victims of gross human rights violations should be compensated equally and that in international law the state is liable for it, I will try a human rights approach to justify that the right of victims of human rights violations to be compensated can easily be transferred in a duty of the state to compensate. The difficulty is that the state actor defined by International Law is in fact a collectivity containing individuals when it comes to the payment of taxes. The first chapter will visualise the problems of consistency arising from a human rights approach towards compensation by the collective of citizens and explaining the interrelation of responsibility and liability.

The aim for in the second chapter is to formulate models to justify that a collective of individuals can be held liable for the compensation of victims of human rights violations committed by a former regime or other individuals within a framework that respects human rights. This will be done in the national context. The strategy in the second chapter is first to apply theories of collective responsibility to the problem of compensation that do not contradict methodological individualism in order to construct a state-liability that is consistent with human rights. Further, theories of individual responsibility are applied to citizens individually constructing a collective liability to compensate on grounds of summarised individual contributions to human rights violations.

If the human rights approach for the justification of a duty to compensate on the domestic level has been accepted then the transfer of this concept to the international level has to be fully utilised. The third chapter will use the same pattern of consideration from chapter two again. The practical consequences of this approach are visualised when I am going to propose an *international fund for the compensation* of victims of gross and systematic human rights violations. The responsibility and liability for the foreign policy of states confronted with extraterritorial human rights violations will fill the current practical gaps of national and international law. I will then present three different hypothetical scenarios on which the

impact of such a international responsibility becomes visible in practise: it would not only satisfy the original claim of compensation for all victims of gross and systematic human rights violations but also would have an impact on democratic and international stability.

CHAPTER 1

A HUMAN RIGHTS APPROACH TO COMPENSATION

The question of compensation for state crimes of human rights usually comes up after a regime change in the transitional period, since then the probability is the highest that victims are still alive and files available. Compensation is an integral part of reparation during a process of transitional justice from an authoritarian regime towards a democratic one. It is very unlikely that an authoritarian successor regime is involved in the fair compensation of victims of the human rights violations of the previous one. Apart from civil and criminal court cases, compensation by state-funding is the only possibility for the victims to get financial relief. The contributions to this fund are indirectly made by the taxpaying citizens. In the following it will be shown that depending on which theoretical framework of the relation between state and individual is chosen, this can be a problem. The human rights ideology correlates with a liberal and individualist paradigm and thus does not allow a simple transfer of state duty into an individual duty to pay. The notions of duty and responsibility to pay will be used alternately in the following since everyone who is found responsible for an action has the duty to pay. Additionally, everyone who is responsible is liable, but not everyone who is liable is responsible since liability can also be taken over voluntarily.

To visualise the differences between an international approach to compensation of the state and a human rights approach to compensation I will present three models of the state and its relation to the individual, namely, the Hobbesian absolute state, the communitarian state and the liberal state. The last one is the concept to be identified the most with the individualist approach of human rights. This becomes clear when the methodological individualist model of responsibility is explained as decisive for the concept of justice in western legal and most modern moral concepts. In order to construct a duty to compensate, a relation between an agent's action and the harm in question must exist. According to the individual human rights approach though, the taxpaying collective is not an entity as such having caused human rights violations but is composed of individuals who were involved in the human rights violations to differing degrees but also of members who are innocent. Remembering the prohibition of collective punishment from the Geneva-Conventions and the individual responsibility approach it becomes more problematic to justify enforced compensation on a collective funding base. It will be shown that the closer a true human rights approach to individual

responsibility is used the more difficult it becomes to justify the liability of the state for compensation. The focus on the material aspect of reparation makes it easier to picture the transfer of responsibility from the state level to the collective of individuals.

Concerning the succession of a state, usually the responsibilities and treaties remain valid after a regime change. According to Rombouts *et al.* "neither a change of government nor a major regime change accompanied by a political transition and a constitutional reform of the State, are liable to have any repercussions on the legal responsibility of the state for international wrongs committed prior to the transition (…)"[26] Thus from the perspective of International Law, the continuity of the state permits the transfer of responsibility for the compensation of gross and systematic human rights violations to the new regime.
This is already controversial, since it might be the succeeding regime that fought against exactly those human rights violations for which it now takes over responsibility, thus a regime has to cover costs it did not produce. A similar case, brought up by Thomas Pogge, shows the practical consequences this continuation of duties has on the stability of the new democratic regime: Succeeding regimes have to pay off the foreign debts of a former regime which might be a heavy financial burden for new democracies adversely affecting their budget and their stability.[27] From a pragmatic point of view, the gross and systematic human rights violations of an authoritarian regime can also be seen as the debts successor regimes have to pay off. The notion of payment is not only metaphorical but can be taken literally since the compensation of victims of human rights violations does cost money.

Another theoretical problem of this practice of regime succession comes as a *clash* between International Law and Human Rights Law. Whereas in the former the unit of reference is the *state* the latter takes into account the *individual*. From an international point of view, i.e. the macro-perspective, it is only the state paying compensation for human rights violations but from the perspective of methodological individualism it is the citizen who contributes to the compensation of the state by paying its taxes. International law just denies/ignores the fact that it is citizens who have to pay off the costs of compensation for human rights violations who might not have caused them. It is necessary to recapitulate what the state is according to

[26] See H. Rombouts et al., *The Right to Reparation for Victims of Gross and Systematic Human Rights Violations*, p 482.
[27] See T. Pogge, *World Poverty and Human Rights*, Cambridge, Blackwell, 2003, pp. 153-155.

the different paradigms, namely International Law, the communitarian approach and the liberal approach.

1.1. Theory

1.1.1 State Sovereignty and Popular Sovereignty

The state is a legal term, defined as a state power that executes internal and external sovereignty over a clearly delimited terrain and a body of citizens.[28] In principle, for International Law it does not count how internal sovereignty is exercised as long as there is an entity exercising control. In this sense, the view resembles Hobbes' theory of the Leviathan: in a theoretical contract, individuals agree to subject themselves to an *absolute* political authority in order to end the war of all against all. For Hobbes the citizens' interest is not political but only a private one, mainly focusing on ending the war of all against all by subjecting itself to a government. The Leviathan is uniting individual agents to one single agent and is an absolute sovereign, which means it rules with absolute power.[29] The authorization of the Leviathan goes along with the abdication on self-government.[30] The state in which the population is the sovereign on the contrary is coined by the representation and participation of its citizens in policy.

Habermas describes popular sovereignty as a concept defining further the relation between the ruling power and those who are ruled and can be described as a moral political concept implying that the legal and political power should comply with the will of those who are ruled. This idea goes back to Rousseau and Kant saying that those being addressed by law should as well be able to see themselves as authors.[31] The notion arose as a metaphysical justification for the coercive character of law when it lost its validity during the schism of religion and reformation, when a more pluralistic worldview came into existence,

[28] See J. Habermas, *The European Nation-State: On the Past and the Future of Sovereignty and Citizenship*, in J. Habermas, *The Inclusion of the Other. Studies in Political Theory*, Polity Press, Cambridge/Oxford, 1999, p. 107.
[29] See E. Wolgast, *Ethics of an Artificial Person: Lost Responsibility in Professions and Organizations*, Stanford, Stanford University Press, 1992, p. 97.
[30] See W. Kersting, *Vertrag, Souveränität, Repräsentation – Zu den Kapiteln 17-22 des Leviathan*, in W. Kersting (Ed.), *Thomas Hobbes Leviathan*, Berlin, Akademie Verlag, 1996, pp. 219-222.
[31] See J. Habermas, *The European Nation-State: On the Past and the Future of Sovereignty and Citizenship,* p. 112.

contradicting rule by divine order. Popular sovereignty thus manifests itself in the principle of the confirmation of a legal constitutional order and popular political self-determination.[32]

Generally speaking, there are basically two ways in which popular sovereignty can be exercised: a liberal and a communitarian one. Whereas the former sees the state as a means to guarantee individual freedom and a protected private sphere for each individual, the latter's emphasis is on creating a common good for all citizens. This might be reasonable in a rather homogeneous society; since every member of society has a similar vision of this good[33], but in a society that is constituted by different worldviews government *for* the people has the "the tendency to set some abstract good of the community above the wellbeing of its individual members."[34] The communitarian approach thus creates the justification to press individuals into conformity.[35] According to Lewis, those are organic theories of society in which the state by definition does the best thing for the society at large without caring about how individuals justified totalitarian and authoritarian regimes in the past and present.[36]

From an individualist standpoint that supposes unlimited and inalienable rights for each individual, those communitarist theories are unacceptable as the liberal picture is one of *societas*, partnership and *Gesellschaft* rather than *communitas*, corporate unity and Gemeinschaft.[37] Comparable problems arose for Western advocates of the first generation of human rights when confronted with the claim of socialist states for second generation human rights. Their fear that a priority of the common good of social and economical rights by positive action of the state realised to the detriment of political and civil rights became a reality in the authoritarian regime of socialist states. Habermas states that, in reality, the mixture of functional and normative argumentations is a defense of paternalistic ministration on the costs of the individual rights.[38] Amartya Sen proves that liberal democracy is also wishful from a practical perspective, since the lack of participation *by* the population is the

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[32] See N. MacCormick, *On Sovereignity and Post-Sovereignity*, in N. MacCormick, *Questioning Sovereignty. Law, state and nation in the European Commonwealth*, Oxford/New York, Oxford University Press, 1999, p.130.
[33] See C. Bertram, *Rousseau and the Social Contract*, London, Routledge, 2004, pp. 97-101.
[34] H. D. Lewis, *Collective Responsibility*, in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, p. 31.
[35] See A. Mason, *Community, Solidarity and belonging*, Cambridge, Cambridge University Press, 2000, pp. 48-49.
[36] See H. D. Lewis, *Collective Responsibility,* p. 31.
[37] See S. Lukes, *Individualism*, Oxford, Blackwell 1973, pp. 138-139.
[38] See J. Habermas, *On the Internal Relation between the Rule of Law and Democracy*, in J. Habermas, *The Inclusion of the Other. Studies in Political Theory*, Polity Press, Cambridge/Oxford, 1999*,* p. 399.

main factor for the emergence of avoidable famines[39] and thus a violation of the right to food. Liberalists have always been suspicious of an authority claiming to know what a collective' wishes are without actually asking them, and so are human rights advocates. It is not enough to have an authority that decides in one's name, it is important how the representation is taking into consideration what the people want,[40] going beyond the mere role of choosing who should act in their name.[41] The democratic state provides the representation and participation of its citizens, the government is subject of control due to constitutional checks and balances and elections.[42] Additionally, Locke postulates a limit for the sovereign power that manifests itself in civil rights of the individual not to be overrun but protected.[43]

1.1.2 Human Rights and Individual Responsibility

The liberalist approach can be found in human rights as the "freedom of individuals to fulfil themselves without interference from outside".[44] Human rights cannot be transferred into a non-individualist, communitarian framework.[45] The individual freedom is bound to a concept of an autonomous individual who is responsible for its actions. In his work, Sen describes individual freedom as the capability to pursue individual needs and preferences, thereby also including economic and social rights in a way not sacrificing individual freedom.[46] Until know, in the legal human rights jurisprudence, collective rights are taken into account in cases were indigenous peoples declare the ownership of land and not as an excuse to overrule individual preferences. Already the protection of minority languages via performative action is debated and the African human rights system admitting more rights to the collective, still has its main focus on individual rights.

