Reparations for international crimes and the development of a civil dimension of international criminal justice

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CHAPTER 5: THE ROLE OF NATIONAL COURTS IN THE ADJUDICATION OF CIVIL REDRESS FOR INTERNATIONAL CRIMES

There can be a variety of responses to deal with international crimes. International criminal justice, in particular, stands on two pillars: it has an international dimension, performed by international courts, coupled by administrative mechanisms, which were the object of previous chapters. It also has a national dimension, fulfilled by domestic courts which enforce international law[482].

This study already addressed two legal frameworks for reparations for international crimes and in this chapter, it focuses on the third framework concerning the role of national courts in relation to reparations for victims of international crimes. In particular, this chapter attempts to address the following research questions:

- What role should domestic courts play in relation to reparations for victims of international crimes?
- Are domestic courts better equipped to deal with reparations for international crimes?
- Can the doctrine of universal jurisdiction include a civil dimension?

The present chapter thus addresses the role of domestic courts in the adjudication and award of reparations through case studies, including a discussion of the principle of universal civil jurisdiction. In this regard, it advances the broader research goal of this thesis, that is, an inquiry into the civil dimension of international criminal justice. Underlying this chapter is the question of the implications of adding a civil dimension in domestic litigation in relation to international crimes.

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[482] The present chapter will focus on the question of the role of domestic courts in the award of reparation for victims of international crimes. In relation to domestic prosecutions of international crimes, many studies have addressed this question in detail. See e.g.: Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, 2005; Damien Vandermeersch, "Prosecuting International Crimes in Belgium", *Journal of International Criminal Justice* 3 (2005), pp. 400-421; Anthony D'Amato, "National Prosecution for International Crimes", in *International Criminal Law*, Cherif Bassiouni (ed.), Nijhoff, 2008.

As it has been stated, bringing civil claims before domestic courts offers a potential for addressing international wrongs[483], including international crimes. This study focuses on reparations for international crimes claimed directly from individuals and examines how different mechanisms co-exist for providing civil redress (reparations) for victims of international crimes. In the present chapter, I dwell upon the possibilities and challenges for national courts in providing an avenue for civil claims from victims of international crimes. In doing so, this chapter keeps in line with this study's paradigm – individuals claiming a right to reparation from individual perpetrators – thus, it focuses on transnational tort litigation of individual versus individual, leaving out cases against the State and those against corporations.

In this sense, this chapter launches into two levels of inquiries: the first one, by analysing how (selected) different legal traditions treat the criminal (prosecution and punishment)/ civil (reparation) dichotomy, especially when it pertains to international crimes. This first dimension will highlight the possibilities of claiming civil redress for international crimes on the basis of the structure of the legal systems in question, and as an adjunct to a criminal prosecution. This chapter also briefly addresses how recent developments in international criminal law at the international level may work as a catalyst for civil claims in national courts, for example, by the implementation in national legislation of the provisions of the Rome Statute, including provisions on reparations. In this respect, this chapter examines how international criminal law at the international level can inform and influence domestic civil litigation in respect of international crimes.

This chapter then turns to a case study referring to civil claims for international crimes committed in Bosnia and Herzegovina during the war in the former Yugoslavia, for which an international criminal tribunal was established but which did not deal with claims for reparation. In this respect, the challenges of bringing civil claims for international crimes before domestic courts will also be examined which will shed light on the road ahead.

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[483] Jaykumar A. Menon, "The Low Road: Promoting Civil Redress for International Wrongs", in *Realizing Utopia: The Future of International Law*, Antonio Cassese, Oxford University Press, 2012, chapter 47.

In the last part of this chapter, I look at the doctrine of universal jurisdiction. I consider its scope, definition and whether it encompasses a dimension for reparation (i.e. a civil dimension), in addition to its criminal dimension. Starting from the *criminal* dimension of universal jurisdiction in relation to the prosecution of international crimes, I inquire whether universal jurisdiction can encompass a *civil* dimension to provide an avenue for victims to seek reparation from individual perpetrators of international crimes[484]. As well, I explore the implications of adding a civil dimension to universal jurisdiction.

