

Statement of the German Government

In response to the request of the deputies Volker Beck (Cologne), Jerzy Montag, Ingrid Hönlinger, other deputies and the parliamentary party BÜNDNIS 90/DIE GRÜNEN
– Drucksache 17/829 –

Attitude of the Federal Government towards the lawsuit filed by apartheid victims against German groups / corporations

Primary note

Victims of the South African apartheid regime have filed class action lawsuits based on the Alien Tort Claims Act (ATCA) in the USA against different enterprises, including the German companies *Daimler AG* and *Rheinmetall AG*, in order to sue them for compensation. The claimants accuse the companies of having supported the violation of human rights in South Africa between 1948 and 1994 by the supply of their produced goods. The judge of the District Court in New York validated the lawsuit against five of the sued companies (including Daimler and Rheinmetall) on April 8th 2009. The defendants have filed an appeal, a decision can be expected in the first half of the year 2010. The appeals court requested the Federal Government on September 10th 2009 to issue an official statement (Amicus Curiae Brief) about the legal battle.

On October 8th 2009, the embassy of the Federal Republic of Germany in Washington D. C. made a declaration on behalf of the German Government, among others, that a decision of the US court concerning this case would damage the sovereignty of the German state in an unacceptable way. The embassy suggested the possibility of taking legal action at the South African or German courts. Furthermore, the risk is involved that civil litigations presumably concerning human rights violation could be abused as instruments against international groups, which would lead to the damage of international trade.

The ATCA is an established law in the USA since 1789, which legitimates the conviction of state actors, private individuals and enterprises due to the violation of human rights. They have to pay compensation, even though the territorial relation to the USA is very weak. This law is criticized for violating the international regulations of jurisdiction. The Principle of universal jurisdiction in international criminal law does so far not exist in international private law. The German legal system does not allow such lawsuits, or rather: the possibilities are extremely restricted.

1. In which specific aspects does the Federal Government see the damage of the sovereignty of the Federal Republic of Germany, if German companies are sued for compensation in the USA due to presumed aiding and abetting concerning the violation of human rights towards South Africans in South Africa?

On September 10th 2009, the Federal Government was requested by the United States Court of Appeals for the 2nd Circuit, New York, to issue an official statement about the lawsuit mentioned in the question. The Federal Government has emphasized in this statement that the continuation of the lawsuit and a decision in the USA lead to the damage of (German) governmental interests, as a connection between the subject-matter as well as between the political parties involved in the lawsuit and the USA does not exist. By means of the ATCA, the claimants try to sue German companies for compensation in the USA, although neither the asserted illegal action, nor its success, nor the participants in the lawsuit show any connection to the USA. Such extensive utilization of international judicial competence contradicts a generally accepted principle in the international law of civil procedure, which requires a close connection to the state of the forum, and thereby violates the German venue jurisdiction.

2. Is it possible, in the Government's judgement, to deliver such a class action, in accordance with section 13 of the Hague Convention concerning the delivery of judicial and extrajudicial writs in civil or commercial matters (of November 15th 1965) from abroad to Germany?
If not, in which specific aspects does the Federal Government see reasons for prevention?

According to this provision, it is possible to refuse the service of process, if the sovereign rights or the security are considered endangered by the requested state. The German courts decide upon each individual case, whether the presuppositions are given. With reference to a class action, the regional appeal court in Düsseldorf recently accepted the service of process with a decision on July 22nd 2009 (I-3 VA 9/03, 3 VA 09/03) and explained:

„The legal and political decision to admit class actions against torts with a wide range of aggrieved parties, which do not require the active participation of each member, has to be respected in Germany – considering the associated difficulties for the defendants of such suits – as long as the indispensable rights of defense are retained in the class action lawsuit (BVerfG 2 BvR 1133/04 and 2 BvR 2247-2049/06).

With regard to the Hague Convention, the German jurisdiction has opened up in favor of the right of the requesting state. Basically, this also includes the service of process for lawsuits which were filed on the basis of proceedings unknown in the German legal system. Especially in the case of legal institutions, which the German legal system considers open to abuse, it has to be examined whether the specific lawsuit evidently shows characteristics of misuse of rights. In this case, a violation of indispensable principles of a liberal state of law might be given, that constitutionally obliges and authorizes (according to international law) the German Government to dismiss the lawsuit (BVerfG, BvR 2247-2049/06).