As Kant sees it, imputation is the judgment by which a subject is regarded as the author of an action. If the action and the effects of this action originate in a subject they can be imputed to

[39] See A. Sen: *Development as Freedom*, Oxford, Oxford University Press, 2001, pp. 160-185.
[40] See E. Wolgast, *Ethics of an Artificial Person,* pp. 107-108.
[41] See Ibid., p. 109.
[42] See Ibid., p. 97.
[43] See W. Kersting, *Vertrag, Souveränität, Repräsentation,* p. 227.
[44] M. Nowak, *Introduction to the International Human Rights Regime*, Leiden, Martinus Nijhoff Publishers, 2003, p. 10.
[45] See M. Ignatieff, *Human Rights as Politics and Idolatry*, pp.72-76.
[46] See A. Sen: *Elements f a theory of human rights*, in "Philosophy and Public Affairs", vol. 32, 2004, pp.330-338 and pp. 345-348.

him.[47] Only a subject whose deeds can be imputed to him can be defined as a person.[48] Thus, for example a moral person is a subject who is able to decide freely; i.e. being autonomous from determination of affection and affinity and hence free to follow the moral rules of reason.[49] As for this paper it is not Kants' moral theory but his concept of a person interlocking individuality with the attribution of deeds that interests us, I will not deal further with the former. Velasquez contributes to the latter with the following interpretation of Kant: "An action or effect is said to originate in an agent if that agent directly carried out the bodily movements that constituted the actions or had those effects and if he did so intentionally – that is the movements were his conscious execution of a freely formed intention to perform the action or achieve the effect."[50] It is the connection between the individual actor and its act and outcomes that constructs the concept of moral responsibility.[51]

The concept of moral responsibility for harm is very similar to the concept of criminal responsibility.[52] Just as the former needs the moral person and a framework of obligatory moral rules it can choose to obey or not,[53] the latter requires the legal person, defined as an individual having the choice to follow legal rules. The conformity with legal rules is called legality, the conformity with the moral rule morality.[54] For Velasquez, to ascribe criminal responsibility two requirements are needed: *actus reus* which is fulfilled if the individual in question causally or conventionally brought about the wrongful act by its bodily movements, helped to execute or failed to prevent it, and *mens rea*, i.e. the act has been intended indicated by the persons voluntary control of the bodily movements that resulted in the act and the knowingly carrying out of those bodily movements.[55]

David Risser links the notion of responsibility to an individual by stating that being responsible is "to be answerable or accountable for one's actions and for any harm caused by

[47] See I. Kant, *The Metaphysics of Morals*, Cambridge, Cambridge University Press, 1991, [227], p 53.
[48] See Ibid., [224], p. 50.
[49] See Ibid., [221], p. 48.
[50] M. Velasquez, *Why Corporations are not Morally Responsible for anything they do,* in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, p. 114.
[51] See Ibid., pp.112-114.
[52] A difference lies within the fact that for moral responsibility the actor has to know about the wrongfulness of his actions whereas in criminal law, ignorance is not accepted as an excuse.
[53] See I. Kant, *The Metaphysics of Morals*, [223], p.50.
[54] See Ibid., [219] p. 46.
[55] See M. Velasquez, *Why Corporations are not morally responsible for anything they do*, pp. 114-115.

ones' actions."[56] He also points out that locating responsibility usually is important after harm has occurred.[57] Joel Feinberg agrees, by saying that moral and legal responsibility for harm yield to the ascription of the liability for certain responsive attitudes, judgments or actions. He states that compensation and punishment are the two ways of responsive actions that arise from the contribution to harmful behaviour.[58] A responsibility that implies a liability to respond would have to meet three criteria: "First it must be true that the responsible individual did the harmful thing in question or at least that his action or omission made a substantial causal contribution to it. Second, the causally contributory conduct must have been in some way faulty. Finally, if the harmful outcome was truly "his fault" the requisite causal connection must have been directly between the faulty aspect of his conduct and the outcome."[59]

In the application of Feinberg's criteria of responsibility to human rights violation, the second and the third criterion are interlocked. This becomes more obvious when applying a consequentialist approach; i.e. actions are evaluated according to their consequences. The fault of not obeying human right rules is highly relevant for the outcome. Since human rights norms are designed to protect human beings from harm, a violation of these norms already implies harm. So the faulty behaviour of violating human rights norms always means to accept an outcome that harms others. This is not always the case, so the behaviour of driving a car while drunk is "faulty", but instead of necessarily resulting in an accident harming other individuals, it only exposes them to a certain risk.[60] Concerning human rights, the violation of moral norms is inseparable of a harmful consequence; there is simply no logic possibility to violate human rights in secrecy (without someone to notice) and without victims.

This logical linking of criteria two and three for human rights violations entails the need for a responsive action as long as it is possible to identify an addressor for this action. This identification is done by satisfying Feinberg's first criteria, namely by figuring out the individual who by acting relevantly contributed to the outcome in question. In other words, if an individual contributes causally to a human rights violation, i.e. the consequence of an individual action is a human rights violation, then the individual agent is responsible for this outcome and therefore is liable to a responsive measure.

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[56] D. Risser, *The Social Dimension of moral Responsibility*: *Taking Organizations seriously*, in "Journal of Social Philosophy", vol. 27, 1996, p. 189.
[57] See Ibid., p. 189.
[58] See Joel Feinberg, *Collective Responsibility*, in "Journal of Philosophy", vol. 65, 1968, p. 674.
[59] Ibid., p. 674.
[60] See Ibid., pp. 681-682.

1.1.3 Human Rights and Collective Responsibility

Being a methodological individualist, H. D. Lewis insists that "no one can be responsible (…), for the conduct of another. Responsibility belongs essentially to the individual."[61] Individual responsibility makes it possible to distinguish one action from another and to assess the value of those actions.[62] This is fundamental, since the value of a person is significantly swayed by its actions.[63] If the link between an individual and the responsibility for its own actions is flawed in favour of a notion of collective responsibility in which an individual is responsible for the actions of someone else then it does not make sense to keep the concept of an individual at all. But in the case of collective liability for compensation of the victims of human rights violations it is highly probable that individuals pay who do not participate by their bodily movements to the outcome and hence are responsible for someone else's deeds.

Lewis deems the notion of collective and group responsibility in which individuals are responsible for the behaviour of someone else to be "barbarous"[64] and "foolish"[65]. Zvie Bar-on adds that it is connected with injustice, vindictiveness, and the blurring of distinction.[66] Interestingly enough, human rights advocates would not hesitate to agree with Lewis when it was about the collective responsibility for the liability for punishment, but they seem to factor out that collective responsibility for the liability to compensate functions along the same lines. In Humanitarian Law, collective punishment is defined as a war crime. In Protocol II, collective punishments are explicitly prohibited[67] and article 33 of the 4th Geneva Convention states: "No protected person may be punished for an offence he or she has not personally committed".[68] The latter mirrors the same principle of individual liability as already presented. There is no denying the fact that a collective punishment such as the massacre in Lidice 1942 cannot be practically compared to the taxpaying collective being liable to compensation, but there are theoretical parallels that have to be taken into account, when advocating a coherent human rights norm system.

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[61] H.D. Lewis, *Collective Responsibility,* p. 17.
[62] See Ibid., p. 17.
[63] See Ibid., pp. 18-19.
[64] Ibid., p. 17.
[65] Ibid., p. 25.
[66] See A. Zvie Bar-on, *Measuring Responsibility*, in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, p. 255.
[67] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 1977, Article 2 b).
[68] *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 1949, Article 33.

1.2 Praxis

Having described the essential individual elements of the concept of responsibility, the clash with the collective liability for the compensation of victims of gross and systematic human rights violations of a state is being analysed: as stated in the introduction, if every victim has to be compensated it is the best strategy to guarantee compensation by law. The fund for the compensation of victims of human rights violations is a theoretical means to show that in fact a collective is liable for those compensations. In principle it does not matter so much if it is really a fund that is financed by an explicit tax: it can as well be a certain part of the national budget and does not even have to be addressed to victim compensation. The important theoretical element of the scenario is that expenses for reparations are paid from money which was levied from a collective consisting of individuals for establishing goods perceives as valuable and labelled as public goods. From an individual view on society, soon as one single member of the collective is not voluntarily taking over the liability the collective liability is contrary to an individual human rights approach. In a society in which the compensation of victims of gross human rights violations is not perceived as a common good but as a duty of the state due to wrong actions committed in the past, arising from International Law, the transfer from state responsibility to popular responsibility is to be justified. In the following, I will go through the already presented models of the state as a unit, as a homogeneous collective, and as a collection of individuals, and evaluate this transfer and means of justification.

1.2.1 Compensation between state sovereignty and popular sovereignty

In the Hobbesian Leviathan, the state is identical with the individuals, thus, according to Wolgast "citizens are directly responsible for everything their government does: its debts become their debts, its promises theirs to keep, and its offences are ascribable to them."[69] So from the point of view of an absolute state authority which is the same paradigm international law uses, compensation for actions committed by the state are to be paid by the people without constraint. The communitarian approach in principle is fine with this, too. As actions of the state are done according to the common will of the collective, by definition, every state act has been accomplished in the name of the people and therefore citizens are equally

[69] See E. Wolgast, *Ethics of an Artificial Person,* p.96.

responsible for the actions of their sovereign.[70] According to those two approaches, it can be said that the collective i.e. the people, is liable for the compensation of the victims since the identity of civil society and government creates a situation in which the people itself is responsible for the gross and systematic human rights violations.

But critique may arise from an individualist perspective: in fact, the liability to respond is implied by the sheer group-membership. Lewis even points out a resemblance of the undiscriminating "ethic of the tribe" with the doctrine of collective responsibility: for both the unit of interest is the group and not the individual a distinguishing feature of Western thinking is given up.[71] The strategy of separating liability from responsibility does not work out either: Though Feinberg claims that the liability for compensation coming from responsibility can be taken over vicariously by another party who does not have to have contributory fault[72] but following Reiff, this is only thinkable as a *contractual* relation that is grounded on the consent of the individual taking over liability. Thus a voluntary act is the precondition for the ascription of liability arising from wrongs of other persons and this voluntariness is not exhaustingly satisfied by group membership.[73] Feinberg raises the possibility that a high degree of de facto solidarity could promote the vicarious emotion but also admits that this degree is not reached in modern societies.[74] The minimal criterion to interpret group-membership as a voluntary consent is an a priori choice whether to belong to this group or not. Citizenship, in most cases is not the result of a voluntary act but attributed at birth. Thus, a question is how liability can be constructed for individuals who are forming a collective in whose name actions were committed without its consent. Wolgast claims that that separating the people from actions done in its name takes the responsibility away from them.[75]

Hence, an advocate of the human rights doctrine distinguishing itself by a methodological individualist framework cannot easily accredit the responsibility for the compensation of state human rights violations to the citizens of this state without contradicting its own ideology. For clarification: it is not coherent to balance the negative outcomes of a rule violation with another rule violation. Thus collective liability for the compensation of victims of gross and systematic human rights violations which occurred in a previous regime cannot be justified in

[70] See Ibid., pp.110-111.
[71] See H. D. Lewis, *Collective Responsibility,* 1991, pp. 29–31.
[72] See J. Feinberg, *Collective Responsibility*, 1968, p. 675.
[73] See M. R. Reiff, War, Terrorism and Collective Responsibility, (unpublished), pp. 4-5.
[74] See J. Feinberg, *Collective Responsibility*, pp. 677-679.
[75] See E. Wolgast, *Ethics of an Artificial Person,* p. 105.

the framework of the individual human rights paradigm unless there is either a way to establish a collective responsibility or liability that is coherent to the principles of individualism, namely a common interest that is literally shared by all individuals or the truly voluntary act of belonging to a group that is liable, or the responsibility of each citizen for the outcomes can be proved.

1.2.2 Compensation and collective responsibility

Lewis admits that an individual can be emotionally affected by the behaviour of another person he shares a close commitment with or a groups' success he is a member of, but none the less the value of an individual can only be influenced by its own actions and not those of another individual or group.[76] "(…) we cannot answer for one another's or share each others' guilt, for that would imply that we could become directly worse persons morally by what others elect to do – and that seems plainly preposterous."[77] So does the fact, that in an individualist framework people can only be responsible for their own acts imply that not more than one person can be responsible for a certain outcome? Certainly not: Even Lewis admits that in a joint undertaking such as a burglary by several individuals, each individual carries responsibility for his actions contributing to the crime.[78]

Mark Reiff sees the concept of individual responsibility as mostly a causal one: "For individual moral responsibility it is both necessary and sufficient for the individual to have committed a wrong that has caused harm."[79] It is causation that links the actor to the victim and thereby establishes a variety of rights and duties including the right to seek and an obligation to pay compensation.[80] But additionally he admits the following criteria for ascribing responsibility to an individual for an outcome that has not been produced by its direct actions but indirectly. Imagine an agent forming the idea for an action, executing this action and being confronted with the outcomes of that action. Other people can be indirectly causally involved in the first two stages and can be affected by the result.

[76] See H. D. Lewis, *Collective Responsibility,* p. 22.
[77] See Ibid., pp. 26-27.
[78] See Ibid., p. 27.
[79] M. R. Reiff, p. 3.
[80] See Ibid., p. 4.

Reiff continues that everyone who motivates the individual to commit the action that connects it causally with the result is partly responsible.[81] This could be a superior giving orders or someone with enough influence to imply a certain ideology. In the case of human rights violations this would certainly be a military commander but also political ideology and propaganda or media. On the second stage, everyone enabling the individual to commit the wrong is partly responsible, too. This facilitation can happen in two ways: positively and negatively. On the one hand there are ways to contribute positively to the action by providing material, financial, emotional, or political support. Whereas on the other hand, the failure to prevent a wrong can equally well link bystanders not supporting some actions actively to a certain outcome. Finally there is the possibility to take over liability for the outcome vicariously, by an explicit, voluntary act.