Questions concerning the right to reparation under international law and State responsibility in relation to reparations for international crimes[485] were treated in a previous part of the present study. In this section, I dwell upon whether domestic courts can rely on the doctrine of universal jurisdiction to entertain victims' claims for reparation from individual perpetrators of international crimes. As explained[486], domestic mechanisms relating to transitional justice, such as truth and reconciliation commissions, as well as well domestic claims processes involving the State are also outside the scope of the present study.

In this analysis, it is pondered whether there should be an increased role for national courts concerning reparations for victims of international crimes and whether progress in international criminal law at the international level could work as a catalyst for national claims for reparation. This chapter nevertheless also highlights the challenges that lie ahead and ponder about ways to increase the role of national courts in the quest for reparation for international crimes.

It is important to focus the present chapter in the broader theme of this study. While reparations for international crimes often involve questions of State responsibility, such issues are outside the scope of the present study, which focuses solely on individual responsibility and reparations from an international criminal law perspective, leaving out

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[484] In this chapter, as throughout the entire study, I use the term "international crimes" to include the core crimes of the Rome Statute as discussed in the Introduction of the present study.

[485] See chapters I and II of the present study.

[486] See Introduction.

other related questions of State responsibility for international crimes[487]. The present analysis also leaves out cases dealing with the responsibility or liability of corporations.

I. DOMESTIC APPROACHES TO CRIMINAL PROSECUTIONS AND CLAIMS FOR REPARATION WITHIN CRIMINAL LAW PROCEEDINGS

This chapter starts with a brief overview of two models of adjudication of civil claims: one model where civil claims are completely dissociated from criminal prosecutions and processes and another where civil claims can be brought within the criminal process. The goal of this overview is to demonstrate how domestic courts may approach a claim for civil redress. This section is purely an overview, with limited selected examples of different jurisdictions purely to illustrate the point rather than provide an exhaustive or detailed discussion of this topic[488].

The concept of victim participation and the award of civil reparation in criminal proceedings[489] is common ground in many States[490]. In saying this, there is a difference within States in Europe depending on whether they come from a civil Germanic background, such as Austria and Germany, a Nordic background, such as Denmark and Norway, a civil Romanic background, such as France, Italy and Spain, or even a mixed background, such as the case of Greece. This being said, each of these systems grants

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[487] For a review of this question and related issues, see generally: Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law* 96 (2002), pp. 833-856; André Nollkaemper, "Concurrence between Individual Responsibility and State Responsibility in International Law", *International and Comparative Law Quarterly* 52 (2003), pp. 615-640; Lorna McGregor, "State Immunity and Jus Cogens", *The International and Comparative Law Quarterly* 55 (2006), pp. 437-445.

[488] For a detailed discussion see Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Productions, 2000.

[489] However, as Judge Pikis has indicated, no national system has a similar provision to article 68(3) of the Rome Statute concerning victims' participatory rights within ICC proceedings, see *Prosecutor* v. *Thomas Lubanga Dyilo*, "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the Directions and Decision of the Appeals Chamber", 2 February 2007, ICC-01/04-01/06-925, Separate opinion of Judge Pikis, p. 16.

[490] See Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Productions, 2000.

victims participatory rights as a "partie civile"[491]. Prticipation in this section is discussed in connection with the ability to claim reparations.

Participation in criminal proceedings can vary from playing the role of a civil claimant, which allows the civil claim of victims to be integrated in the criminal proceedings[492], to acting as a private prosecutor[493]. Another trait of the civil law system is the "investigative judges", who hold investigation powers, which normally lie with the Prosecution; however, this characteristic is slowly disappearing[494]. Given the differences between various legal traditions this study will proceed to analyse some selected national criminal jurisdictions.

