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PRIVATE LAW AS RESTORATIVE JUSTICE:  
NOTES ON ITS USE FROM HISTORICAL WRONGS  
TO HUMAN RIGHTS LITIGATION

ABSTRACT. *Within the wider phenomenon of so-called 'juridification' of historical wrongs, the paper examines the role of private law as a tool for restorative justice. Whereas the use of private law and its remedies (such as contract, tort, unjust enrichment) as instruments for "reparation" may appear to be at odds with the functions of restorative justice, the paper assesses extensive litigation that was brought forth in different legal systems especially as of the end of the XX<sup>th</sup> Century, and which though based on claims in private law, poses a series of specific problems that deserve attention.*

CONTENT. 1. Introduction – 2. Private law claims in the Holocaust-Era Litigation – 3. Meaning and use of restitutionary claims in human rights litigation. Emergence of a new notion? – 4. The quiet appeal of private law remedies – 5. A few conclusive remarks

### **1. Introduction**

The phenomenon of the so-called “juridification” of historical injustices, centred on the use of law and legal instruments as a means to try and offer reparation for historical (and often mass) torts is neither new nor unprecedented.<sup>1</sup> Whereas public law, international

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1 Literature on this point is extremely vast and impossible to quote. With reference to the specific issues examined in this paper see for an overview *ex multiis* A. GARAPON, *Peut-on réparer l'Histoire? Colonisation, Esclavage, Shoah*, (Paris: Odile Jacob, 2008); H. MUIR WATT “Privatisation du contentieux des droits de l'homme et vocation universelle du juge américain: réflexions à partir des actions en justice des victimes de l'Holocauste devant les tribunaux des États-Unis”, 4 *Revue Internationale de Droit Comparé* 2003, p. 883; E. BARKAN, *The Guilt of Nations. Restitutions and Negotiating Historical Injustices*, (New York: The Johns Hopkins University Press, 2000); M. J. BAZYLER, *Holocaust Justice. The Battle for Restitution in America's Courts*, (New York and London: New York University Press, 2005); J.

law and criminal law have traditionally been the elective instruments for the prosecution of these violations of human rights, the growth of private law as a tool to offer reparations is somewhat more recent. The latter has developed around the notion of “historical wrongs” as private law infringements, giving rise to extensive litigation in several legal systems, beginning especially in the United States in the last decade of the XX<sup>th</sup> century.<sup>2</sup>

The very idea of reverting to private law as an instrument for “reparation” (and as an independent cause of action, disjointed from criminal procedures) may appear to be at odds with the functions of restorative justice, given the reconciliatory and reparative nature of the latter and the adversary nature of the former;<sup>3</sup> the practical experience of the litigation that will be briefly discussed here however seems to indicate that

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THOMPSON, *Taking Responsibility for the Past. Reparation and Historical Injustice*, (Cambridge: Polity Press, 2002); J. WALDRON, *Redressing Historic Injustice*, 52 *U. Toronto L. J. (University of Toronto Law Journal)* 2002, p. 135; G. RESTA, V. ZENO-ZENCOVICH (Eds.), *Riparare Risarcire Ricordare. Un dialogo tra storici e giuristi*, (Napoli: Editoriale Scientifica, 2012) and Id., *La storia «giuridificata»*, *ibidem*, p. 11.

2 The United States’ vocation, typical of the tradition of adversarial legalism, of attracting litigation based on torts of various nature often committed outside the American territory within its *fora*, was long anchored on the provisions of the Alien Tort Claims Act and on the acceptance of an extraterritorial jurisdiction within US courts for violations of international *ius cogens*. This tendency suffered however an abrupt stop after the *revirement* brought by the US Supreme Court in 2013 with the *Kiobel v. Royal Dutch Petroleum Co.* decision (133 S. Ct. 1659, 2013). The Alien Tort Claims Act (28 U.S.C. § 1350), was originally promulgated as part of the Judiciary Act of 1789, and it provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States. The role of the Alien Tort Claims Act in human rights litigation became relevant after the *Filartiga v. Pena-Irala* case (630 F2d 876 (2d Cir. 1980)) which recognized torture practiced by a foreign state as a tort committed in violation of international law. The practice of the lower Federal courts of recognizing US jurisdiction for a wide panoply of cases (suffice it to recall not only the so-called Holocaust Litigation on which this paper further dwells, but also war prisoners litigation, Japanese forced labor litigation, Armenian genocide litigation, American slavery litigation, and a wide array of cases for violation of human rights, labour rights, child labour) was never explicitly affirmed by the Supreme Court until the *Kiobel* case, in which reverting the interpretation of the lower courts, the Supreme Court denied that the Alien Tort Act confers jurisdiction for violations of the law of nations occurring within the territory of a sovereign other than the United States (presumption against extraterritorial application of US law). A previous attempt to circumvent the reach of the Alien Tort Statute had already been made by the Court in *Sosa v. Alvarez-Machain* (542 US 692 (2004)).