1.3 Resumé

The aim in this chapter has been to show that establishing a state duty to compensate victims of gross and systematic human rights violations cannot easily be transferred to a duty to compensate for each citizen living in this state if the compensation should be consistent with human rights. Therefore I had to demonstrate that the approach used in international Law representing the collective responsibility is not coherent taken together with a liberal and individualist view of the citizen. Kant's image of an individual as an agent responsible for its own actions needs another framework of the exercise of power i.e. a state that not only has actual control but does rule according to the actual will of the citizen. Only an approach to state compensation of human rights violations that does not overrule the principle of individual duty due to personal responsibility can be deemed sound with the human rights framework. It has to be kept in mind that everyone who is responsible is liable for compensation. Thus in order to establish an obligation to compensate a responsibility-relation has to be found. In the following chapter I will first present the conditions for a concept of collective responsibility that satisfies the mentioned criteria and then concentrate on establishing a causal responsibility to gross and systematic human rights violations for the whole state. If this is successful, it is possible to justify holding a collective liable for human rights violations by taxes within the liberal human rights methodological individualist approach.

[81] See Ibid., pp. 9-10.

CHAPTER 2

CONSTRUCTING COLLECTIVE RESPONSIBILITY FOR COMPENSATING VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS ON THE NATIONAL LEVEL

Chapter 1 gave an idea of the liberal approach of individualism and then contrasted this with the concept of collective responsibility. Individualism supposes that individuals are agents that are responsible for the acts they commit and therefore are to blame for negative outcomes of those acts which again, imply a certain duty to compensate for the damages. Several voices from the individualist methodology criticised the concept of collective responsibility as unthinkable, especially if it was about holding individuals responsible for acts other individuals have committed. But on the other hand there are actions which are clearly collective such as the Democratic Party nominating their candidate; the mob leaving the stadium or the Dow Chemical Company manufacturing Napalm that are not reducible to individuals. The relevance of these considerations for the justification of the liability of a collective for the compensation for the victims of human right violations lies in the idea that those human rights violations committed in the past were a real decision of a collective – in this case the state – and therefore the state as a whole is responsible for the outcome. If this is possible, the praxis in international law to hold a state liable is justified according to a human rights approach.

As explained in the first chapter it is rational to suppose that the duty do pay is somehow linked with an action conducted due to an intention, so that the actor's responsibility for the outcome is visualised in the duty to contribute to the compensation. For the collective duty of the state to compensate victims of human rights violations to be justified according to the individualist human rights framework it is necessary either to *show that states themselves can be treated as agents* and by this can be held responsible for the negative outcomes they provoked. The other strategy is to show that the individuals contained in this collective are all somehow linked by their actions as moral agents to the outcomes in question so that the

responsibility for undoing the damage is in fact not collective but a *summary of individual contributory responsibilities*.

In what follows, it will be shown that certain criteria within the structure of a collective imply the existence of a collective's capability to actually act: i.e. to execute actions according to intentions transcending those of the composing individual group members. If a collective is able to decide and in acting according to those decisions causes certain outcomes, we can deem the collective actor itself to be responsible for it. The point is not to prove that individuals within the structure are never responsible for their actions within the collective but to show that it is reasonable to say that a collective can be treated as an actor with intentions and therefore be obliged to respond to outcomes it has caused by its actions. Collective responsibility implies neither that no individuals are taking part nor that they are free from responsibility. But for ascribing responsibility for actions, it is reasonable to assume that the same criteria which exist for defining a moral individual agent are valid for a moral collective agent; i.e. at least a collective must have continuous identity that can bodily act according to own intentions. This chapter will explain that Peter French's theory of conglomerate responsibility satisfies the claims being made to hold a collective responsible for its actions. As he mainly sees its application within corporations, the theory needs extensional considerations concerning the legitimacy of those decisions, namely an extension of his own theory according to Jürgen Habermas and David Risser.

As this turns out to apply to collectives being organized in a participatory democracy guaranteeing human rights as defined in a true democracy only and thus leaves out authoritarian regimes without an internal legitimate decision structure, other philosophical frameworks of individual responsibility have to be found to justify compensation within regimes that are not truly democratic. These are the most prominent for committing human rights violations and therefore the problem of justification for compensation in most cases will occur after the fall of an authoritarian regime. Hence in the second part of this chapter, I will approach the collective of citizens of a human-rights-violating state with different theories of responsibility to include as many responsible individuals as possible, so that in the end a collective liability can be justified on the grounds that each responsible individual is linked to the atrocities. Each of the presented theories applies to a group of individuals within the collective due to their relation to the human rights violations taking place. The categories -

theoretical, non-exclusive and not meant to be of practical value – are: Individuals as directly involved by their actions and bystanders as not actively involved and innocent individuals.

The first category mostly coincides with the group that can also be held criminally responsible: Actual perpetrators bear a direct causal responsibility to the human rights violations. Then there are those who do not directly act but commanded the violations. The second category is formed by citizens who witnessed the massive human rights violations but neither actively contributed nor prevented them. The theory of negative individual and group responsibility is a means to construct a liability to compensate for the bystanders. The third category finally includes three groups of citizens, namely victims, immigrants and the very controversial group of those who were minors or simply not born during the atrocities. They are not responsible in a causal sense but still have a motivation to contribute to compensation can be established on grounds of victim-solidarity, acceptance of membership and the consequences of massive human rights violations perceived as a collective bad playing a major role in various concepts of justice. Additionally two other possibilities to motivate compensation are mentioned, namely solidarity within society and a consequentialist and pragmatic argument: it is possible that those victims being uncompensated could become a more cost intensive post in the long run.

In any case the focus of the paper is on responsibility and hence will avoid the notion of guilt except in cases were this is unavoidable. I will further not take into account the role of collectives different from states such as companies. Using the framework of Peter French I will start by describing the main differences between aggregate and corporate collectives by way of summarising the prerequisites a collective must have in order to claim an outcome caused by the collective to be indeed the result of a decision of the same collective.

2.1 Conglomerate responsibility

2.1.1 Peter French's theory

French describes the minimal attributes a collective has to hold in order to assign it collective responsibility as such, which is not a result of combined responsibilities of the members, but an intentional action by the collective. Thereby he relies on Velasquez's definition of responsibility, connecting body and mind by saying that in order to have responsibility an

agent has to be capable of forming a plan of action or intention *(mens rea)* and has to be competent to have direct control on his bodily movements to fulfill this action. If those criteria are not fulfilled, the agent cannot be blamed or punished and thus not be the addressor of liability.[82]

In principle any gathering with more than one individual can be named a collective. The significant difference between collectives lies in their genesis and structure. In his work, Peter French distinguishes aggregate collectives from conglomerate collectives. An example of an aggregate collective is a crowd or mob whereas a conglomerate collective is represented by a corporation or a club. Although both types can cause the same outcome French deems only conglomerate collectives to be capable of having responsibility for the consequences of action as a collective. This is due to the fact that an action or bodily movement need not be intentionally directed towards a specific outcome to cause it; intentional attributions are opaque.[83]

An aggregate collective is defined as a group whose identity is bound to a specific set of members. "A change in an aggregate's membership will always entail a change in the identity of the collection."[84] The group is not more than the summary of the contained individuals defined for a *focal event*. As soon as only one single member leaves the group or accrues to it the composition, i.e. the identity of the group changes.[85] Virginia Held classified this type of collectivity as "random collection" and shows that a predication on those groups applies to every member of them; at the same time,[86] responsibility in random collectives is distributive.[87] French refers to the "Canby Saloon Crowd" as a collective of 17 people, being present in a Saloon within a certain time-framework.[88] Their existence as a metaphysical unity is a "by-product of our way of conceiving of that collection of seventeen persons.(…) The crowd exist because its component members do (…)."[89] In the example given by French, the

[82] See M. Velasquez, *Why Corporations are not Morally Responsible for anything they do*, pp. 114-115.
[83] See P. French, *The Corporation as a Moral Person,* in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, pp. 141-42.
[84] P. French, *Collective and Corporate Responsibility*, New York, Columbia University Press, 1984, p. 5.
[85] See Ibid., pp.22-23.
[86] Virginia Held, *Can a random collection of Individuals be morally responsible*, in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, p. 98.
[87] See P. French, *Collective and Corporate Responsibility*, p. 13.
[88] See Ibid., p. 17.
[89] Ibid., p. 24.

"Canby Saloon Crowd" lynched two other individuals during a brawl.[90] This lynching is the focal event which determines the group and at the same time is an action for which the aggregate collective of the specific seventeen people is responsible. If one person within that collective dies, the sixteen people left do not represent the collective being responsible for the lynching anymore, even though, they are still responsible for their individual acts during the brawling.[91]

By contrast, a conglomerate collective is "an organization of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organization."[92] This collective continues to be the same independent of varying membership.[93] A predication on conglomerate groups can be made without being applicable to every single member of it.[94] The "Gulf Oil Corporation" for example is not sufficiently described by an enumeration of the individuals being the executives, the employees or the stockholders to a certain time. The corporation is in a state of flux: stock is bought and sold, employees are fired, are promoted, die, etc. and still no one would say that firing a stuff member changes the Corporations' identity. Nor is it reasonable to say that a stockholder is personally responsible for an outcome of a decision taken by the managing board.[95] In opposition to aggregate collectives, there is no focal point that determines the composition of the group, and the identity of the individuals belonging to the collective is not decisive for its identity.

According to French aggregate collectives lack the following attributes that distinguish conglomerate collectives: (1) internal organizations and/or decision procedures by which courses of concerted actions can be chosen; (2) enforced standards of conduct for individuals associated are more stringent than in random collectives; (3) members of the collective fulfil predefined roles in which they exercise certain power over others but the structure does not change by an exchange of individuals playing those roles.[96] With an internal decision structure (IDS) it becomes possible for a collective to directly control its actions since acts are executed according to an internal decision, transcending those of the individual actors within. The other two attributes allow the continuity of the corporation independent of its members

[90] See Ibid., p. 22.
[91] See Ibid., pp. 23-25.
[92] Ibid., p. 13.
[93] See Ibid., p. 28.
[94] See Ibid., p. 13.
[95] See Ibid., p. 27.
[96] See Ibid., pp.13-14.

and that a decision taken by an individual in the name of an organization can be defined as being a decision of the corporation as such or not. For example, even though a chief executive officer is at the top-level of the hierarchy his position does not imply the labelling of every decision as a corporate act.[97] For French - taking a strict, non-positivistic interpretation of the corporate structures - "decisions made by managerial officers that are not consistent with organizational structure or established procedure are not decision of the corporation."[98]

The internal decision structure (IDS) is composed of three elements: an organizational or responsibility flowchart; and two types of corporate recognition and decision rules – procedural rules and policies. The responsibility flowchart can be described as the "grammar of corporate decision-making".[99] It defines the formal roles and levels within the hierarchy and shows up the lines of authority, subordination and dependence between them so that it becomes possible to track the distinct routes and stations a decision has passed. As individuals in a corporative collective act within the boundaries of their roles which are prescribed by the grammar, they have a fixed set of options when acting. French gives the following example of a responsibility flowchart: "Decisions reached among the counsels are ratified in that vice-president's office and the vice-president for law is responsible only to the chairman and chief executive officer and through him, to the board."[100]

A further prerequisite for the identification of a corporate act as the act of a particular organisation are the recognition rules: French argues that in every corporate collectives' structure, there are ultimate rules that are valid because they are recognized by the individuals. "(…) [R]ecognition rules within the corporate Internal Decision structure determine and justify the corporate intentional character of corporate actions."[101] By obeying the proceeding rules when deciding, individuals within the cooperation prove their acceptance of the corporation framework and subordinate their actions to a collective action. "Unless those rules have been satisfied, actions taken cannot be regarded as corporate actions of that firm."[102] French is well aware of the fact that usually informal ways of decision-making are being established but insists that as long as the official, prescribed way of ratification and responsibility is obeyed, the formal responsibility flowchart is not violated. If, however,

[97] See Ibid., p. 55.
[98] Ibid., p. 54.
[99] Ibid., p. 48.
[100] Ibid., p. 49.
[101] Ibid., p. 53.
[102] Ibid., p. 53.

decisions are taken in accord with an informal phantom-structure and not the published one then the current responsibility-flowchart is not up-to-date. In any case, for French, the decisive point is that there exists a responsibility flowchart as reliable grammar that is maintained.[103]

French mentions policy recognitors as a last requirement for a decision taken in the name of a collective to be truly an incorporate decision: Without a corporate policy that defines principles and purposes of the corporation, the decision-making structure is without content, too. It is not enough to define the responsibilities and authorities when the information about the sense of those procedures is missing. Even though explicit information about the policy is often missing it is implicitly clear according to which general expectations, patterns and standards an activity has to be executed.[104] In the case of a company an example of a goal is making profit, whereas a principle could be transparency. "An act or decision that is in violation of corporate policy is not an act of that corporation."[105]

Keeping in mind that French is depicting the conditions of holding a company responsible in the first place, there is a possible clash between the external and internal legitimacy of the IDS: An act or a decision which is perfectly consistent with the internal rules of an organisation can be in contradiction to legitimate behaviour or outcome outside the company, at the same time. The described theory implies the following rules for keeping a cooperation responsible for those cases: As long as an action defined as illegitimate in the outside world is the result of a conform behaviour to the internal rules and policies, it can be defined as a collective intentional action and thus the collective is responsible for it. If this is not the case and the decision turns out to be contradictory to internal decision making procedures the collective is not responsible.[106]

2.1.2 Adaptation of French's theory

2.1.2.1 General considerations

With French's argumentation I was able to show that in principle it is possible to state that collectives can act according to developed intentions and thus, like human actors, be held

[103] See Ibid., pp. 49-52.
[104] See Ibid., pp. 54-58.
[105] Ibid., p. 60.
[106] See Ibid., pp. 59-66.

responsible for damaging outcomes, as long as certain criteria concerning the internal decision making procedure are fulfilled. A state resembles a conglomerate collective in several ways. It is not a random collectivity of individuals but a structure with stringent codes of conduct that maintains its identity even if individuals change their roles or leave the collective. This structure usually contains a legal framework that legitimizes the rule-making competences of the political power/government. Is this enough to transfer the state responsibility to an individual regarding the fact that the conglomerate structure is not only found in representative democracies? Usually, in authoritarian regimes, dictators follow prescribed regulations for decision-making and defined roles and responsibilities as well.