The participation of victims in criminal proceedings raises the possibility of claims for reparation from victims within the same criminal proceedings. Domestic proceedings for reparation may take dramatically different forms, depending on whether victims are permitted to participate in criminal proceedings and bring claims for reparation within the same proceedings, or whether claims for reparation are completely dissociated and separate from criminal prosecution against the accused.

Depending on the legal system's approach to dealing with civil claims of victims of crimes, the role of domestic courts, prosecutors and victims will be different in shaping the path to reparation. Domestic legal systems are largely influenced by the legal tradition to which they belong. In the next section, I shall review two legal systems (Romano-Germanic and common law systems), not with the purpose of exhaustive analysis of the

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[491] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court", *St. Louis University Public Law Review* 26 (2007), p. 3. In regards to the concept of "partie civile", see in France articles 85 and 87 of the "Code de Procédure Pénale", in Belgium the "burgerlijke partij", articles 63, 66 and 67 of the Belgian Criminal Procedure Code "Wetboek van Strafvordering", and in Austria the "Privatbeteiligter", para. 47 of the Austrian Criminal Procedure Code "Strafprozessordnung 7975". In Germany, victims do not act as a "partie civile" but rather as auxiliary prosecutor, see paras. 395 to 402 of the German Criminal Procedure Code "Strafprozessordnung".

[492] See Mugambi Jouet, *ibid.*, p. 39.

[493] See Mugambi Jouet, *ibid.*, p. 3, where the author submits that in many continental European systems victims can prosecute criminals of felonies without the need of a public prosecutor.

[494] In regards to the role of investigative judges in national systems, see Jerome de Hemptinne, "The Creation of Investigating Chambers at the International Criminal Court", *Journal of International Criminal Justice* 5 (2007), p. 402.

legal traditions that exist, but rather to compare and contrast different countries' approaches to victims' claims for reparation, and to survey whether victims in certain instances may claim reparations within criminal proceedings. For this purpose, I first provide a general overview of two main legal systems and discuss whether victims may claim reparations within criminal proceedings or whether civil proceedings are the only avenue available to victims.

1. Romano-Germanic Systems

In France[495], victims may hold different roles within the criminal justice system. Victims may act as a "partie civile" (civil claimant), a complainant or private prosecutor[496]. A victim who reports a crime ("complainant" role) will not only inform the public authorities of the crime, but will also initiate criminal proceedings if they have not been started by the public prosecution[497]. In this sense, victims' rights are broader than the rights provided in the ICC system, since they can participate in proceedings without further conditions and begin criminal proceedings in the event that the prosecution has not yet done so. In certain cases, victims can also act as private prosecutors, which enable them to summon the accused to appear in court and start the prosecution[498]. However, once the prosecution has been initiated, the public prosecutor has to continue with the proceedings since it is the duty of the prosecution to carry on public prosecution[499]. As far as participation as a civil claimant goes, it concerns the right of victims to demand compensation in a criminal court of justice, in addition to his/her right in a civil court[500]. That being said, there are some conditions for the exercise of this right which are set out in section 2 of the French code of criminal procedure.

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[495] See generally, Mireille Delmas-Marty & J.R. Spencer, *European Criminal Proceedings*, Cambridge University Press, 2002, pp. 218-291.

[496] Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*,Wolf Legal Productions, 2000, p. 316.

[497] *Ibid.*, p. 317. Here, I will not analyse the case of certain crimes such as defamation in which filing a complaint is an essential condition for a public action, see for instance section 48 of the French Penal Code, cited in Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Productions, 2000, p. 318.

[498] See section 2 French Code of Criminal Procedure.

[499] Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems*, Wolf Legal Productions, 2000, p. 321.

[500] *Ibid.*, p. 318.

In Brazil, victims may act as assistants to the prosecutor throughout the criminal proceedings and no special application needs to be filed for them to be granted the status of victims in criminal proceedings[501]. Similarly, in Senegal, according to Articles 2 and 3 of the Code of Criminal Procedure also recognize the possibility of raising civil claims in criminal proceedings[502].