3 For an outline of the terms of the discussion, see G. RESTA, *Le ferite della storia e il diritto privato riparatore* in G. CONTE, A. FUSARO, A. SOMMA, V. ZENO-ZENCOVICH, *Dialoghi con Guido Alpa. Un volume offerto in occasione del suo LXXI compleanno*, (Roma: Roma TrE-Press, 2018), p. 417. On the implications of the different instruments of reparation including “compensation” (for both material and non-material injuries) see G. MANNOZZI, G. A. LODIGIANI, *La giustizia riparativa. Formanti, parole, metodi*, (Torino: Giappichelli 2017), at 37-39 and pp. 222-228; A. GARAPON, *Peut-on réparer l’Histoire?*, at 153 *et seq.*

private law remedies – tort but not only – have the potential of pursuing restorative justice. It should be kept in mind however, that when these legal devices are invoked as instruments for the pursuit of reparations, very often their discipline is somewhat adjusted so as to overcome procedural difficulties.

Indeed, whereas victims of historical wrongs (often as a class) dispose of a wide array of legal instruments through which to try and pursue “historical justice,” including instruments which aim at ascertaining “historical truth”,<sup>4</sup> and whereas these instruments often cross interdisciplinary borders between different areas of the law, the use of private law remedies in both historical and “human rights” litigation, poses a series of specific problems on which this paper would like to focus.

One of the most illustrative cases at point is the so-called “Holocaust-Era Litigation,” whose importance is due notably to its antecedence in time and scale. This litigation refers to those civil actions brought forth starting from the end of the 1990’s mainly in US courts under the form of class actions (*ex* Rule 23 of the Federal Rules of Civil Procedure) by American and foreign plaintiffs who were survivors of the Holocaust. Claims against both American and foreign defendants requested compensation for torts, breach of contract and unjust enrichment deriving from events which took place during the Second World War and are related to the Holocaust.

This civil litigation later served as a model for other cases of violation of human rights including *inter alia* other World War cases (Japanese-American claims, other insurance cases), colonial and post-colonial claims, American-slavery reparations, and corporate liability cases for aiding and abetting in the commission of human rights violations. Whether this may be considered a practicable model however remains an open issue. It should be noted indeed that all of the Holocaust-Era cases were settled out of court with strong political interventions, entailing questions on whether the model could be successfully proposed again. This proved to be especially problematic after the *revirement* of the US Supreme Court in 2013 regarding the interpretation of the Alien Tort Claims Act, which had served thus far as the basis for jurisdiction in

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<sup>4</sup> See S. RODOTÀ, *Il diritto alla verità*, in G. RESTA, V. ZENO-ZENCOVICH (Eds.), *Riparare Risarcire Ricordare. Un dialogo tra storici e giuristi*, at 497.

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American Courts.<sup>5</sup> In the aftermath of the *Kiobel v. Royal Dutch Petroleum Co.*<sup>6</sup> decision, pending litigation in other areas of human rights litigation was dismissed for want of jurisdiction.<sup>7</sup>

The common feature of these cases is that the civil claims based on either alleged tort, breach of contract and/or unjust enrichment also constitute a violation of human rights to the detriment of the plaintiffs, and thus offer an interesting intersection of at least three different branches of law (other than private law which becomes central for the correct assessment of the claims only once justiciability issues are solved).

International human rights law, while not necessarily ensuring the enforceability or guaranteeing a cause of action in foreign courts, provides however the substantive rule of law for certain claims.<sup>8</sup> Private international law is central for the determination of jurisdiction issues where private law claims are involved (such as the contractual or

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5 See *supra* note n. 2.

6 133 S. Ct. 1659, 2013.

7 See for example *In Re South African Apartheid Litigation*, 56 F. Supp. 3d 331 (S.D.N.Y. 2014); *Balintulo v. Daimler AG*, 727 F.3d 174 (US Court of Appeals, 2d Cir., 2013). Interestingly, some scholars have highlighted that it will be precisely the reference to tort law (both national and foreign) that will allow, notwithstanding the impracticability of the Alien Tort Act, to continue this course of litigation for human right violations, given that every human right violation is also an intentional tort under private law. See R. P. ALFORD, “The Future of Human Rights Litigation After *Kiobel*”, in 89 *Notre Dame Law Review* 2013-2014, 1749.

8 In one of the first – unsuccessful – Holocaust Litigation cases, *Handel v. Artukovic* (601 F. Supp. 1421 (1985)) the Federal District Court of California explained that the international law claims of the plaintiffs must arise under the laws of the United States for jurisdiction to exist (thus excluding that plaintiffs may infer a cause of action from the law of nations) and the while international law may provide the substantive rule of law in a given situation, the enforcement of international law is left to individual nation states, unless the claims are based on self-executing Treaties and Conventions (an argument that the Court rejected in the *Handel* case with reference to the Geneva Convention of 1929 and the Hague Convention of 1907 (see *Handel v. Artukovic*, 1425-1426)).

labor claims at the basis of some of the principal Holocaust litigation cases). Public international law is determinant for assessing enforceability of claims where issues of State sovereignty and immunity arise.<sup>9</sup>

## ***2. Private law claims in the Holocaust-Era Litigation***

While certainly not the only case of international human rights litigation, the so-called Holocaust-Era cases offer an interesting example of claims in private law for the reparation of human rights violations. The litigation (which after several unsuccessful attempts<sup>10</sup> in the years following the Second World War and up to the 1980's were pro-