If we agree in defining the state as a conglomerate collective analogously to French's approach, then it can be held responsible for actions except in the subsequent three scenarios: (1) the decisions-structure i.e. the constitutional framework is disregarded during the actual decision-making; (2) the decisions or the decision-making processes are detached from the ultimate rules of recognition; (3) the decisions do not satisfy the predefined policy of the collective, i.e. the basic goals and procedures of the state. To be more concrete, I'll give an example for each of those scenarios right away: Neither a Shadow regime pretending to rule according the constitutional framework, nor a regime that officially changed the proceeding rules by upholding the basic constitutional framework, nor a government defining new goals exceeding the constitution or dropping established principles is a continuous entity to be regarded as responsible for its actions.

This means that only stable regimes that act in conformity with their own procedures and policies allow the ascription of consistent identity. This identity implies the intention of an action executed within a decision-making procedure, which itself is the prerequisite for attributing collective responsibility. But there arises another problem: What exactly are the borders of the collective? Does the collective responsibility of the regime include the collective responsibility of the people, too? Is every policy and decision legitimate as long as it is consistent with internal procedures? I will suggest three interacting approaches to shape a decision-making structure that legitimately includes individuals not occupying roles in the deciding government in order to satisfy a human rights approach to state-responsibility legitimately transferable to a citizens' responsibility. The first will be a development of French's own approach, the second Habermas' theory on legitimate state power and the third is based on a critique by David Risser.

2.1.2.2 Within French's structure

At first I will continue in applying Peter French's theoretical framework to the state. The dominant idea in Peter French's model of defining collectivity is the individual participation in an action. This is the fact for random and for conglomerate collectivities. In the case of the latter, individuals take part in the collective by exercising roles. It does not seem coherent to define a role in a conglomerate collective that does not have any competencies regarding the decision-making procedure. It must be justified that individuals not actually participating in making decisions are included as if they did. Thus in applying cooperative responsibility to a state the mere factual conformity to the normative structure is not enough and asks for qualities within that structure.

A prerequisite criterion for the inclusion in a conglomerate collective is participation. In the case of a state where inclusion is determined due to citizenship and cohesion this inclusion must be justified by participation if the collective is to be held liable. If there is a means to guarantee the participation of everyone in the state in the decision, in which usually less than all formulate action, liability would be legitimate. I suggest the following two characteristics that (insufficiently) satisfy the prerequisite criteria of the inclusion within a conglomerate collective: An adequate procedure guaranteeing on the one hand that the roles within that IDS are in principle open for everyone[107] and on the other hand allowing an actual representation of the decisions of everyone by giving them influence in the formulation of the conglomerate policy and consider their ideas.

2.1.2.3 Norms being worth obeying

Jürgen Habermas points out the instable legitimisation of French's 2nd principle: "(…) even the basic norms that the constitution itself has declared non amendable share with all positive law the fate that they can be abrogated, say, after a change of regime."[108] In states, political rules are used to integrate individuals by coercion. Not only that a regime in power, in principle, can establish any rule it wants to but with the necessary means of coercion it can always change decision-making procedures as well as recognition norms. In the case of state violations of human rights those could be defined as lawful and would have to be accepted.

[107] See b) of the Second Principle, J. Rawls, *A Theory of Justice (revised)*, Oxford, Oxford University Press, 1999, p. 53.

[108] J. Habermas, *On the Internal Relation between the Rule of Law and Democracy*, in J. Habermas, *The Inclusion of the Other*, Cambridge/Oxford, Polity Press, 1999, p. 255.

Habermas continues with considerations describing the features of modern law: "The positivity – the fact that norms backed by the threat of state sanction stem from the changeable decision of a political lawgiver – is bound up with the demand of legitimation."[109] It is not enough for rule to claim validity because it is actually executed. People concerned by it should also be able to comply with the rules out of respect and not only due to strategic considerations, i.e. to avoid punishment.[110] As Habermas rules out the possibility of metaphysical validity of law[111] he points out the co-originality of the rule of law and human rights as a grounding for legitimate state power.

Human rights – in this case civil rights and political rights of participation and communication that safeguard the exercise of political autonomy - satisfy a legitimate legal institutionalisation of the communicative freedom as an exercise of political sovereignty. Political freedoms written in the constitution are not a result or a barrier of the sovereignty but a prerequisite of legitimate rule-making.[112] Whereas political autonomy is represented by a sovereign people that give itself rules, the rule of law guarantees the private autonomy of the individuals.[113] Private autonomy is determined by legal personhood being absolutely necessary to legitimately construct the institution in which citizens of a state can make use of their political autonomy. Only if individuals have equal basic rights guaranteeing private autonomy and the pursuit of the individual good, are they sufficiently independent to make use of their political autonomy. And unless they use their political autonomy they cannot legalise their private autonomy.

2.1.2.4. Responsibility due to power

Although cooperation can be responsible this does not mean that the individuals within the collective are free from responsibility. David Risser, by analysing the individual responsibility for an action done by a corporate actor complying with Frenchs' criteria notes the connection between power and responsibility. The more possibilities an agent has to influence or restrict other individuals or the corporations, actions and choices, the more responsibility he has for the consequences of those actions. And, additionally, the more

[109] Ibid., p. 254.
[110] Ibid., p. 255.
[111] J. Habermas, *Zur Legitimation durch Menschenrechte*, pp. 387-391.
[112] J. Habermas, *On the Internal Relation between the Rule of Law and Democracy*, p. 259.
[113] Ibid., p. 258.

responsibility he carries, the more his decisions are to be justified for those being influenced by them in their actions.[114]

If there is a cooperative collective in which the distribution of power is unequal because the decisions are executed according to a hierarchical structure, then the responsibility for an outcome depends on the individual's position and share of power. In a flat hierarchy with a decentralised distribution of power each is equally responsible.[115] An authoritarian regime thus is unlikely to be able to transfer its responsibility for state actions on its people without competencies to take part in the decisions.

2.2 Intermediate Resumé

My considerations so far have shown, that, in certain circumstances, it is possible to hold a collective responsible without violating human rights principles. Prerequisites are at least functioning internal decision structure which best has certain qualities. This is because, analogously to the individual, a collective can only deemed to be an agent if the action undertaken has been wilfully and intentionally executed. Unless the individuals included in the collective act in an organised way, and the outcome has been more than the result of chaotic individual actions, there is no collective responsibility. But in order to justify a state-responsibility that satisfies a human rights approach to popular sovereignty, the structure of the state has to fulfil additional criteria. The theory given by Peter French has been developed for corporations so it needed a little adjustment to be applicable to states which entailed postulations about the conditions of inclusion. With Habermas it has been demonstrated how a modern view of rule and law again changes the claims to be made on a legitimate internal decisions structure. David Risser finally suggests that not any kind of decision structure in a corporation justifies the transfer from collective responsibility to the individual. He claims a certain quality of that structure, namely the inclusion of equal distribution of power.

With the help of those attributes, I will postulate that indeed cooperate collectives can be responsible agents but that states need to fulfil more criteria concerning the quality and not only the function of the Internal Decision Structure. If we follow this line of argument, an act can only be legitimised as the outcome range of collective decision if the structure of the collective is includes participatory and democratic principles. In order not to have to mention

[114] See D. Risser, *The Social Dimension of moral Responsibility*, pp. 190-191.
[115] See Ibid., p. 200.

specific states, in the future I will refer to the notion of *true democracies*, i.e. whenever I want to address states that have a stable IDS shaped by a considerable flat hierarchy in decision-making, higher positions that are in principle open for everyone that is affected by this power exercise, the possibility to influence decisions and the guarantee of real representation of the will as well as private and political autonomy as civil and political human rights. Only in true democracies it is possible to hold individuals liable for the actions done by their states; thus *only true democracies satisfy both, the international law and the human rights approach of compensation*.

Until now it can be said that if human rights violations happened due to consent, for example in a regime which guarantees legitimate representation of the will of those individuals being part of the collective, cooperate collective responsibility applies. This means it is justifiable if individuals that didn't personally take part in cruelties have the duty to financially cover the costs of the reparations of the victims. In fact it is rather improbable that large human rights violations occur in democratic regimes that already guarantee human rights and, unfortunately, in most cases, where human rights have been violated, the regimes aren't true democracies. Since those regimes famous for human rights violations, i.e. authoritarian regimes, military dictatorships, failed states etc. lack either a functioning internal decision structure or only features insufficient legitimate representation and thus aren't covered by the French's theory of collective responsibility; other ways of justification have to be found to hold individuals liable for the compensation.

2.3 Individual responsibility

2.3.1 General Considerations

As seen in the first chapter, in the case of a state succession, the international treaties a state is committed to, usually remain valid as are debts being made by the government in the name of the state. This practice was interpreted as not coherent with a human rights approach towards compensation. It will be shortly assessed in how far the theory of collective responsibility has been useful to solve this dilemma. The state cannot be presented as a random collective, since those kind of collectives cease to exist as soon as one individual leaves (dies) or appears (migrates, is born). So the state must be a conglomerate collective. But the change of the regime from one committing human rights violations to one that is willing to compensate for

them suggests that there is no continuity within the internal decision structure; i.e. it is not the same conglomerate collective according to French anymore. Additionally, only true democracies are deemed to be collectively responsible. So far, the theory of collective responsibility has been unsatisfying as in cases in which gross and systematic human rights violations are not committed by a continuant democratic regime – which is usually the case – the duty to compensate the victims has to be constructed as a contributive responsibility of the individual citizens. As liability is a consequence from being causally responsible for an outcome it is my aim to detect responsibility.

I will present another strategy now, allowing us to construct a theoretical responsibility relationship for every individual within the collective defined as the taxpaying community. In the following different scenarios will be presented as well as strategies to build (at least) a causal relation of every individuals´ intended actions with the cruel outcomes of human rights violations which lead to the necessity of compensation for victims. Those scenarios are to be interpreted as different categories, including as many individuals of the collective as possible. They are not exclusionary, theoretical and therefore individuals´ actions can imply a combination of more than one group. From the theoretical angle of collective responsibility, I will try to develop a pattern of distributive collective responsibility meaning that any individual included in the collective somehow contributed to the outcome.[116] This is justifiable since, as described in the first chapter, even though individualism states that individuals are only responsible for their own acts it is not contradictory to say that several individuals can, by their own acts, contribute to the same outcome.[117] However it must be kept in mind that this does not imply that necessarily all individuals equally contributed to a certain outcome and therefore each is equally responsible. I will not tackle the different degree of contributory fault but instead suggest a weak argument that at least everyone somehow is justifiably held liable for the compensation of victims of human rights violations.

After massive human rights violations in a state there are at first the following two obvious categories of individuals to be made responsible for the outcome: The perpetrators themselves i.e. those who directly caused the outcome by actually committing the violations in direct contact with the victims for example torturer, wards or members of the army or the militia, or independent actors. Since most of the perpetrators do not act only on their behalf but on

[116] See J. Feinberg, *Collective Responsibility*, pp. 683-85.
[117] See S. Sverdlik, *Collective Responsibility*, in "Philosophical Studies", vol. 51, 1987, pp. 62-65.

command by people at a higher position in a command-hierarchy, those who order the behaviour represent another group responsible for the outcome. But this view leaves out an enormous amount of people: those who neither ordered nor executed human rights violations. This remaining group differentiates into distinctive attributes: those who were present and those who became moral agents after the atrocities. Especially the last group is highly debated in contemporary politics and often represents a deep controversy between those who finally want to end a dark chapter and those who see a sense of trans-generational guilt.