To sum up, these selected examples demonstrate that victims from countries which partake in a Romano-Germanic legal system are granted extensive participatory rights which are broader than the system established in the ICC. In this sense, if compared to Romano-Germanic legal systems, a broad interpretation of participatory rights within the ICC framework will be compatible. However, it is important to note that the large scope of participation in national systems is based on different provisions than those of the Rome Statute which confine participatory rights to a judge-oriented system[503]. Such extensive participatory rights cannot be convened in the absence of a supporting legal text.

2. Common law systems

In the common law system, victims are not granted participatory rights in criminal proceedings[504]. In general, victims only have the right to participate in the sentencing part of the proceedings. In Canada, victims are given a voice during sentencing where they can express their opinion as to the sentence the judge should give the convicted person[505]. In these cases, the judge is not obliged to follow victims' suggestions. Likewise, in the American legal system, most States grant victims a participatory right at the sentencing

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[501] See in general: Flaviane de Magalhães Barros Pellegrini, "Os direitos das vítimas de crimes no Estado Democrático de Direito – uma análise do Projeto de Lei nº 269/2003 – Senado Federal". The author suggests in this article that victims are lacking a few essential rights in the Brazilian criminal law system, such as the right to be informed of the initiation of proceedings, and also mentions the difficulty to effectively obtain reparation.

[502] For a discussion of Senegal and other countries, see Amnesty International, Annual Report 2012, "Universal Jurisdiction: the Scope of Universal Civil Jurisdiction", available at: http://documents.law.yale.edu/sites/default/files/Amnesty%20International%20-%20Universal%20Jurisdiction_%20The%20scope%20of%20universal%20civil%20jurisdiction%20_%20Amnesty%20International.pdf

[503] Article 68(3) of the Rome Statute states "where the Court considers it appropriate".

[504] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court", *St. Louis University Public Law Review* 26 (2007), p. 4.

[505] See section 722 of the Canadian Criminal Code.

stage[506]. Private prosecutions are banned both in federal cases, as well as in every State[507]. In England and Wales, victims are granted no participatory rights other than that of initiating private prosecutions[508]. However, it is worth noting that in this system, victims are not granted any special status since any person can initiate a private prosecution, including non- victims[509].

This brief overview of the role and rights of victims in different domestic legal systems provides the backdrop for a discussion of specific case studies in the following section, and provides a context in which the initiatives in each case study came about. It also provides the fabric in which proposals for the role of domestic courts in adjudication of reparation claims for international crimes can develop.

II. CASE STUDY: FILLING IN THE REPARATION GAP IN THE FORMER YUGOSLAVIA

This study now turns to an analysis of a case-study through domestic mechanisms in the aftermath of the international crimes committed in the Balkans war, particularly in Bosnia and Herzegovina, alongside the international criminal prosecutions at the ICTY. This case study was selected on the basis of its potential to illustrate how domestic mechanisms for reparation can fill in the gaps left by international criminal tribunals pertaining to reparations. In this perspective, I shall examine how the proceedings at the international level were not concerned with reparations for victims of the crimes under their jurisdiction, and to what extent domestic mechanisms have filled in the gaps. In this section, domestic mechanisms, such as court proceedings in Bosnia and Herzegovina, as well as in foreign States will be examined.

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[506] Douglas E. Beloof, *Victims in Criminal Procedure*, Carolina Academic Press, 1998.

[507] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court", *St. Louis University Public Law Review* 26 (2007), p. 5.

[508] See *inter alia*, *Queen's Bench Division R (on the application of Gladstone Pic) v Manchester City Magistrates* [2005] All.E.R. 56 (All England Law Reports); Divisional Court, *Jones v. Whalley* [2006] 2 Criminal Law Review 67 on appeal to the House of Lords, *Jones v. Whalley* [2006] 4 All.E.R 113; Cyprus: Supreme Court, *Ttofinis v. Theochandes* (1983) 2 Cyprus Law Reports 363.

[509] Mugambi Jouet, "Reconciling the Conflicting Rights of Victims and Defendants at the International Criminal Court", *St. Louis University Public Law Review* 26 (2007), p. 5.