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9 The recognition or refusal of jurisdiction for international law crimes in national courts (admissibility of actions against a person accused of committing a crime, especially if the crime was committed extraterritorially) may depend on different principles of jurisdiction. These include the territoriality principle (jurisdiction is recognized when an offence occurs within the territory of the prosecuting state); the nationality principle (jurisdiction is recognized when the offender is a national or resident of the prosecuting state); the protective or security principle (jurisdiction is recognized where an extraterritorial act threatens interests that are vital to the integrity of the prosecuting state); the passive personality principle (recognizing jurisdiction where the victim is a national of the prosecuting state); and the universality principle (jurisdiction is recognized for the prosecution of perpetrators of certain violations of international law regardless of the nationality of the perpetrator, the nationality of the victim or the place of commission). See I. BROWNIE, *Principles of Public International Law*, 5<sup>th</sup> ed., (Oxford: Oxford University Press, 1998), at 303-308. See generally Restatement Third of Foreign Relations Law of the United States, Pt. IV Introductory Note 1987.

See also, precisely on the problem of jurisdictional immunities of States and civil actions for compensation related to events of the Second World War, the judgement of the International Court of Justice of February 3<sup>rd</sup> 2012 (ICJ, 3/2/2012 n. 143, *Germany v. Italy* (Greece intervening)), quashing, as contrary to international law, convictions of Germany executed by Italian courts. The Italian Constitutional Court however, with a ground-breaking and much discussed judgment in 2014 (Corte Cost., 22<sup>nd</sup> Oct. 2014, n. 238), confirmed the judicial trend initiated by the Italian Supreme Court in 2004 (with the famous Ferrini case, relating to a claim against Germany for the damages suffered by the plaintiff who was deported to Germany and subject to forced labour during World War II), in which the Supreme Court had affirmed that Germany was not entitled to sovereign immunity for the violations of human rights committed during World War II (Corte di Cassazione, Sezioni Unite, 11<sup>th</sup> Mar. 2004, n. 5044). On the Ferrini case, see, *ex multis*, P. DE SENA, F. DE VITTOR, "State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case", 16 *The European Journal of International Law* 2005, p. 89.

Following these judgements, a new wave of civil litigation connected to the Second World War was initiated in front of Italian courts, with claims for damages related inter alia to deportation in concentration camps, forced labour, massacres committed by military forces, killings, injuries and other crimes against civilians (conduct qualified as relevant not only for criminal law, but also under tort law). See for an overview of these cases, G. RESTA, 'Le ferite della storia e il diritto privato riparatore', at 441- 442.

10 See *i.e.*, *Kelberine v. Société Internationale*, 363 F. 2d. 989 (D.C. Cir. 1966); *Handel v. Artukovic*, 60F. Supp. 42 (C.D. Cal. 1985); *Princz v. Federal Republic of Germany*, 26 F 3d 66 (D.C. Cir. 1994).

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posed again at the end of the 1990's), can be roughly grouped into the so-called Swiss Bank litigation;<sup>11</sup> the German and Austrian Bank Litigation;<sup>12</sup> the Slave-labour Litigation;<sup>13</sup> and the Insurance Litigation.<sup>14</sup>

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11 The so-called Swiss Bank litigation (starting in 1996, later consolidated in 1998, with the *In Re Holocaust Assets Litigation* class action in front of the Federal District Court of NY (1998 US Dist. LEXIS 18014 E.D.N.Y. Oct. 7<sup>th</sup>, 1998), was brought forth by survivors or heirs of victims of the Holocaust against defendant Swiss banks alleging three distinct sets of accusations. Under the first, the so-called 'dormant account claims', plaintiffs alleged that the Swiss banks failed to return money deposited with them by Jews seeking a safe haven for their assets; according to the so-called 'looted assets claims' plaintiffs alleged that the banks traded in assets looted from the Jews by the Nazis; and according to the so-called 'slave labour claim' the banks were alleged to have traded in assets made by slave labour which were then sold, and to have received in deposit the proceeds of sale. The case settled out of court (with a \$ 1.25 billion settlement) with the identification of five different categories of entitled recipients to compensation from the fund: the class of deposited assets; the class of looted assets; the class of slave labour I; the class of slave labour class II; the refugee class.

12 The German and Austrian bank litigation (consolidated claim of 1999 in front of the US District Court for the Southern District of New York *In Re Austrian and German Bank Holocaust Litigation* (80 F. Supp. 2d 164; 2000 US Dist. LEXIS 119; 46 Fed. R. Serv. 3d (Callaghan) 30) made similar accusations as the Swiss Bank litigation against German and Austrian banks. This litigation too settled out of court with a \$ 40 million settlement. Later actions were brought against French, British and US branches of banks in front of the California State Court in San Francisco (*i.e.*, *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *Mayer v. Banque Paribas*, no. BC 302226 (Cal. Super. Ct. filed Mar. 24, 1999)) for claims arising from the so-called "Arianization" of bank accounts and deposited assets. Whilst some defendants agreed to settling immediately (*i.e.*, Britain's Barclays Bank, with a \$ 3.6 million settlement) others were induced to do so after claims of dismissal for non-justiciability were denied by the Courts (but before any judgment was passed).