In the following I will establish at least a causal individual responsibility for most of the individuals present during the human rights violations,. proving that without certain behaviour of an individual moral agent the human rights violations would have been less severe or even not occurring at all. As I will focus on causal responsibility and not on moral fault, the important point is that all individuals being assigned to one ore more of these categories causally contributed to a result. This contribution allows ascribing liability for the compensation of victims and works for people *directly involved* in violations, people ordering human rights violations and those bystanders who *did not act to prevent* them. Whereas the first category traditionally contains a moral controversy, namely the discussion about legal and moral superior-order-responsibility, the second category is discussed with theories on negative responsibility and responsibility of random collections. Underlying excuses for holding the three groups responsible are those preventing a moral agency. I remind that responsibility for actions does prerequisite agency that is connected to a status allowing forming proper intentions and control and acting according to those intentions. Possible excuses are a superior order, a well-reasoned fear of severe consequences, ignorance and difficulties in getting organised which I will tackle during the text.

After justifying liability for the former two categories I will include the rest, so that in the end every taxpaying citizen is included. Unlike the former categories whose individuals participated in the one or other way to the atrocities, and thus are obliged to compensate, there is no established mechanism for those who didn't contribute. But it is reasonable to believe that individuals belonging to the third category who didn't participate in the human rights violations - namely those who disassociated themselves from collectives participating in the atrocities, the victims themselves, immigrants and individuals who not even have been present as agents during the atrocities – have strong moral motivation to participate voluntarily in the compensation.

2.3.2 Directly involved Citizens

The responsibility for those individuals directly being involved in perpetrating actions or commands mostly goes together with *criminal responsibility*.[118] Kurt Baier differentiates between the factual guilt of having committed a crime and the responsibility for it. Those two modes do not necessarily come together:[119] Imagining a case in court in which a person is found guilty of murder but at the same time it is stated that she is insane and therefore was not able to act according to her own intentions and therefore does not bear responsibility for the deed. Baier goes on: "A person may be guilty of committing a crime, (...) yet somebody else may be responsible for *their* committing it."[120] For this special situation of separation of guilt and responsibility, Richard Wasserstrom, constructs a case in which a soldier in combat is excused from responsibility if he had faced severe consequences for disobedience.[121] The free will of the soldier is restricted by superior command and the fear of punishment as the free will of the insane person is constricted by his illness. So who is responsible for human rights violations committed?

The question for responsibility for harm caused by individuals acting in a hierarchical system is a controversial one and is difficult to answer. Military and civilian leaders are in a position to decide freely and assess options whereas subordinates are supposed to act according to superior command.[122] This has also been a major issue at the Nuremberg-Tribunals: The Charter of the international military tribunal says in Article 8 that "the fact that the defendant acted pursuant to order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment (...)."[123] I am well aware of the fact that it was leaders not ordinary soldiers who were held primarily responsible at Nuremberg, "whose culpability seemed easiest to establish and most difficult to deny" [124] for Wasserstrom in "Conduct and Responsibility in War". But still the norm has been established that superior order is no excuse for committing crimes and should in principle also be valid for the ordinary soldier.

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[118] Interesting for this category is therefore E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague, Asser Press, 2003.
[119] See K. Baier, *Guilt and Responsibility*, in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, p. 204.
[120] Ibid., p. 203.
[121] See R. Wasserstrom, *Conduct and Responsibility in War*, in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, pp. 182-184.
[122] See Ibid., p 186.
[123] *London Charter of the International Military Tribunal*, 1945, Article 8.
[124] R. Wasserstrom, *Conduct and Responsibility in War*, p. 187.

This is of course a very controversial debate. It is very improbable that every person actually executing human rights violations was in an unavoidable position to do so, i.e. he got orders that were impossible to modify or disobey and even if they were they still are guilty of committing them. Concerning the causal contribution, individuals directly acting as human rights violators as well as those commanding them, such as politicians or generals are without doubt causally responsible and therefore liable for compensation. Additionally soldiers or administrators are not the only ones contributing to human rights violations. Hence, independent individuals are complicit with the regime by helping it. Individuals or legal persons making use of the opportunity to commit human rights violations on their own[125] belong to the group of persons directly committing human rights violations.

2.3.3 Bystanding Citizens

A second category is that of *bystanders* including all those individuals who neither executed nor took action for actively supporting human rights violations but have been present on the national territory and during the whole framework of time in which the atrocities occurred. This definition is borrowed from the "Handbook of Reconciliation after Violent Conflict" in which Luc Huyse indicates bystanders and onlookers as a type of indirect offenders, whereas the first category of individuals involved by their action was labelled as primary offenders.[126] They are identified by complicity through inaction when confronted with the victims. That individuals are accomplices even though they do not act is a theory also found in philosophy:

According to John Harris there are two ways of letting outcomes happen for moral agents: "one is by positive action, doing things with the result that these events occur, and the other is by negative action, failing to do things with the result that these events occur".[127] The latter is covered by the concept of *negative responsibility*. Until now, responsibility attached to individuals of the collective, has been only applied in the positive sense. The notion of negative responsibility allows including the bystanders who have been moral agents at the time, to be responsible for the outcome, namely the human rights violations and thereby

[125] An example would be a Corporation selling weapons or benefiting from forced labour.
[126] See L. Huyse, *Offenders*, in *Reconciliation After Violent Conflict: A Handbook*, D. Tutu, D. Bloomfield and T. Barnes (Eds.), Stockholm, International Idea, 2003, pp. 67-68.
[127] John Harris, *Williams on Negative Responsibility and Integrity*, in "The Philosophical Quarterly", vol. 24, 1974, p. 256.

justify holding them liable for the compensation of the victims. It seems reasonable to not only hold agents responsible for their actions but also for outcomes they *failed to prevent by inaction* if there is a clear causal relation between the inaction and the consequences. It is arguable that people causing terrible outcomes by inaction are morally less guilty than those causing them by action, but since I do not focus on moral blame but mainly on causal responsibility I will not cling to this topic. It is only important to remind the reader that bystanders can be called neutral if they support an outcome by their neutrality, i.e. inaction.

As mentioned earlier, a random collection is the same as an aggregate collective in French's theory which is brought together in time and space. Virginia Held makes some assumptions on collective responsibility of random collections that go along the line of negative responsibility.[128] The responsibility in random collectives is distributive, i.e. can be broken down to individual responsibilities. Held claims that if a certain action was the obvious deed to perform for reasonable persons forming a random collective, then the group is collectively morally responsible in the case of a non-performance.[129] "But when the action in question is not obvious to the reasonable person a random collection may not be held responsible for not performing the action in question, but, in some cases, may be held responsible for not forming itself into an organized group capable of deciding which action to take."[130] This point is compelling since it allows Held to imply that to not overthrow a regime, whose overthrow is an obvious action being called for by a reasonable person is due to the fault of the random collective, in this case, the present citizens.[131] As it is not self evident how to overthrow a regime, the bystanders are at least responsible for not transferring their randomness into an organised group in order to find a strategy. The distribution of responsibility though means that every by-standing agent in a regime that commits human rights violations or allows them to occur is individually responsible for not organising an overthrow.

In his critique of Held, Stanley Bates notices that a collective of citizens is strictly speaking not really a random collection according to Helds criteria, since the attributes of space and time are not sufficient to describe this specific group also containing the attribute of citizen of

[128] See V. Held, *Can a random collection of Individuals be Morally Responsible*, pp. 89-100.
[129] See Ibid., pp. 93-95.
[130] Ibid., p. 94.
[131] See Ibid., p 98.

this particular state.[132] But nevertheless he agrees with her pleadings concerning the ascription of group responsibilities. Bates adds that not only situations are thinkable in which a random collective as a whole fails to do a joint act together but a situation where every single individual of a collective itself could have individually taken the action necessary.[133] In those cases the responsibility for having failed to avoid certain outcomes clearly comes with every individual. On the other hand, Bates constructs the case of a collective which failed to act in a joint matter although some individuals did their best to initiate this action. In those cases it would be inappropriate to hold those particular individuals responsible.[134]

Howard McGary writes on the liability of individuals for " (...) practices that they themselves did not directly engage in."[135] He states that being a citizen of a state is belonging to a moral community that insures all members of society to remain free moral agents.[136] For McGary the following two conditions allow us to ascribe moral liability to an individual for not preventing certain common practices within its collective, without its actual participation: (1) the individual knows or should have known about the practice and (2) the individual solidarises with those being engaged in the practices or at least fail to disassociate himself from it.[137] The first condition supposes ignorance not to be a valid argument unless reasonable efforts have been made to become knowledgeable.[138] The second requires disassociation which may include the risk of harm, time and opportunity for control.[139] After McGary this is due to practical reasons: Emotional support or silent agreement enables the group, executing the wrongful practice, finally enables her to remain powerful whereas disassociation may serve to reduce injustice.[140]

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[132] See S. Bates, *The responsibility of Random Collections Guilt and Responsibility*, in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, pp. 101-103.
[133] See Ibid., pp.105-106.
[134] See Ibid., p. 106.
[135] H. McGary, *Morality and Collective Liability*, in L. May and S. Hoffman (Eds.), *Collective Responsibility – Five Decades of Debate in Theoretical and Applied Ethics*, Maryland, Rowman & Littlefield Publishers, 1991, p. 79.
[136] See Ibid., p. 83.
[137] See Ibid., p. 84.
[138] See Ibid., p.. 84.
[139] See Ibid., p.85.
[140] See Ibid., pp. 84-86

2.3.4 Innocent citizens

The collective responsibility of the citizens should not be mixed up with the collective responsibility applied to participatory democracies according to Peter French's conception of conglomerate responsibility: While the latter does apply responsibility due to an action that shows participation in a certain practice and therefore the belonging to a collective, the first does so due to an individual failure to prevent practices within a collective one surely belongs to. The previous section showed that it is possible to keep bystanding individual citizens and the bystanding collective of citizens as a whole responsible for their inaction unless individuals have tried to dissociate themselves from the harming practice.

This leads to a third category within the collective of the taxpayers that has been present during the violations and justifiably should compensate victims of human rights violations; the *victims* themselves and the *opponents* who dissociated from the human rights violations. The latter probably became victims themselves during their activities. But, if, not I suggest to include them in the group of the *trans-generational* individuals. It is important to stress that whereas responsibility or guilt could be established in the former three categories there is no possibility for intergenerational collective responsibility or guilt, since guilt implies the contribution in an action and is not vicarious.

It is reasonable to assume a sense of solidarity within the victims. In some cases they have been bound by primordial or postmordial criteria which themselves made them a target for human rights violations. Solidarity within a victimized group usually is very strong and even becomes a means of identification that lasts for generations. There also should be solidarity between victims that suffered the same human rights violations without having shared other criteria previously. At least an account for compensation of human rights violation should be universally valid for all individuals having suffered comparable abuses. Interestingly enough, Chaumont and others reveal rivalry and competition for compensation between different group of victims instead of empathy and solidarity. This is not only true for victim groups of different conflicts but also for groups within one conflict. The decisive criteria for identification vary from cultural/religious backgrounds (Jews, Armenians) to the reasons for human rights violations (political deportees, communists) to the kind of suffering (camp survivors, forced labourers). Further, there are tendencies to monopolise victim-hood.[141] This is due to the fact that usually compensation is limited and pained unequally so that it makes

[141] See H. Rombouts et al., *The right to Reparation for Victims of Gross and Systematic Human Rights Violations*, pp. 473-474.

sense to be the most prominent group. If all victims of human rights violations would be compensated equally, anyway, then such a competition might vanish.

After having justifiably included all individuals who have been agents at the time and within the territory of human rights violating regime those who have not been addressed so far are: Individuals who either have not been present or have not been agents at the time, such as immigrants, new born or minors. This distinction is due because in neither of the two conceptions of collective responsibility – conglomerate or random –can they be included, since they cannot be causally responsible for anything happening before their presence, they are innocent by definition. None of their actions as agents can have had an implication on the human rights violations of the past having occurred. Thus a justification must be found why those agents can be held liable, independent of their actions. This is not so complicated in the case of *immigrants*: They voluntarily decided to join a society, knowing that it decided to compensate human rights violations of the past. Immigrants who came after this decision thus have to accept the rules of membership. But immigrants who came before, minors or individuals from the next generation do not have the choice and somehow have inherited the burden of liability without committing to the reason for it.