The second dimension is forward-looking and analyses how international criminal tribunals may inform or influence reparation cases in domestic courts and mechanisms. This second dimension is dealt with at another section of this chapter.

1. The Balkans War: Reparations in Bosnia and Herzegovina[510]

The conflict in the Balkans took many lives and left hundreds of thousands of victims[511]. In additional to outrage and violence, the war was characterised by a campaign of sexual violence crimes[512]. The surviving victims of sexual violence during the war not only deserve reparation but also *need* reparation to continue to survive with the

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[510] Many pieces in the literature review efforts at the international and national levels concerning reparation for victims of international crimes committed during the Balkan wars. I rely on some accounts in detail in this section of the present chapter, see references *supra.* Other interesting works include: Dino Abazovic, "Reconciliation, Ethopolitics and Religion in Bosnia and Herzegovina", in *Post-Yugoslavia: New Cultural and Political Perspectives*, Dino Abazovic & Mitja Velikonja, Palgrave Macmillan, 2014. Antoine Buyse, *Post Conflict Housing Restitution: The European Human Rights Perspective with a Case Study on Bosnia and Herzegovina*, Intersentia, 2008. Timothy Cornell & Lance Salisbury, "The Importance of Civil Law in the Transition to Peace: Lessons from the Human Rights Chamber for Bosnia and Herzegovina", *Cornell International Law Journal* 35 (2000-2001), pp. 389-426. Lara J. Nettlefield, *Courting Democracy in Bosnia and Herzegovina, The Hague Tribunal's Impact in a Postwar State*, Cambridge University Press, 2010. Linda Popic & Belma Panjeta, *Compensation, Transitional Justice and Conditional International Credit in Bosnia and Herzegovina*, Independent Research Publication, 2010 http://Ibid..justice-report.com/en/file/show//Documents/Publications/Linda_Popic_ENG.pdf . Eric Rosand, "The Right to Compensation in Bosnia: An Unfulfilled Promise and Challenge to International Law", *Cornell Journal of International Law* 33 (2000), pp. 130, 131. Rodri C. Williams, *Post Conflict Property Restitution in Bosnia: Balancing Reparations and Durable Solutions in the Aftermath of Displacement*, TESEV International Symposium on 'Internal Displacement in Turkey and Abroad', 5 December 2006, Istanbul, pp. 10, 11. David Yeager, "The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice", *International Legal Perspectives* 14 (2004).

[511] Concerning official background information of the conflict see the ICTY website: http://Ibid..icty.org/sid/322

[512] Concerning studies of sexual violence during the war, see e.g. Kelly D. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status", *American Journal of International Law* 93 (1999), pp. 97-123; Colette Donadio, "Gender Based Violence: Justice and Reparation in Bosnia And Herzegovina", *Mediterranean Journal of Social Sciences* 5 (2014), p. 692. Anne-marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence*, Intersentia, 2005; Courtney Ginn, "Ensuring the Effective Prosecution of Sexually Violent Crimes in the Bosnian War Crimes Chamber: Applying Lessons from the ICTY", *Emory International Law Review* 27 (2013). See also reports by Amnesty International concerning sexual violence during the conflict: "Bosnia-Herzegovina: Rape and Sexual Abuse by Armed Forces", 1993; "'Whose Justice?' - The Women of Bosnia and Herzegovina Are Still Waiting", 2009; "Public Statement - Bosnia and Herzegovina: Amnesty International Calls for Justice and Reparation for Survivors of War Crimes of Sexual Violence", 2010; "Old Crimes, Same Suffering: No justice for Survivors of Wartime Rape in North-East Bosnia and Herzegovina", 2012.

consequences of *inter alia* rapes and sexual violence[513]. For example, unwanted pregnancies, internal injuries and mutilations, and contraction of HIV require care, and are lasting marks of the conflict.