13 The slave-labour litigation (starting from the famous case *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248 (D.N.J. 1999) and followed by *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 1999), brought forth by former deported slave-workers, claimed compensation for the profits derived to corporations and undertakings from the use in their plants of slave-labour provided by the Nazi-regime and performed by the plaintiffs. In one of the few cases in which a decision was reached at first instance, the case was dismissed on the basis of issues of justiciability. The appeal lodged subsequently became moot when the parties reached an out-of-court settlement. This litigation is nonetheless relevant for the issues of substantive law that were considered (*see infra*).

14 The insurance claims (see *Winters v. Assicurazioni Generali S.p.A.*, no. 98 Civ. 9186 (S.D.N.Y. filed Dec. 30, 1998); *Cornell v. Assicurazioni Generali S.p.A.*, no. 97 Civ. 2262 (S.D.N.Y. filed Mar. 31, 1997) alleged the breach of life insurance contracts signed prior to World War II events whose premiums were never paid by (several) defendant insurance companies to plaintiffs who were either direct beneficiaries or heirs of insured victims of the Holocaust. The *ad hoc* International Commission on Holocaust Era Insurance Claims was charged with the distribution of the awards following out-of-court settlements.

There are several other cases filing claims both against individuals (*i.e.*, the cases concerning looted art), corporations and industries, and some of these make inter alia express claims for unjust enrichment (*i.e.*, the litigation against pharmaceutical firms for the unjust enrichment allegedly derived from the medical experiments conducted on interns of concentration camps: *see Kor v. Bayer AG* (S.D. Ind. Filed Feb. 17<sup>th</sup> 1999). For the scope of this paper however it

The facts of these cases are notorious, as are the outcomes which almost invariably led to out-of-court settlements accompanied by political intervention on both sides and often by ad hoc legislation for the creation of Funds for the payment of compensation. This has left many of the procedural and justiciability issues unanswered.

Indeed the central issues of the standing of both plaintiffs (recognized where the plaintiffs were direct survivors of the Holocaust, controversial in case of heirs) and defendants (more problematic because of State Immunity and corporate liability issues); the problem of political question; the one of subject matter exclusion (since claims were allegedly barred by War Reparations and Peace Treaties); and the one of time limitation (with the prescription of contractual and tort based claims and the problems concerning the applicability of so-called equitable tolling), were only decided incidentally, if it all, in the preliminary phases (and with different opinions on admissibility given by the relevant courts).

What however was not thoroughly considered in the litigation and calls for closer attention from a comparative lawyer's point of view is the substantive law underlying the claims.

The Swiss Bank Litigation made three different claims for restitution: the deposited assets claim, the constructive trust claim and the slave labour/looted assets claim.<sup>15</sup> Plaintiffs alleged that defendants "breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory and punitive damages, and declaratory and other appropriate relief."<sup>16</sup> Plaintiffs also de-

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will suffice to analyse some of the recurring elements in the cases cited above in the text. For a thorough and detailed reconstruction of the history, antecedents, claims and facts of the Holocaust Era Litigation see *ex multiis* especially M. J. BAZYLER, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Rich. L. Rev. (University of Richmond Law Review) 2000-2001, p. 1.

15 Memorandum of Law submitted by Burt Neuborne, *In re Holocaust Victim Assets CV-96-4849 (ERK) (MDG)* [hereinafter Neuborne Memorandum] and B. NEUBORNE, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 *NYU Annual Survey of American Law* 2003, p. 618.

16 See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139; 2000 US Dist. LEXIS 1072, (Fairness

manded “disgorgement of any profits unjustly earned by defendant banks by knowingly assisting Nazis in the consummation of crimes against humanity, together with the return of any assets (or the value thereof) for which the banks acted as knowing receivers of stolen property.”<sup>17</sup>

The order and variety of claims made in the Swiss bank litigation gives a meaningful insight into the problems related to the use of a restitutionary remedy. From a purely private-law point of view, there are three distinct situations which give rise to claims under different branches of the law. In general where the victims of the Nazi persecution had voluntarily deposited their assets with the Swiss banks, hoping for a safe haven, claims can be founded in contract or tort (while the continued retention and refusal to return the assets can also lead to a restitutionary claim); whereas when the Banks had knowingly received stolen or looted assets, claims can be based solely on unjust enrichment (and violation of customary international law, such as aiding and abetting in the commitment of war crimes). Hence the resort to the typical remedial device of the constructive trust, which is also justified by the circumstance that under US case law (and New York law more specifically) it is not a requirement for a constructive trust that there be any special fiduciary relationship between the parties (as is instead required under the English law).<sup>18</sup>

In its relation to other claims (*i.e.*, bailment), the case for an equitable remedy such as a constructive trust becomes residual to the extent that a claim under the former cannot be made (*i.e.* when the deposit of money in a fund entails the loss of an identifiable and particularized proprietary interest).<sup>19</sup>

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Hearing), 4.

17 Neuborne Memorandum, at 3.

18 See § 160 Restatement on Restitution (1938): “Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.” See also J. P. DAWSON, *Unjust Enrichment. A comparative Analysis*, (Boston: Little Brown Co. 1951), at 28 ff.; and generally, A. W. SCOTT, *Constructive Trusts*, 71 *Law Quarterly Review* 1955, p. 39. On the “purely remedial” nature of the constructive trust see J. P. DAWSON, *Unjust Enrichment*, at 32.