3. How does the German Government explain the discrepancy between its own opinion and the opinion of the South African Government which supported the lawsuit in the USA with a statement on September 1st 2009?

The Federal Government does not comment on the letter, which was sent to judge Scheindlin by the South African justice minister in the current proceedings.

4. With which departments of the Federal Government has its position been brought into agreement? Have the German Bundestag and its responsible committees been integrated? If not, why?

The Government's statement has been brought into agreement with the Department for Foreign Affairs and the Federal Ministry of Justice. The participation of the German Bundestag has not been necessary, neither for demands under constitutional law (section 59 of the Basic Law), nor for other reasons.

5. Had the Federal Government talked to the participants (claimant and defendant) and heard their arguments before it took up its position?

Knowing the positions of both parties, the Federal Government complied with the court's request to state the Government's position independently from the parties. It is not the Government's task to hear the participants involved in the lawsuit. This is the task of the responsible court.

6. Does the Federal Government intend to intervene in all external lawsuits against German enterprises? If not, what are the criteria for its intervention? Why did it follow the request of the US-American appeal court in the present case?

Only on rare occasions, the Federal Government comments on current proceedings towards foreign courts, if a special public interest exists, in the present case in the preservation of the German venue jurisdiction. Whether such an exceptional case exists, is decided in coordination with the responsible departments on each individual case.

7. Why does the Federal Government give voice to the concern that international trade could be harmed by lawsuits according to civil law due to presumed violations of human rights, in its statement on October 8th 2009?

Do the international trade and its interests, from the point of view of the Federal Government, have priority over the judicial solution of eventual violations of human rights as well as the compensation and rehabilitation of their victims?

In its statement, the Federal Government gives voice to the concern that international trade could also be abused in order to file damage suits against multinational companies because of presumed violations of human rights and thereby damage them. In order to avoid this risk, multinational companies could decide to

quit their business activity with or investments in certain states or regions. This would lead to the damage of international trade as, by this means, additional trade and investment barriers would occur. Such decisions will regularly affect states to which the international economical commitment is highly important. The Federal Government shares its concern about the damage of international trade with the Solicitor General of the USA who spoke against Unocal in the lawsuit Doe in front of the United States Court of Appeals for the 9th Circuit.

From the point of view of the Federal Government, the international trade does not have priority, neither over the judicial solution of eventual violations of human rights, nor over the compensation of their victims. The Federal Government rather emphasizes in its statement that there should exist a possibility of the judicial or another assertion in those States which interrelate closely with the action and the participants.

8. With what arguments does the Federal Government take up the position that the German courts would be the ones primarily responsible regarding the trial of the lawsuit?

The Federal Government considers both the South African courts and the German courts internationally responsible in the US-American lawsuit. The sued German companies are based in Germany. It is possible that part of the presumed illegal actions have been committed in Germany. The other part of these actions has probably been committed in South Africa. There, also the presumed "violation" (Verletzungserfolg) has occurred. The company domicile and the place where the tortious act was committed and where the damaging result occurred are internationally accepted starting points for judicial competence. The lawsuit does not have any connection with the USA.

9. How does the Federal Government reach its opinion mentioned in the statement that the claimants can still go to law in Germany, despite the lawsuit already pending in court in the USA?

In its statement, the Federal Government indicates that the lawsuit pending in court in the USA should be negotiated and decided either in the Republic of South Africa or in the Federal Republic of Germany. The dissent concerning foreign pendency does not conclusively lead to the estoppel of a lawsuit in Germany, from the point of view of the Federal Government. If the prospects of approval in Germany of the verdict hard-won in the USA are low, an adjournment of the German lawsuit analog § 148 of the civil process order (Zivilprozessordnung ZPO) will come into consideration, until the finalization of the foreign lawsuit. If the approval of the US-decision in Germany could not be expected from the outset, a permission of a parallel lawsuit would be imaginable. Furthermore, the Federal Government points out that in the case of a dismissal due to an illegal filing of action in the USA at the latest, a lawsuit could basically be filed in both of the other countries. According to § 17 subparagraph 1 and § 32 of the civil process order (ZPO), which do also partly determine the international jurisdiction, the subject-matter could be put before the courts in Germany on the conditions described in the paragraphs.