In his recent book "Historische Gerechtigkeit" Lukas Meyer suggests to treat the crimes of a former regime as a public heritage that all members of a certain trans-generational society, even the innocent, are confronted with. A public good of a trans-generational society is constitutive for the current public order - being for example the organisation of the society, the cultural traditions and techniques. Usually public goods are at public disposal and are not-exclusionary, thus no one can be excluded from it and every member of a group can make use of it without additional costs for others.[142] A current public crime on the contrary is exclusionary, since usually a target group has to suffer from it.[143] Thus not the crime itself is a public good but its influence to the successor society is: The consequences caused by the human rights violations such as the existence of victims, the socio-psychological patterns of fear or exclusion and the allocation of wealth.[144] As in a private heritage an acceptance of the gains also implies the duty to fulfil claims of restitution or compensation a third person originally had against the bequeathing actor even if this diminishes the worth of the

[142] See L. Meyer, *Historische Gerechtigkeit*, Berlin, Walter de Gruyter, 2005, p. 163.
[143] See Ibid., p. 164.
[144] See Ibid., pp. 165-166.

heritage.[145] Mayer gives two reasons for the historic duty of compensation in trans-generational societies: *duties of future-oriented justice because of current impact* and *identification with the trans-generational group*.

Meyer writes that the individual considers itself to be a member of a trans-generational society which should be worthy of appreciation. The membership in the group implies the duty to run a test if this is possible and thereby has to include all relevant positive and negative factors of historic collective heritage.[146] If this value of membership is diminished by collective public crime, then a member should attempt to re-establish the intrinsic value of that common identity.[147] Independent of the given contemporary structures mirroring the consequences of those past crimes, different aspects of social justice can restore the appreciation.[148] As societies are understood to realise and maintain social justice, past crimes determine the conditions under which this has to happen. In the case of human rights violations it can be compensation and recognition for the suffering. Additionally, in terms of justice for the past this can have important effects in the future by changing the social and cultural norms and mentality that facilitated or even constituted the genesis and maintenance of human rights violations.[149]

2.4. Resumé

Over the last chapter first I was able to show that a state can be deemed collectively responsible for actions if this state satisfies the criteria for conglomerate responsibility established by French and additionally complies with the characteristics of a true democracy, namely the basic political and civil human rights. The second strategy - to establish a liability to compensate for each citizen in the state-collective that does not fulfil the requirements of a true democracy - has been successful, too: It is possible to construct a causal link to the systematic human rights violations for the larger part of the state-population. Thus all those individuals to be assigned to one ore more of the first two categories, namely those involved by active participation and by inaction to prevent are responsible for the atrocities and hence have the duty to compensate the victims. Further, those agents belonging to the third category

[145] See Ibid., pp. 167.
[146] See Ibid., pp. 240-246.
[147] See Ibid., p. 242.
[148] See Ibid., pp. 231-235.
[149] See Ibid., pp. 231-233.

containing innocent individuals have strong motivations to compensate the victims in the framework of a voluntary vicarious liability.

The categories are not exclusive: In principle the argumentation for those belonging to the next generation is valid for bystanders and actively involved too, and the theory for bystanders also includes the actively involved. There are two other approaches which can also be a valid motivation for every category: the vicarious liability due to solidarity and the compensation due to pragmatic, utilitarian reasons. Neither of the two concepts implies a duty to compensate. Lewis already mentioned the phenomenon of sympathetic identification when alluding to vicarious satisfaction for the success of someone an individual is sympathizing with.[150] Feinberg describes the vicarious feeling of shame, victim-hood or pride arising from the identification with a group or a state including its history.[151] Even an individual that is born decades after the human rights violations thus by solidarity with the state it feels bondage can feel obliged to compensate the victims. A last reason for everyone living in the society to compensate victims of gross human rights violations since they will be a burden to societies' social systems anyway and its less costly to run a compensation program that cares about the mental, physical and economical damage of victims and their families as soon as possible and tries to restore the abilities of the victims as a member of society that takes part in civil life and contributes to the social welfare system than waiting until this ability is no longer to be restored and the victim has to life at the costs of the community, anyway.

The achievement of this reasoning has been that it is now possible to oblige a state-collective to be liable by taxes for the compensation of victims of gross and systematic human rights violations by grounding it on a duty arising from individual responsibility or motivation and not the mere fact of living on a state-territory which would systematically contradict the normative human rights norm system.

[150] H. D. Lewis, *Collective Responsibility*, p. 22.
[151] See J. Feinberg, *Collective Responsibility*, p. 679.

CHAPTER 3

JUSTIFICATION FOR AN INTERNATIONAL RESPONSIBILITY FOR GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS

There are facilities in International Law that transcend national borders of compensation such as the ICC Fund but until now it is only provided compensation for a marginalised group of victims. Other attempts on the domestic level meaning to get compensation for systematic and gross human rights violations in other countries under universal jurisdiction are usually unsuccessful and rather symbolic. An exception on the regional level is the Inter-American Court for Human Rights but still the opportunities for victims to get compensation outside of the territory their human rights have been violated are very poor. But it is not unfair that victims of human rights violations in poor countries are getting less compensation than in rich ones? Why is a victim condemned to stay in the state which violated its rights in order to get compensation? There is a clear moral need to have transnational/international possibilities for compensation. And there is also a practical one: if the countries that hold up human rights are interested in their proliferation and the stabilisation of peace and security on the world then they should support new democracies. Until now, there are no political movements regarding an international responsibility towards the compensation of human rights victims, but if we accept the transfer of collective responsibility to individual liability on the domestic level, it is possible to use those theories to construct a worldwide liability for the compensation of human rights violations demonstrating an international duty to prevent human rights violations.

After having shortly described the legal and practical status quo regarding an international compensation of human rights I will evaluate the chances of such an international duty. Therefore I will use the results from the second chapter which were being made for the domestic level and transfer them to the international level. The second chapter started with the duty to compensate and tried to justify this claim as well as possible for different actors of a collective so that it is legitimate to use their contributions for the purpose of compensation. In the international context, I'm going the other way round: I will use the justification for the contribution of the different actors of the national context, transfer them to the international

level and thereby create a collective in which, again, actors have the duty to contribute to an international compensation fund. On the international level, the individual actors are truly democratic states. I had to restrict the community of all states to those being truly democratic since only then we can talk about a sufficient collective responsibility for state actions of the individuals living in a certain state, as it was described in chapter two.

I will present the notion that, ideally, true democracies are usually only negatively involved in massive human rights violations in other states, namely in two positions: actively involved and bystanding. But analogously to the second chapter, it is possible to construct a causal responsibility and thus a liability to compensate. This liability is visualised in an international fund for the compensation of victims of gross and massive human rights which had influence on domestic stability of a new democracy but also on the international security. The thesis will be finalised with a short example visualising differing concepts of responsibility and the impact of a human rights approach to liability on compensation, democratisation and security on the domestic and international level.

3.1 Status quo of international responsibility

3.1.1 International legal status quo

Internationally, it can be observed that in compensation the situation is still very oriented towards the Westphalian system of the state and not globalised. States insist on their exclusive responsibility towards their own territory and citizens instead of acknowledging the fact that states are not as sovereign as before in their foreign policy due to their long-term commitment to treaty-systems that prescribe a certain behaviour, their membership in international organisation and the fact that the growing interdependence caused by the global exchange of money and persons. Those globalising factors of mutual interdependence bring about that internal events in states can have effects that transgress its borders and become a threat to other states. This principle already has been long represented in the UN Charter Chapter VII, stating that intervention in other sovereign states is prohibited except in cases that are a threat to international peace and security. Since the end of the cold war the tendency has become more and more obvious to acknowledge the fact that not only wars but also human rights

violations – earlier perceived as an internal affair – can pose such a threat.[152] Additionally politicians in Western states have started to criticise human rights violations in other states. But whereas human rights violations more and more are a topic of international attention, until now, there have been practically no political movements regarding an internationalisation of the compensation of human rights victims.

As written by Rombouts, Sardaro and Vandeginste,[153] the structural limitations of present international law exclude a coherent and integrated approach to reparation. This is due to an uncoordinated international fragmentation of law resulting in the fact that no international tribunal exists who has general jurisdiction over all relevant actors subject to human rights protecting norms. Whereas the ICJ is competent to judge in interstate disputes, and the International Criminal Court, the ad hoc international tribunals for Yugoslavia and Rwanda, and national courts care for *individual criminal* responsibility, regional human rights courts predominantly adjudicate between individuals and states.[154] As usually claims of compensation are *fully national*, i.e. "claims directed against the State of the forum or its nationals, with regard to the facts committed on national soil"[155], there is almost no different source of compensation than the convicted perpetrators or the own state. An exception is the newly constituted Trust Fund for Victims of the ICC.

Concerning *extraterritorial national* claims against state-officials, foreign to the territory the claims are made, there is a conflict between the *erga omnes* character of human rights norms which might imply such a duty at least for severe cases, on the one hand, and the fact that the duties arising from *universal jurisdiction* for major crimes under the conventions for genocide, slavery, apartheid and torture are only permissible and not mandatory under customary law,[156] on the other. Apart from other juridical difficulties of universal jurisdiction these are only civil and criminal cases against foreign parties and the state only takes over the duty of jurisdiction and not the one of compensation. So never has a party other than the state in which the human rights violations have been committed ever compensated a victim. Additionally examples of the most prominent example of legislation allowing foreign victims

[152] See A. K. Talentino, *Military Intervention After the Cold War: The Evolution of Theory and Practice*, Ohio, Ohio University Press, 2006 and H. Slim, *Military Intervention to Protect Human Rights: The Humanitarian Agency Perspective*, at http://www.jha.ac/articles/a084.htm (29 June 2006).
[153] See H. Rombouts et al., *The Right to Reparation for Victims of Gross and Systematic Human Rights Violations*, p. 477.
[154] See Ibid., p. 477.
[155] Ibid., p. 436.
[156] See Ibid., p. 441.

of violations of international law to seek redress, the American Alien Tort Statute (ATS), show that even the judgments have a rather symbolical value since usually they aren't followed up.[157]

The European Court of Human Rights is said to be reluctant whereas the Inter-American Court of Human Rights has been very concrete in ordering compensation to victims that had to be paid by the violating states.[158] The jurisdiction concerning international criminal justice eventually included some elements of civil reparation within their mainly criminal focus. The ICTY and the ICTR both had explicit provisions in their statutes but didn't make use of the possibilities in practise.[159] The ICC also has the provision to order compensation. However it has no power to hold states responsible but has to raise funds from another source: This can either be the convicted perpetrators themselves[160] although past experiences have shown that recovering funds from individuals is very difficult and additionally there are some legal barriers[161] or the newly created Trust Fund for Victims of the International Criminal Court (TFV).

The TFV was established on grounds of Article 79 of the Rome Statute of the International Criminal Court and is supposed to work "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."[162] Its resources are collected through fines transferred to the trust fund[163] and *voluntary* contributions of the treaty-parties and other entities; taken together in April 2006 around 1.5 million Euro[164]. Neither the competencies nor the procedures of the Fund are clear as the Draft Regulations have not been adopted by the Assembly of States Parties. Especially the regulations on the cooperation of the ICC and the Trust Fund will have a large impact on its actual functioning. As the Fund should support victims that are defined as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"[165] the role of the Trust

[157] See Ibid., pp. 442-444.
[158] See Ibid., pp. 373-395.
[159] See Ibid., pp. 418-420.
[160] *Rome Statute of the International Criminal Court*, Article 75, Paragraph 2.
[161] See P. de Greiff and M. Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, in M. Bossuyt, K. De Feyter, P. Lemmens and S. Parmentier (Eds.), *Out of the Ashes - Reparation for Victims of Gross and Systematic Human Rights Violations*, Antwerp and Oxford, Intersentia, 2006, p.238.
[162] *Rome Statute of the International Criminal Court*, Article 79, Paragraph 1.
[163] Ibid., Article 79, Paragraph 2.
[164] The Trust Fund for Victims, at http://www.icc-cpi.int/vtf.html (30 June 2006).
[165] International Criminal Court, *Rules of Procedure and Evidence*, Rule 85.

Fund can either narrow; i.e. executive and reduced to implement judgement of the court or it can be broad in the sense that it is not obliged to stick to the victims who literally have participated in court procedures.[166] Although the procedures are still very unclear, de Greiff and Wierda suggest a supporting and active role of the fund targeting victim-groups according to the broad sense but at the same time reduce reparation to assistance.[167]

3.1.2 International imbalance

Generally speaking there is no international institution granting compensation to a significant extent, thus the victim of human rights violations is condemned to seek compensation in the state committing those violations. This means that in practise a victim whose human rights have been violated in a rather poor state having a small state-budget gets less money than a victim whose rights have been violated by a rich state. Apart from this inequality of the height of the compensation the burden of compensation is very unequally shared between the nations. Those states with recent gross and systematic human rights violations to compensate are former non-democratic regimes, which are limited by a very restricted national budget during the transition whereas states with a high budget usually either are not interested in compensating at all or simply do not have the problem.