19 See *Bertoni v. Catucci*, (117 A.D.2d 892, 498 N.Y.S.2d 902, 905 (N.Y. App. Div. 1986)): “as an equitable remedy a constructive trust should not be imposed unless it is demonstrated that a legal remedy is inadequate.”; see also for example the claim filed in *United States v. Pokerstars et al.* (2011), 11 Civ. 2564 (LBS), US District Court

The Litigation against German, Austrian, and other banks (based on the so-called “Aryanization claims”) draws more extensively on the notion of unjust enrichment. The claimants argued that banks converted the assets of those persecuted by the Nazis and profited from their forced and slave labour.<sup>20</sup>

While the insurance cases were classic claims for breach of contractual obligations,<sup>21</sup> the litigation which sets out the most complex issues concerning unjust enrichment is the slave labour one (although the case was dismissed). The complaint of the Iwanowa case set out causes of action for restitution and unjust enrichment and quantum meruit/quasi contract under US State law (Michigan and Delaware) and for restitution and unjust enrichment under German law. It also claimed violation of the law of nations and sought disgorgement of all economic benefits accrued to the defendants as a result of the plaintiff’s forced labour and compensation for the reasonable value of her services and damage for the inhuman conditions the defendant inflicted upon her.<sup>22</sup>

### ***3. Meaning and use of restitutionary claims in human rights litigation. Emergence of a new notion?***

From the point of view of the pattern of facts and of the claims, the common element in the different categories of litigation consists in the unjust enrichment deriving to non-governmental entities (corporations, banks, insurance companies) by the transfer of assets and by other forms of exploitation of the condition of victims of the Nazi persecutions.<sup>23</sup>

Notwithstanding the constant reference to the need to prevent “unjust enrichment” and to this principle as being common to the different legal systems whose

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Southern District of NY.

20 Consolidated Complaint *passim*; see *In Re Austrian and German Bank Holocaust Litigation*, Master File no. 98 Civ. 3938 (SWK), 80 F. Supp. 2d 164; 2000 US Dist. LEXIS 119, 46 Fed. R. Serv. 3d (Callaghan) 30, 5.

21 The amended complaint also sets out other causes of action including breach of insurance policies; breach of fiduciary duties; breach of duty to disclose; conversion; bad faith; unjust enrichment; and accounting.

22 See *Iwanowa v. Ford Motor Co.*, US District Court for the District of New Jersey, 67 F. Supp. 2d 424, 1999, 432.

23 B. NEUBORNE, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, 58 *NYU Annual Survey of American Law* 2003, p. 615.

laws could have hypothetically been applicable if the litigation had not been settled out of court, at first sight it may be difficult to identify a correspondence with a single unitary notion of this institute (if one excludes the common ethical, moral and equitable idea which derives from Pomponius's maxim in the Digest and the following doctrinal elaborations on it)<sup>24</sup>.

The fact that different national laws are recalled entails significant difficulties in the articulation of the claims. This is particularly clear in the slave labour cases where reference was made both to the common law – equitable – notions of unjust enrichment and quantum meruit and to the German general clause for unjust enrichment (§ 812 *BGB*); and in the Swiss banks litigation where New York law and jurisprudential precedents and the Swiss code of obligations (§ 62-68 *OR*) are referred to.<sup>25</sup>

These difficulties concern first of all (setting momentarily aside the doctrinal issues on the classification of the action and on its relation to contract or tort) the possible foundation and actionability of the claims. Suffice it to consider for example the issue of burden of proof in an action for unjust enrichment. The requirement that there is proof of a loss or an injury suffered by the plaintiff as a consequence of the enrichment of the defendant is not universally construed, especially as far as the type of loss is concerned. It is for example traditionally required in the romanistic systems such as the French or Italian one, whereas under the American system, given that the defendant was enriched at the plaintiff's expense, it is sufficient the plaintiff lost an expected benefit or that the plaintiff has a superior "moral" claim to the enrichment that the defendant obtained.<sup>26</sup> By its very nature, even where mention to a loss is made, actionability of disgorgement of profits focuses and depends on the unjustified enrichment derived to

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24 D. 50, 17, 206 '*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiores*'.

25 As instances of alternative applicable law, both of which inspired by the common principle of "preventing unjust enrichment as a principle function of justice, along with the enforcement of contract and tort remedies" see Neuborne Memorandum, 14.

26 Restatement of Restitution § 1 (1937); E. SHERWIN, *Reparations and Unjust Enrichment*, 84 *Boston University Law Review* 2004, p. 1448. The construction of the German and Swiss systems distinguishes between enrichment at the plaintiff's expense deriving from voluntary transfers (*Leistungskonditionen*) whose legal basis subsequently cease to exist and unconvenanted benefits arising "otherwise" (mainly benefits arising from unauthorized use of the plaintiff's rights or property). See § 812 par.1 *BGB* and art. 62 Swiss *OR*.

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the defendant, whereas, on the contrary a profit derived as a consequence of a tortious act will not be relevant if no injury has occurred.