10. Which legal process would be available for the claimants in Germany from the point of view of the Federal Government?

In Germany a civil law process might most likely be the adequate way, according to §13 German judiciary act (Gerichtsverfassungsgesetz GVG). In the individual case the binding decision is up to the responsible German court.

11. Will the Federal Government support such a lawsuit by giving a public statement for the benefit of the claimants?

Public statements of parties not involved in the lawsuit are not intended by the German civil law. A German court will therefore not request a statement like the one issued by the Federal Government in the US-American lawsuit.

12. Are the juridical opportunities of the claimants in the current lawsuit comparable to their opportunities in the USA from the point of view of the German Federal Government?

The claimants demand compensation - by way of class action – for presumed violations of human rights, which were mainly committed in South Africa during the time of Apartheid policy. The responsible court could not admit a class action, as the German law does not contain this legal institution. It would decide about the applicable law in the current lawsuit after the ascertainment of its international jurisdiction according to the German international private law. The applicable law would hardly be the US-American law, as the lawsuit is not related to this state. As far as German tort has to be followed, the claimants can only demand compensation for actual harms, not for punitive damages, like the US-American law provides

in some cases. In case of violation of body, health, liberty or sexual self determination the violated person can demand compensation also for immaterial harms according to German law.

13. What are the reasons why lawsuits concerning violations of human rights are very often filed abroad and not in Germany, from the point of view of the Federal Government?

The Federal Government has not received statistics supporting the stated assertion.

14. Does the Federal Government consider the German civil law adequate for lawsuits concerning not recently committed violations of human rights considering the valid limitation period of three years and its, in international comparison, quite restrictive regulations of default?

The limitation period of three years, which is valid for many compensation claims, does not hinder an effective assertion of existing compensation claims under private law due to the violation of human rights. The limitation of a claim is not only determined by the length of the limitation periods, but also by the regulations about their outset, their delay and their interruption. The limitation period of three years does not start with the emergence of the claim, but not until also the creditor gains knowledge – or should have gained knowledge - about the context of the claim and about the debtor. If these requirements do not exist, the claim will not lapse until the expiration of the corresponding maximal limitation period in § 199 subparagraph 2-4 of the German Civil Code. In case of compensation claims based on the violation of life, body, health or liberty, the maximal limitation period of 30 years is valid. The expiration of limitation periods can be hindered by negotiations with the debtor or through methods of prosecution, such as the judicial assertion of a claim.

The argument that the German law contains, in international comparison, quite restrictive regulations of default, is not shared by the Federal Government. The principle of the fault-based liability that is determined by the German liability law links the obligation to pay compensation to the liable party, only if the defendant's conduct is culpable. Thereby, the regulation of default takes the general freedom of action into account, by making the liability of each individual foreseeable. Innocent violations of human rights – and only in this case, a difference between liability without actual fault and liability based on actual fault could become important – are, if at all, only imaginable on a very limited scale. As the law stands the default is moreover partly assumed by law, for reasons of facilitation of proof for the aggrieved party; in part, the principles of reversal of the burden of proof, developed by the jurisdiction, intervene. In the Government's judgement, the damage suits should generally not founder on the regulation of default.

15. Does the Federal Government see the need for legislative action in order to facilitate or to enable the implementation of demands by civil law concerning the violations of human rights?
If not, why not?

The German tort provides a profound protection for the legally protected interests life, body, health, liberty and property as well as the general personality right, especially through § 823 ff. of the Civil Code (BGB). First in the year 2002 liability gaps and deficits in justice were effectively eliminated due to the second amending law concerning tort. Moreover a shifting of compensation for material damage was implemented. By means of this profound reform an adaptation of the German tort to European and international standards came along. It is not detectable that violations of human rights could thereby not be recorded completely or that liability gaps remain which would have to be closed. In the Federal Government's judgement, the need for legislative action in order to facilitate or to enable the implementation of demands by civil law concerning the violations of human rights does not exist at the present time.