The financial burden for a new democracy should not be underestimated as it already has to start with a diminished budget while at the same time expecting larger than usual future challenges. Systematic and gross human rights violations usually come up in a authoritarian regime who is also a characterised by corruption, illegal money transfer to foreign bank accounts or large investments in weapons compared with the public expenses for health, education or infrastructure, which might also be destroyed in a civil war that ended the regime. Thus a new democracy already starts with a very little budget – probably has to pay back inherited foreign debts, too. And it secondly has to build up a new state and for an essential economic development that works well enough to persuade its citizens of its value. If the performance of a new regime is not satisfactory for the people, supporters of the old regime get the possibility to regain public support and democratic development gets stuck in the worst case. If, in this scenario, a large number of victims claim compensation from the

[166] See P. de Greiff and M. Wierda, *The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints*, p. 229.
[167] See Ibid., pp.235-236.

state – which, in the case of systematic state violations of human rights is the only reasonable strategy - the already fragile position of a new democracy becomes seriously endangered. Not only because this is money coming from the state budget causing opportunity costs in the public sector but also because it allows revisionism or hatred against the victimised group to arise.

An ideal state without any human rights violations, in practise would not have to do anything to guarantee this right. It would be enough to provide a framework for compensation which is never used in reality. A state, instead, where massive human rights violations have been occurring, is confronted with a large number of potential right holders. The state would have to guarantee that every victim gets its compensation, (regardless if the perpetrators can be prosecuted to individually pay compensation in civil procedures or not.), but the secondary right identity of the right to compensation for human rights violation makes it more costly than the implementation of other rights and thereby has direct impact on the disposal of the national budget. So states which are already functioning do not have to invest much, whereas new democracies - usually having a smaller budget, more costs due to the restoration of the system and more problems with being persuasive towards the people - are risking their stability by paying off compensation for human rights victims.

3.2 Constructing international responsibility

3.2.1 Chances for a shared responsibility for compensation

Rombouts *et. al.* claim that besides grounding the responsibility for the financial burden for reparation in one single party, according to the *in solidum* principle, it is reasonable to require "that each responsible should be held accountable for and contribute to the financial burden of the reparation in relation to its own responsibility."[168] It is, however, added that waging the responsibility (gravity of the conduct, degree of negligence, strength of the causal nexus) will turn out to be extremely difficult.[169] Not denying the practical difficulties arising from a shared principle of responsibility, there is a clear moral need to have transnational/international responsibility for compensation. Victims of human rights violations are unequally and insufficiently compensated due to the restrictions of the national

[168] Ibid., p. 478.
[169] See Ibid., p. 479.

budget. And there is also a practical one: if the countries that hold up human rights are interested in their proliferation and the stabilisation of peace and security on the world than they should support new democracies.

Until now, there have been almost no political movements regarding an *international responsibility towards the compensation of human rights victims*, but if we accept the transfer of collective responsibility to individual liability on the domestic level, it is possible to use those theories to construct a worldwide liability for the compensation of human rights violations. In the second chapter I presented a possible justification for the liability of a state for the compensation of victims of gross and systematic state human rights violations within their own territory on grounds of collective and individual responsibility. It is legitimate to hold a collective responsible for the outcomes of an action decided according to certain structures and policies. If this collective is a state then a prerequisite to hold all citizens collectively liable for the action of the state is a structural guarantee that decisions and actions are taken accordingly to the will of those individuals. Since only if the citizens participate in the decision-making is it justifiable to blame the state as a whole and not solely the government. It turned out that whereas according to French's criteria any stable state could be deemed as having direct collective responsibility for all actions, the individualist and human rights approach only allows to ascribe responsibility to those states that, besides being well-ordered, have also sufficiently implemented the principles of individual popular participation, namely democracy and additionally and at least guarantees individual civil and political rights. Those states widely fulfilling those criteria will be again referred to as true democracies.

Concerning the compensation of state human rights violations territory this conclusion has not been a step forward: Though a liability for the compensation of victims of human rights violations could be justified, gross human rights violations usually are not a current issue of domestic policy in democracies. But a new dimension arises from a level-up, in which Western democracies being collectively responsible for their actions are individual actors in the international community. I will try to transfer the considerations and results from the second chapter to the international level to answer the following question: If democratically constituted states are agents who are responsible for the outcomes of their decisions, what consequences would this have on their foreign policy concerning the compensation of victims of human rights violation? In the following, theories of responsibility being valid for

individual agents in the national context are being applied to collective agents, namely states, in the international context. I hereby suggest only two categories of democracies being confronted with gross and systematic human rights violations in another state: states that have been connected to the events by direct actions and those who have not.

I will try to stick to principles of international law but it will be clear that the theory will transcend the framework of existing international law. It will be oriented around the theoretical framework already presented; an acceptance of the first two chapters implies the acceptance of this third chapter, but none the less it is speculative and more hinting at the "concrete utopia" in the sense of Ernst Bloch: A sketch of how the future might be without clinging to the pessimistic consequences of realist and conservative thinking, a real possibility to change society.[170] The third chapter is a blueprint of how the compensation of violations for gross and systematic human rights violations can be realised from a universalistic and individualist human rights approach.

3.2.2 Directly involved state-actors

In the present states with the attributes defined as true democracies usually do not commit gross and systematic human rights violations within their own territory. On the contrary, modern democracies usually are not confronted with gross human rights violations within their own state but with those happening in other countries within the international community. If responsibility can be found linking the democratic state to the outcome of human rights violations in another state, then it is legitimate to hold the first state liable as a collective allowing to finance the compensation of the victims of another state from the own national budget. What kind of relation can be stated between victims of human rights violations and a democratic state? Since such states have been categorised earlier as being responsible for their actions and the corresponding outcomes, as a collective, in essence, any action or inaction within the timeframe of gross human rights violations happening that contributed to the outcome implies liability. At a first glance, it seems rather improbable that a state which does not allow human rights violations to occur on its own territory is contributing to human rights violations in another state instead.

[170] See H. Seidel, *Was heißt `Konkrete Utopie'? Erläuterungen zur Philosophie von Ernst Bloch*, in "Streitschriften zu Geschichte und Politik des Sozialismus", vol. 17, 2004, pp. 81-88.

A responsibility relationship arises with the deployment of troops in conflict areas executing at least in part territorial control. Besides the active involvement in gross and systematic human rights violations which is not common for democratic states, although it is occurring and thinkable,[171] Belgium's behaviour in Rwanda gives a good example of negative responsibility allowing human rights violations to occur: The United Nations Assistance Mission for Rwanda (UNAMIR) was a relief mission established for the purpose of the implementation of the Arusha Accords from August 1993, providing peace between the Rwandese Government and the Tutsi rebels. After the murder of the Prime Minister and ten Belgian soldiers in April 1994, Belgium – instead of protecting the civilians - quickly withdrew its troops (Operation Silverback) entirely from the Rwandese territory. As Belgian peacekeepers thereby had to abandon a school in which about 2000 refugees had been searching for protection, being well aware of the Hutu militants waiting outside, they can be deemed responsible for the militants entering the school and massacring those inside, including hundreds of children. This action has been justified on the grounds that UNAMIR was planned as a peacekeeping mission with only the right to self-defence, but nevertheless a different action would have been possible as has been shown by the remaining troops of the Netherlands and Angola. Whereas the legal responsibility of Belgium for the murder is disputed it is no problem to establish the causal relation between the action of the withdrawal and the consequence of human rights violations; i.e. Belgium is responsible for the outcome.[172]

3.2.3 Bystanding state-actors

Theoretically speaking, since the international community consisting of truly democratic states is a community of agents being capable of responsible behaviour, it should be treated in the same way as a collective of individual moral agents. Like the analysis in chapter 2, I will elaborate a causal relationship between the actions and inactions of the community of democratic states and the systematic human rights violations happening in another state. I will use the theories originally valid for individual persons and apply them to the democratic states and thus establish the liability earlier constructed within the personal agents of the actual state

[171] Certainly it is possible that a true democracy is actively contributing to systematic human rights violations in other states but as an ideal democracy not only should have a coherent internal but also external policy regarding human rights those cases are not my main concern.

[172] Further examples, mentioned by Luc Huyse are France and the United States of America in the case of Rwanda and the Dutch UN battalion in Srebrenica. See L. Huyse, *Offenders*, p. 68.

committing gross human rights violations, for the democratic state-agents as well. At first, I will try to establish a corporative responsibility in the meaning of Peter French in order to continue with the ascription of individual responsibility of state-agents.

Both, on the national and the international level, there cannot be assessed a collective corporate responsibility. However whereas on the national level this is due to the fact that the internal decision method in authoritarian states did not accomplish the extended quality criteria, on the international level it already fails in complying with the basic criteria. The UN, besides missing reasonable well established Internal Decision Structure, does not contain only states complying with the criteria of agency but also authoritarian states and simply lack an authority that goes enough beyond the interests of the individual states,. Albeit multinational unions of democratic states do exist, there is none embracing all those states. In order for those collectives of states being ascribed conglomerate collective responsibility they must meet the criteria established by Peter French. They certainly have decision structures, policies and roles defined but usually the single member-states try to maintain their external sovereignty as much as possible and thus cannot be deemed to really fulfil their roles in the name of the collective. So, international or regional organisations of states do not allow for a corporate responsibility yielding to liability. This means that – again along the lines of the domestic level – responsibility relations have to be established on the individual agent level; in this case the truly democratic state's actions facing gross and systematic human rights violations.

The responsibility of democratic states for massive human rights violations outside of their territory is usually a *negative* one.[173] The concept of negative responsibility states that an agent is equally responsible for what he brought about as for what he failed to prevent.[174] Again, there are different categories of behaviour to be constructed to define the relationship between the actions of a particular state agent and the human rights violations in another state:

[173] It is neither about the fact that those democratic regimes usually let their human rights oriented foreign policy override by real politics and thus – when subsidising their local agrarian market or supporting bilateral WTO-PLUS agreements with developing countries - can be deemed responsible for the violations of social and economical rights in foreign countries, because my thesis is about the gross human rights violations being addressed by the Basic-Principles usually occurring in authoritarian regimes. Nor do I want to cover the complicity in human rights violating actions as the recent scandal in which the CIA illegally detained amendable terrorists in Council of Europe states for extraordinary rendition in countries allowing torture or single cases of troop members violating human rights themselves. It is only about the actions of an individual state actor regarding the human rights violations of another state.

[174] J. J. C. Smart and B. Williams, *Utilitarianism – For and Against*, Cambridge, Cambridge University Press, 1973, p. 95.

These are the negative responsibility of actions on the territory and the negative responsibility in the international diplomatic relations. As in the second chapter, negative responsibility will be applied to the agents as individual agents and as being a group-member of a random collective. Thus, if for a responsible agent actions do as well matter just non-actions, a democratic state letting gross human rights violation to occur is not neutral or without responsibility but equally liable for the consequences.

Since, according to French and Held, the random collective's responsibility is a summed-up individual responsibility it is possible to make the community of all truly democratic states responsible for not having prevented gross and massive human rights violations as a collective in another state and therefore liable for the compensation of victims, even though to different levels according to their powers and capabilities. Virginia Held writes about random collectives failing to undertake an action that could have been expected to execute.[175] Thus all truly democratic states are being treated as a random collective arising from their characteristics of witnessing systematic human rights violations to go on in another state and being a democratic state; i.e. an agent capable of controllable actions. As long as gross human rights violations have been happening while the international community had known about it, the random collective of democratic states has been contributing to the human rights violations in question by their inaction and therefore is ascribed responsibility and liability.