Another significant issue is the concurrence with other actions (tort and contract) and the possibility of cumulating claims.<sup>27</sup> There is no clear position concerning the possibility of basing claims on concurring actions. On the contrary, these actions all denote an intersection of at least two types of remedies.

Indeed, most of the claims are based on both tort and unjust enrichment (the basis of tort is also necessary given the foundation for jurisdiction in US courts lies with the Alien Tort Claims Act<sup>x</sup>)<sup>28</sup>. Torts also serve as a direct connection to international law claims.<sup>29</sup> Concurrence with contract seems to be excluded (if one for example reads the requisites for actions for quantum meruit under US law quoted in one of the cases at issue)<sup>30</sup>.

These cases often also intersect with typical proprietary remedies (*i.e.*, conver-

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27 The difference becomes relevant as for the type and entity of compensation that can be recognized; as for the articulation of the burden of proof; and as far as limitation periods are concerned: see *i.e.*, the (often quoted but also contested) decision of the German Supreme Court *Bartl v. Heinkel*, BGHZ 48, 125 (1967) (F.R.G.) considering the two-year limitation period for wages (§ 196(1)(9) *BGB*) as applicable to claims for compensation for rendered slave labour (and not the longer limitation periods for tort or for unjust enrichment under § 195 *BGB* and § 852 *BGB*).

28 D. 50, 17, 206 '*Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletioerem*'.

29 Torts provide the substantive law basis of crimes committed according to the scheme of inclusion of most international human right violation instances within a corresponding tort at common law (*i.e.*, genocide, torture, rape, correspond to species within torts of battery, assault, intentional infliction of emotional distress, wrongful death; forced labour comes within the tort of false imprisonment and so forth). See Neuborne Memorandum, 59 ff.; see also A. J. SEBOK, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 *Brooklyn J. Int'l L. (Brooklyn Journal of International Law)* 2008, p. 886; and see the argument by Judge Greenaway in dismissing the claim in the *Iwanowa* case where the court found that the Alien Tort Claims Act in addition to establishing subject matter jurisdiction, also creates a private right of action for violations of customary international law torts (*Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d, 441-443).

30 "A *quantum meruit* recovery is available under principles of restitution where recovery under contract is not possible." "A plaintiff seeking to recover the reasonable value of her services on a *quantum meruit* theory under Delaware law [invoked in the *Iwanowa* case] must establish that (1) she performed such services with an expectation that the recipient of the benefit would pay for them and (2) absent defendant's promise to pay, the plaintiff performed the services under circumstances which should have put the recipient of the benefit on notice that she (plaintiff) expected to be paid for her services." "Similarly, Michigan courts have held that a plaintiff may recover under a quantum meruit theory where the defendant accepts beneficial services from the plaintiff for which compensation is customarily made and naturally anticipated." See *Iwanowa v. Ford Motor Co.*, at 471-472

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sion), especially in the common law. Even the use of the constructive trust (to describe a proprietary claim which operates to disgorge a profit wrongfully made in some instances as a fiction for the custody of money as a result of an illegal activity) does not always clarify the boundary between restitution law and proprietary law, as it often remains unclear whether the liability to account in the manner of a constructive trustee is a proprietary or personal response of liability.<sup>31</sup> This difficulty is not only found in the common law; may it suffice to consider some of the issues in German law regarding the relation between restitution under the law of enrichment and the liability of the unjustified possessor.<sup>32</sup>

Furthermore and closely related: given that several of the claims proposed base the action on more than one institute of substantive law, an open issue remains whether this concurrence or cumul of actions may contrast for example with the element of subsidiarity which characterizes actions for unjust enrichment in some legal systems (such as France and Italy for example) or with the notion of waiver of tort (typical once again of the common law traditions) which would seem to exclude a cumul of claims in tort and restitution for the same case in which unjust enrichment derived to the defendant by his own wrongful conduct.

A closer examination of the references to “unjust enrichment” in the human rights litigation thus seems to suggest that what is being recalled is not the technical notion of unjust enrichment disciplined by national laws, but rather a trans-national and general action, which is closer to tort than it is to contract (given the tie with instances of international law and war crimes). Only under such a perspective, can the difficulties in reconciling differences in national rules on restitutionary claims be at least in part surmounted.

The issue thus becomes, where and how is the reference to “unjust enrichment”

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31 See J. J. EDELMAN, *Restitutionary and Disgorging Proprietary Awards for Wrongs*, in ELTJO J. H. SCHRAGE (Ed.), *Unjust Enrichment and the Law of Contract*, (The Hague, London, New York: Kluwer Law International, 2001), p. 205.

32 With consequences as far as “severeness” of liability and effects on defendants in good faith are concerned. See M. J. SCHERMAIER, *Current Questions in the German Law of Enrichment*, in ELTJO J. H. SCHRAGE (Ed.), *Unjust Enrichment and the Law of Contract*, p. 118 ff.

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relevant and what is its significance? One of the most meaningful aspects of basing claims on unjust enrichment lies in the attempt to justify civil claims for redress deriving from international (criminal) law violations. It serves as the medium of connection between these two areas of law. If restitution and unjust enrichment have traditionally been classified in some systems as “*quasi contracts*,” one could consider them here as “*quasi-torts*” or better still as “*quasi crimes*.”