As it has been stated, in countries like Bosnia and Herzegovina, devastated by war, and having left numerous victims in the aftermath of the war, the harm caused can never be fully repaired; yet there must be efforts towards reconciliation and lasting peace, and reparation is part of a sense of justice for victims[514].

2. Developments at the international level

The war in Bosnia and Herzegovina witnessed hundreds of thousands of victims of international crimes perpetrated on a massive scale. The war and the crimes committed therein prompted the establishment, by the Security Council acting under its chapter VII powers[515], of the ICTY, as already discussed. Nevertheless, the ICTY has been crucial only in so far as it pertains to criminal accountability for the crimes perpetrated during the war. The question of reparation for victims has not been fully addressed by the Tribunal[516].

Judge Jorda, then President of the Tribunal, expressed his concern about the need to develop mechanisms for the award of reparations to victims[517]. However, as already discussed in a previous chapter[518], the ICTY did not concern itself with the issue of reparations and did not award reparation for victims of the Balkans wars. The matter was

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[513] Concerning sexual violence crimes and rapes during the war in Bosnia, see Helsinki Watch, Human Rights Watch, "War Crimes in Bosnia-Herzegovina", 1992; *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights,* U.N. ESCOR, 49th Sess., Annex, Agenda Item 27, U.N. Doc. E/CN.4/1993/50 (1993); see also Yolanda S. WU, "Genocidal Rape in Bosnia: Redress in United States Courts Under the Alien Tort Claims Act", *UCLA Women's Law Journal*4 (1993).

[514] Manfred Nowak, "Reparation by the Human Rights Chamber for Bosnia and Herzegovina", in *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al., Intersentia, 2005, p. 245.

[515] See chapter 3 of this study for details.

[516] See chapter 3 of this study, and references cited therein.

[517] Cf. UN Doc./S/ 2000/1063, 3 November 2000. See also discussion in Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 484.

[518] See chapter 3 of the present study.

highlighted by the Tribunal as an important one, and according to Rule 106 of the Rules of Procedure and Evidence of the Tribunal, a judgment condemning an accused is final and binding as to the criminal responsibility of the perpetrator concerning claims of compensation, which may be brought by victims in a national court. Thus, compensation for victims was left for national courts and domestic mechanisms.

Another development at the international level pertaining to reparations to victims of the Balkans wars derived at the International Court of Justice in the *Bosnia Genocide case*, concerning claims by Bosnia and Herzegovina against Serbia for reparation for alleged acts of genocide[519]. Although this is a case of State responsibility concerning a claim between States for reparation, it is relevant to refer to it at this juncture in the perspective of attempts at the international level to obtain reparations for international crimes committed during the war.

The ruling of the Court, in sum, was to the effect that Serbia had not committed genocide in Bosnia, nor was it an accomplice. Although the Court did find that Serbia incurred responsibility for its failure to prevent and punish the genocide that occurred in Srebrenica, it was held that the genocide could not be attributed to Serbia. For present purposes, it is important to note the Court's failure to order reparations, which can be explained by its finding that Serbia did not commit the genocide. In this sense, the Court held that compensation would not be an appropriate remedy for Serbia's breach of the obligation to prevent the genocide in Srebrenica:

> "The question is whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide. Such a nexus could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations. However, the Court clearly cannot do so."[520]

In particular, the Court held that:

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[519] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007.

[520] *Ibid.* at para. 462.

> "the Court's findings […] constitute appropriate satisfaction, and that the case is not one in which an order for payment of compensation, or, in respect of the violation referred to in subparagraph (5) [failure to prevent genocide], a direction to provide assurances and guarantees of non-repetition, would be appropriate."[521]

Another case concerning the application of the *Convention on the Prevention and Punishment of the Crime of Genocide*, between Croatia and Serbia, was recently adjudicated by the Court. This case refers to a claim by Croatia, and a counter-claim by Serbia, for reparation for allegations of genocide committed by Serbia in Croatia, and by Croatia in Serbia (during "Operation Storm"). This case provided another missed opportunity for the Court to address questions of reparation. The Court looked at the crimes alleged to have occurred in each of the municipalities put forward by Croatia, and although it found that the *actus reus* of the crime of genocide was proven in many localities addressed by Croatia, it could not find that the specific intent, or the *mens rea*, was proven by either Party in their respective claim and counter-claim. As a consequence of this finding, the claims for reparation were not entertained by the Court[522].