This view is supported by the present international legal system in which a collective duty of all States to prevent or stop gross and systematic human rights violations, committed on the territory of other States can be constructed.[176] This is possible on grounds of the UN Charter for all States and for those States having ratified the ICCPR[177] and the Convention on the Prevention and Punishment of the Crime of Genocide. Article 55 c) of the UN Charter, together with Article 56 reads that "all members pledge themselves to take joint and separate action in co-operation with the Organisations for the achievement of the purposes set forth in Article 55"[178] including the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction (…)"[179]. Additionally, the International Court of Justice in its case-law confirmed explicitly that the obligation set by the Convention

[175] See V. Held, *Can a Random Collection of Individuals be Morally Responsible*, pp. 89-100.
[176] See UN doc. A/59/565, § 203 and UN doc. A/59/2005, § 135.
[177] See *International Covenant on Civil and Political Rights*, 1976, Preamble "reaffirms the obligation of States under the Charter (…)".
[178] Charter of the United Nations, Article 56.
[179] Ibid., Article 55 c).

that each State has to prevent and punish the crime of genocide has an application *erga omnes*. i.e. no territorial limits.[180] This duty though implies that a failure to use all lawful means at their disposal to stop those violations is a breach of international law.[181]

Concerning the possibility for an individual state not directly being involved in the human rights violations there are two main levels of action to influence the human rights violations in another state: the diplomatic and the military actions. Certainly, large and rich state can more easily influence the actions of another regime or the actions of other democratic regimes than a small state, and thus the amount of responsibility varies between the democratic states of the random collective. Additionally, diplomatic measures such as sanctions as well as military interventions are legally to be decided by the United Nation Security Council, in which some states have a privileged position. David raises the idea of holding a veto-power individually responsible for its voting-behaviour in the Council which has the failure of a collective action as a consequence.[182] But this allocation in influence does not mean that a small state cannot act at all and as my paper is about proving that there can be a responsibility relationship established at all and not about the quality or the size of a share of responsibility. Moreover, Held not only mentions the non-performance of an action itself as a reason to hold a collective liable but also deems the group responsible for not succeeding in transforming itself into a group being capable of a decision about which action is to be taken to end a certain event.[183] As aggregate or random collective responsibility is a result of individual contributory responsibilities, each of the democracies is responsible in the case of a failure to act and therefore liable for the compensation of victims.

3.3 Practical effects of international responsibility

3.3.1 International context

The attempt to ascribe responsibility to democratic states for gross and systematic human rights violation has been successful: as states fulfilling certain criteria such as the existence of

[180] See ICJ, Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), judgement of 11 July 1996, § 31.
[181] See H. Rombouts et al., *The right to Reparation for Victims of Gross and Systematic Human Rights Violations*, p. 484.
[182] See E. David, *Des occasions manquées de mettre en cause la responsabilité de la communauté internationale*, in L. Burgorgue-Larsen (Ed.), *La répression internationale du génocide rwandais*, Bruxelles, Bruylant 2003, p. 246.
[183] See V. Held, *Can a random collection of Individuals be Morally Responsible*, pp. 97-98.

an internal decision structure, participation and civil and political human rights they can be deemed collectively responsible for their actions. Since it has been shown earlier that individuals can be held responsible for their actions as well for their inactions it was possible to ascribe the duty to compensate to states not committing human rights violations for human rights violations appearing in other states.
In order to visualise the international responsibility of truly democratic states according to the responsibility of citizens in a state for gross and systematic human rights violation I suggest an equivalent of the national budget used for compensation: an international compensation fund for states transitioning into democracies to which all democratic states are morally obliged to contribute. This fund differs from the TFV insofar as it doesn't involve states voluntarily on the basis of positive law but on an underlying duty. This normative duty arises from the moral implications of an ideal implementation of the rights of victims of gross and systematic human rights violations to be compensated that is coherent towards its own framework of norms. States affirming universal human rights simply cannot cut this responsibility at the borders of their territory but have to admit that they are responsible for human rights violations in other states and not only for those occurring in their own state.

I cannot give any details about the actual practical functioning of the international fund. It has to be kept in mind that the focus on monetary reparation has been made due to pragmatic reasons and that on the national as well on the international level, the fund for compensation of human rights violations has been a means to improve the visualisation of a responsibility relationship. But just assuming that there was such a fund, no democratic state perceiving itself as affirmative towards human rights could easily detach itself from the duty to contribute to it. The international moral pressure to contribute to that fund could be enormous if civil society and intergovernmental organisations kept an eye on that. A monetary moral duty for the compensation of the victims of human rights violations in other states also could enhance the acknowledgment of responsibility of the states that have been bystanding while facing gross and systematic human rights violation and may augment the chance that they actually participate in the attempt to end those practises.

3.3.2 National context

In the following I will adumbrate the different effects a *theory of responsibility* can have on the situation of victims and the whole society in a state whose former regime committed gross and systematic human rights violations. Therefore, I'm lining out a hypothetical government's policy when confronted with the claims of victims to be compensated and its outcomes in three different scenarios. Each of those scenarios is attached to a concept of responsibility; the first to criminal responsibility, the second to collective national responsibility as described in the second chapter of my thesis and the third to international responsibility presented in the third chapter. By contrasting the scenarios it will become clear that the international responsibility is a concept that should also be preferred by human rights advocates for practical policy reasons and not only for reasons of persuasive coherence.

In the *first* scenario no special governmental endeavour at all is being made to compensate the victims. This illustrates a situation in which only responsibility for actions directly intending to aim at causing human rights violations is acknowledged as described in the category of the perpetrators in the second chapter. This approach implies that the compensation is backed by criminal and civil court procedures, only. Thus if on the one hand it complies with the prerequisites of a human rights approach to liability but on the other hand it clearly fails in fulfilling to equally grand compensation to victims. Usually most of the victims don't have enough money to pay the costs. Amnesty laws make it very difficult to find anyone to accuse and additionally criminal procedures have the disadvantage that the guilt must be proven beyond doubt; there is not enough evidence for that in most cases. The elements of crime defined are not meeting the human rights violations in question and so are the provisions for civil liability. The juridical system will be overcharged hence it will take years for the victims to get compensation. In the end, most of them do not get compensation but only those having enough time and money to care for that. If ever a national health system is to be implemented, uncompensated victims will be a heavy burden for it.

Already the *second* scenario in which the national duty for compensation due to various categories of responsibilities described in chapter two of my thesis is accepted, offers a fairer allocation of compensation for the victims. Moreover, it meets the claims of a human rights approach for collective liability. But this approach might have practical consequences diminishing the chance for a transition to democracy. The collective obligation for liability is

transferred into the implementation of a national program for compensation of victims paid from the national budget. However at the same time, the government might use the diminished national budget as an excuse for not changing the system adequately to a welfare state with a social system. It invests less money in infrastructure and education in the rural areas than it should. This poor performance could promote feelings of envy and dislike towards the victims and mistrust in democracy within the population, giving the opportunity to an authoritarian nostalgia. Additionally, it is very likable that some groups of victims are left out of the program, might it be because they are not strong enough to be heard or due to ideological reasons.

Only the *third* scenario oriented towards a collective national responsibility for true democracies and a shared international responsibility for outcomes not prevented by inaction, as outlined in this chapter, can satisfy the equal compensation of victims, the human rights approach to liability and the support for democracy all together. National compensation for victims of gross human rights violations is supported by the international compensation fund. This gives a rising interest of compensation processes by the state to deal with compensation and to execute its other tasks as an efficient change the system. This dealing with the compensation not only facilitates an equal distribution of compensation within the victims but an acknowledgment of the deeds. It will become more difficult to excuse poor regime performance on opportunity costs and thus has to try its best. The international and national acknowledgment of the rights of the victims makes it much harder for the old forces to come up with revisionist thoughts so there is more chance for social democratisation. The national regime stability contributes to the international peace.

3.3.3 Resumé

Besides the moral reasoning of the duty of state-actors, the compensation of victims of gross and systematic human rights violations can also have a practical, strategic purpose. The international human rights approach to collective liability for the compensation of victims of gross and systematic human rights violations is not only the best scenario for an adequate and equal compensation of victims but also supports domestic democracy and international peace. An international contribution to the compensation of victims of gross and systematic human rights violations would simplify the organisation of the state budget in a transition to allow

the new democracy a credible and successful start. If the new regime knows that budgetary restrictions are no excuse for not compensating the victims of the former regime it cannot deny former human rights violations for political purposes. Additionally, if compensation were a realisable project it would not be only the topic of parties on the extremes of the right- and leftwing who use it as a populist slogan to get support but a mainstream topic. The international community has an interest in the stability of a regime since failing regimes are a danger for the stability of the whole system of states, especially with the new danger of terrorism. Additionally, stable democracies are perceived as more contributing to international security than stable authoritarian regime because according to the "democratic peace theory" there is less war between democracies than between authoritarian regimes.[184]

[184] See P. R. Hensel, G. Goertz and P. F. Diehl, *The Democratic Peace and Rivalries*, "Journal of Politics", vol. 64, 2000, pp. 1173-1188 and C. F. Gelpi and M. Griesdorf, *Winners or Losers? Democracies in International Crisis, 1918–94*, "American Political Science Review", vol. 95, 2001, pp. 633-647.

CONCLUSION

The human rights discourse is oriented around a legal and political focus since juridical laws implemented by a state are the only way to guarantee human rights. But other disciplines, looking on human rights from their own scientific paradigms may have valuable things to add to this discussion. By looking at problems from another angle they can identify new perspectives that might be helpful in solving clashes in deadlocked discussions between national sovereignty, positive law, missing cohesion and scarce financial resources. Human rights advocates should be open to new debates if they want to be sure to make use of every means to support human rights. This strategy will bring us all a step further to the worldwide proliferation and protection of human rights.

My research on compensation for victims of gross and systematic human rights violations from an analytical philosophical perspective detected significant shortcomings in the coherence of the human rights normative system. It turned out that the transfer of the right of the victim to compensation to a duty of the state to compensate is sound with the logic of International Law but significantly contradicts human rights ideology. Human rights are individual rights and inter alia ought to protect the individual from being trumped by the state or the majority. But if compensation by the national budget in reality is paid by individual taxpayers, the citizen is not treated correspondingly to its personal actions but due to its being part of a collective. This membership has not been voluntarily chosen but is a random ascription due to the abode on a certain territory. Why should someone be liable for the actions of another person just because they share the same state territory?

It became clear that the more we adapt a human rights approach to compensation, the less the realisation of it in a domestic context is justified. My research question hence has been: *How is the compensation of all victims of recent gross and human rights violations by the state to be justified within an individual and liberal human rights approach that is coherent towards its own principles in theory and ideal praxis?* The strategy has been to apply theories of responsibility to whole states and citizens individually that do not violate principles of individualism such as popular sovereignty and individual responsibility; namely corporate responsibility, criminal responsibility and negative responsibility. This is reasonable because

an action that caused a certain outcome implies the responsibility for that outcome and creates the duty to be answerable in case of negative consequences. Thus as long as citizens either have been involved in the decision of a corporate collective - fulfilling the criteria of a true democracy – violating human rights or contributed individually to the outcome by their action, it is justifiable to oblige the collective to compensate.

This approach not only is valid for the domestic context but also has impact on the international community: As individuals can be deemed responsible for consequences by their inaction to prevent them, states satisfying the criteria of a true democracy can be made responsible for human rights violations they failed to prevent in other states. I suggested an international fund for the compensation of victims of gross and systematic human rights violations to which states perceiving themselves as true democracies are obliged to contribute. This fund would have enormous impact on the proliferation of human rights. Hence, the result of my research is multiple: *First*, I was able to give an affirmative answer to the question if it is justifiable to hold individuals belonging to a state-collective liable for the compensations of victims of human rights violations of a former regime within an approach that satisfies human rights claims. Therefore, *second*, I could justify the right to compensation as an element of the human rights norm system in its realisation, by re-establishing its consistency and making the whole human rights system persuasive as a non-metaphysical moral theory. *Third* I demonstrated that this justification transcends borders and delivers a true reason to hold participatory democracies conforming to human rights liable for the compensation of victims outside their territory. As the focus on the liability on financial aspects of reparation has been a means to visualise responsibility, the international fund for the compensation of victims for human rights violations stands for a responsibility not to link the concern for human rights only to domestic policy but also to take an active role in foreign policy.

It goes without saying that my assumptions can be challenged and disapproved but I claim that in any case they deliver a new perspective to an old debate which is useful for human rights protection. This paper is a practical philosophical contribution to international responsibility for the proliferation of human rights, especially addressing states that perceive themselves as human rights affirmative within their own territory. This responsibility is not restricted to an active implementation within their own state, combined with a non-harming behaviour towards other states, but includes an active duty towards the guaranteeing of human rights in other states. This implies clear contents of policy-making as a duty to proactively

prevent gross and systematic human rights violations by diplomatic or military means in the framework of the UN Charter.

During my research I came across two questions that are interesting enough to be followed up: First, it might be interesting to analyse the responsibility of the European Union or other regional organisations for extraterritorial human rights violations. This certainly is very difficult due to the complicated structure of competences but especially the negative approach to responsibility might indicate scenarios that support the motivation for a common foreign politic. This project would be multidisciplinary including political and legal scientists. The second is an economic research paper on the impact of inherited costs of regime succession on the stability of the new regime. I hope both projects will become reality, as I personally believe in their value in vitalising the discourse on strategies of action for human rights advocates.

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