Indeed, the claims in the different categories of Holocaust litigation also made a further case: the alleged violation of customary international law by private entities as a result of the knowing cooperation with governments in carrying out certain state policies. The consequent claim under civil law was for the disgorgement of the unjustly earned profits made by those private entities (once again construed as constructive trustees of the victims’ assets).<sup>33</sup>

The last type of claim becomes particularly relevant as to whether the Holocaust litigation possibly set a “model” for human rights litigation. In the immediate aftermath of (or still pending) the Holocaust litigation, different class actions were initiated claiming restitution for unjust profits derived from the commission of war crimes (such as the American Prisoners of War in Japan litigation)<sup>34</sup>; from unpaid insurance claims to heirs of victims of the Armenian genocide;<sup>35</sup> from issues related to American slavery reparations;<sup>36</sup> or in cases against corporations for aiding and abetting in the commission of human rights violations.<sup>37</sup> Most of these cases have either been settled out of court

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33 See Neuborne Memorandum, 30 ff.

34 See *Levenberg v. Nippon Sharyo Ltd.* no. C-99-1554 (N.D. filed March 16, 1999) and *Jackfert v. Kawasaki Heavy Industries Ltd.*, no. CIV 99 1019 (D.N.M. filed Sept. 13, 1999) later consolidated *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000).

35 *Marootinan v. New York Life Ins. Co.* C.D. Cal. Filed Jan. 17, 2000. The claim was settled out of court.

36 *Cato v. United States* (70 F. 3d 1103 (9<sup>th</sup> Cir. 1995)); *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. III. 2004). The latter action was dismissed on the basis of limitation and lack of standing of the plaintiffs. Under the political question doctrine however, the Court referred the issue to Congress (given the lack of a sufficient legal basis for judicial redress) and several legislative proposals ensued (see “The Commission to Study Reparations Proposals for African Americans Act” H.R. 40, 105<sup>th</sup> Cong., 1997).

37 See *i.e.*, two cases against oil companies (both settled out of court): *Doe v. Unocal*, 248 F.3d 915, (9<sup>th</sup> Cir. 2001) and *Wiwa v. Royal Dutch Petroleum Co.*, 96 Civ. 8386 (S.D.N.Y.) 226 F. 3d 88 (2d Cir. 2000); see also *Beanal v. Freeport-McMoran, Inc.*, 197 F 3d 161 (5<sup>th</sup> Cir. 1999) and *Hereros ex re. Riruako v. Deutsche Afrika-Linien Gmbh.*

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or dismissed on different grounds.<sup>38</sup> While this therefore leaves the issue of the practicability of the model of this type of litigation partly unanswered, it further confirms however that undoubtedly the role played by political intervention in the Holocaust litigation should not be underestimated as one of the determining factors for its outcome. Indeed most of the settlement agreements also contained provisions barring all future similar claims against national classes of defendants, with the direct obligation of intervention in favour of defendants assumed by plaintiffs' Governments. It may also be questioned whether these cases represent a truly "legal civil remedy" model for the violation of human rights.

#### **4. *The quiet appeal of private law remedies***

An issue which several observers have raised concerns the question whether the choice of basing claims for reparation of historical wrongs and human rights violation on tort or on restitution is an appropriate one. Doubts have been expressed for example on the suitability of the instrument in relation to the objectives of the plaintiffs; on the moral and ethical implications surrounding cash payments; on the "efficiency" of these tools for the scope of obtaining reparation.<sup>39</sup>

It has been highlighted for example that cash payments under tort or other compensation schemes for historical wrongs are hardly in line with the typical functions

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*Co.*, 232 Fed Appx. 90 (3d Cir. 2007) (dismissed insufficient foundation of the action). This litigation too was brought under the Alien Tort Claims Act.

38 It has been noted that success of future similar claims for disgorgement of profits (for example the claims on behalf of descendants of American slaves for the unjust enrichment derived to slave-owners and corporations from centuries of exploitation) requires specific conditions such as "1. identification of massive wealth transfers to identifiable recipients that unjustly enriched the recipients; 2. a demonstration that the wealth transfers were unlawful; 3. the ability to reverse the transfers by requiring restitution of unjustly acquired profits to identifiable victims." B. NEUBORNE, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement*, at 619. This however may not be enough, especially given the difficulties deriving from justiciability issues.

39 See *ex multiis* for example D. SATZ, 'Countering the Wrongs of the Past: the Role of Compensation' in M. S. WILLIAMS, R. NAGY, J. ELSTER (Eds.), *Transitional Justice, Nomos*, Vol. LI, 2012, p. 129; A. VERMEULE, *Reparations as Rough Justice*, in M. S. WILLIAMS, R. NAGY, J. ELSTER (Eds.), *Transitional Justice, Nomos*, Vol. LI, 2012, p. 151; E. POSNER, A. VERMEULE, *Reparations for Slavery and Other Historical Injustices*, in 103 *Columbia Law Review* 2003, p. 689.

of disincentive, redistribution and sanction of tort law; that they are problematic from the welfarist approach of compensation; that there is an incommensurability between the monetary liquidation and the entity of the wrongs suffered as a result of the injustice; that there is a mismatch between the perpetrators of the wrongs and the defendants (often representatives of the former, sometimes even third parties) and between the plaintiffs and the injured parties.