16. Does the Federal Government have notice of a paper of the Daimler stock corporation termed as „background information“, which was emailed to all the members of the committee for human rights and humanitarian aid of the German Bundestag on January 28th 2009 and which contains in item 4, subitem 4 the pronouncement that even the European Commission has pronounced against the completion of the apartheid lawsuit in the USA?

Does the Federal Government have notice of this statement of the European Commission?

If not, why not?

What is the content of this statement of the European Commission?

The Federal Government does not have notice of the paper mentioned.

It is aware of the statement of the European Commission. The Commission considers whether, according to international law, all legal remedies should be exploited according to national law before it could be sued in a forum which the case does not have any connection with.

17. Will the lawsuit of the apartheid victims be part of the bilateral conference of the government on the development assistance between the Federal Republic of Germany and South Africa in April 2010?
If so, what kind of position will the German Federal Republic take there?

No. The preservation of the German venue jurisdiction towards the USA does not relate to the development assistance towards South Africa.

18. Does the Federal Government advocate the lawsuit pending in court in Argentina, in the province of San Martín (Nr. 4012 Az. 292) against the Daimler stock corporation because of the corporations violations of human rights during the Argentinian dictatorship?
If not, why not?
If so, why is the lawsuit of the apartheid victims not being supported?

The Federal Government does not have notice of the lawsuit in Argentina.
As far as a misconduct is being alleged in Argentina, an Argentinian place of jurisdiction might be internationally appropriate.

19. Is the German penal law from the point of view of the Federal Government sufficiently suited for the efficient prosecution of crimes against international law in Germany, given the possibility of deactivation of § 153f of the code of criminal procedure?

The penal code (Völkerstrafgesetzbuch VStGB) that became effective on June 30th 2002 contains - orientated towards the universally acknowledged rules of the customary international law (Völkergewohnheitsrechts) - profound sanctions and moreover wants to contribute to the support and spreading of the humanitarian international law. § 1 of the penal code intends for all crimes against international law the validity of the universal jurisdiction. Therefore the German penal law is applicable to these crimes even if the crime was committed abroad and does not bear any relation to the domestic country. By the use of the procedural norms in § 153f of the code of criminal procedure (Strafprozessordnung StPO), an obligation to prosecute foreign crimes is basically affirmed. But at the same time, the discretionary power of the Public Prosecution Department concerning foreign crimes is structured and restricted. As a result, an unnecessary or senseless use of resources of the German prosecution authorities in cases which do not bear any relation to Germany and in which an investigation by German authorities is not very promising either, is said to be avoided.

20. Does the Federal Government see the need for legislative action beyond the penal law in order to facilitate the prosecution of alleged delinquents of violations of human rights, even if these are foreigners and the crimes were committed abroad?
If not, why not?

The Federal Government does not see the need of legislative action in order to interfere in the balance between § 1 of the penal code and § 153f of the code of criminal procedure. By basically affirming a duty of prosecution also for foreign crimes according to its domestic law, the Federal Government rather initiates the development of the penal law in other countries.

21. Does the Federal Government see the need to enshrine a culpability of companies in the German law, beyond binding declarations of self-commitment (compliance) - against the background of possible enmeshments of companies which are transnationally acting in violations of human rights abroad?
If not, why not?

The “commission on the reform of the penal sanctions system” („Kommission zur Reform des strafrechtlichen Sanktionensystems“), appointed by the Federal Ministry of Justice, deals with the question whether it was generally - therefore independently from the background of the questioning – useful to implement a criminal responsibility of juristic persons in Germany. It negated the issue after its final report in March 2000. Among others, the main reasons were that a model of penal regulation introduced substantial concerns regarding the principle of guilt and further that the existing instruments for the sanctioning of companies were enough. The Federal Government has not received any findings which would necessitate a shift of opinion.

Translation: Julia Meise (KOSA), edited by: Miriam Saage-Maaß (ECCHR)