As attempts to achieve what has been defined as “rough justice,” these schemes of compensation would find a justification as second-best, only insofar as they are better than no justice at all;<sup>40</sup> a critique that could be extended *mutatis mutandis* to other instances of compensation under tort law.

Strictly speaking, from the point of view of the plaintiffs and the *quantum* that is recoverable, actions based on tort could probably lead to better results as far as compensation is concerned when compared to actions based on unjust enrichment (restitution aims at disgorging a profit, compensation also covers damages arising from an injury). However reference to the “unjustified” profit is germane to the type of litigation at issue: claims for the reparation of historical wrongs (the Holocaust litigation but also the American-slavery litigation) are characterized by a strong “moral” (and political) component, in which on the one hand the concrete difficulties posed by issues of limitation, indirect liability and justiciability, make a case in contract or tort quite problematic; but on the other hand, the urge to “seek justice for wrongs” (also felt by the public opinion who is no less an actor in this litigation than politics), suggests basing claims on the more or less commonly accepted notion of a restitutionary action.

The legal device of restitution is by definition and historically “residual.” It is also relatively broad (whether or not it was born as a single specific action or whether it later developed into a general remedy) and thus particularly appropriate for claims that cannot be classified according to definite legal parameters.

Under this perspective, a claim in tort or in contract has sharper boundaries, and the legal problems which arise with the notion of repairing historical injustices (a significant portion of so-called human rights litigation deals with historical wrongs) can

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40 A. VERMUELE, *Reparations as Rough Justice*, at 151-152.

be circumnavigated by recurring to the general notion of restitution of what was unjustly gained. The inherently moral dimension of this type of remedy seems appropriate for “punishing of recognized wrongdoings.”

Furthermore the use of unjust enrichment in modern claims against corporations may find its justification in the looser (or more flexible) boundaries offered by restitution as compared to claims for compensation in contract or tort, especially since the claims based on aiding and abetting do not necessarily imply the commission of an (intentional) injury – one of the elements of tort –, it being sufficient that the defendant has somehow benefited from the enrichment derived to it to the detriment of the plaintiff. Restitution thus allows a wider range of instances to be accommodated within the framework of the claims.

The relatively residual and comparatively new (in the US legal system) entry of the institute of restitution within the array of tools that claimants can dispose of has also another competitive advantage over the use of contract and tort: there has been minor doctrinal (and jurisprudential) elaboration around the notion and its use.<sup>41</sup>

However, these relative advantages in framing a claim in restitution suffer from the inherent element of vagueness and the difficulty in determining the exact *quantum* of the disgorgement, especially in view of the fact that more often than not human rights litigation involve class actions (with numerous plaintiffs whose “detriment” may not always be easily and uniformly classified); refer to facts that are distant in time (thus posing issues of justiciability in relation to direct standing of plaintiffs but also liability of current shareholders for facts alleged to behaviour of longstanding corporations,<sup>42</sup> and issues of limitation); and finally suffer the danger that if restitution is the “last action” available, defendants can somewhat more easily make the argument that there is a need for a moral reparation (preferably out of court) and not for a judgment (with

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41 See E. SHERWIN, *Reparations and Unjust Enrichment*, at 1448.

42 In case of successful unjust enrichment claims against corporations, shareholders would be the ones to sustain the financial burden of the award, even though it may be both logically and procedurally difficult to demonstrate that current shareholders have “unjustly” benefited or profited from a historical wrong. (See E. A. POSNER, A. VERMEULE, *Reparations for slavery and other historical injustices*, at 704-705; E. SHERWIN, *Reparations and Unjust Enrichment*, at 1453.

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the clear implication that the former is more discretionary and of minor entity).

Thus, given that often the notion of “unjust enrichment” invoked in these cases is supra-national and *sui generis*; given that it serves as a medium for the recognition of new forms of international wrongs, setting itself at a crossroad between torts and crimes; and finally given that the use of this notion can be a double-edged sword, it remains to be ascertained whether the referral to this notion is the most appropriate – and especially – the most viable for this type of litigation. This will be possible only if and when a significant amount of decided cases will allow meaningful observations.

### ***5. A few conclusive remarks***

The use of private law as an instrument of restorative justice, as highlighted above, is neither a new nor an unprecedented phenomenon. Notwithstanding a meaningful development of litigation in front of courts worldwide, giving rise to some important judgements (but significantly more numerous extra-judicial outcomes), there are both theoretical underpinnings left unanswered and substantive and procedural issues still unresolved.

The former concern the role and appropriateness, both from ethical, moral, and systemic points of view, of private law remedies as instruments of reparation for historical wrongs. The latter concern the difficulties in “fitting” private law institutes to human right infringements without distorting neither the substantive rules nor the procedural ones. Private law remedies tend to have a “quiet appeal” in this type of litigation; it should however be kept in mind that by its very nature, restorative justice transcends not only the boundaries between different branches of the law, but also between law and other forms of reparation. As a consequence, any reflection on the most appropriate or effective approach towards reparation of historical wrongs and human rights violations needs to take into account both this interaction, and the varying attitude that politics, courts and the public opinion may have towards them in any given moment.