An analysis of the reasoning of the Court concerning the merits of the case, and in particular, the allegations of breaches of the Genocide Convention from a State responsibility perspective are beyond the scope of the present study[523]. The conclusion that can be drawn from the Judgment of the Court is that victims have yet again been left without reparation for international crimes that were committed during the wars in the Balkans[524].

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[521] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007, p. 239.

[522] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Croatia v. Serbia)*, Judgment, 5 February 2015. For an in-depth discussion of the question of reparations, see the Dissenting Opinion of Judge Cançado Trindade.

[523] See in this regard a commentary on the case: Monica Moyo, "ICJ Delivers Decision on the Application of the Genocide Convention", *AJIL International Law in Brief*, 3 February 2015.

[524] See criticisms to the Court's Judgment in respect of its treatment of reparations: Marko Milanović, "State Responsibility for Genocide: A Follow-Up", *European Journal of International Law* 18 (2007), pp. 669-694; see also Christian Tomuschat, "Reparation in Cases of Genocide", *Journal of International Criminal Justice* 5 (2007), pp. 905-912, who states, in regard to the Court's treatment of the question of reparation: "in the human rights field the judges take into account the degree of pain and suffering endured by the victims. It is hard to understand why the

It is important nevertheless to place both cases in their right perspective in terms of the legal framework and the question of reparations claimed by the Applicant States. In both cases, the jurisdictional basis for the Court was the Genocide Convention, and thus, the legal claims of the Applicant States were circumscribed by the legal framework of that Convention. More importantly, they had to prove a breach of the Respondent State, Serbia in both cases, of the Convention. This was an important point since the Court could not adjudicate claims of war crimes or crimes against humanity[525]. Thus, the treatment of the question of reparation, in both cases, was limited by the finding of a breach of an obligation of the Genocide Convention (or otherwise). As already discussed, given the Court's finding in the Bosnia Genocide case of Serbia's failure to prevent genocide, reparation, in the form of compensation, could have been ordered. Instead, the Court limited itself in dealing with the request for reparation in a cursory manner by stating that the Court's finding was appropriate reparation[526].

The other question that needs to be put into perspective is that: if reparations were to be ordered by the Court, would they have reached the victims themselves? The ICJ deals with questions of State responsibility rather than individual criminal responsibility[527], and one of the consequences thereof is that individual victims have no role to play in the proceedings, including for purposes of reparation. Thus, even if the Court were to order reparation in the form of compensation, it is not clear whether individual victims would

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international judge at The Hague dismisses any such considerations, without even addressing the issue. The praetorian statement—one sentence!—that a simple declaration indicating the occurrence of a breach constitutes appropriate satisfaction fails to comply with the duty of any judge to support his or her decision by explicit reasons. This is all the more deplorable since the proceedings in the case had been going on for 14 years. There was ample time to assess every facet of the relevant facts. Instead, the Court rushes though the issue of satisfaction as if it intended to avoid giving it due consideration", p. 911.

[525] There is no universal Convention on Crimes Against Humanity on which the Applicant State could base its claims.

[526] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, 26 February 2007, p. 239.

[527] On the question of State responsibility and individual criminal responsibility relating to the proceedings before the Court and the Court's decision see: Richard J. Goldstone & Rebecca J. Hamilton, "Bosnia v. Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia", *Leiden Journal of International Law* 21 (2008), pp. 95-112.

directly benefit from the compensation award, other than the obvious symbolic meaning to victims of such a decision.

Be that as it may, there have been developments both at the level of domestic Court decisions concerning reparations for the crimes committed in Bosnia and Herzegovina, and also the creation of other domestic mechanisms concerning reparations for international crimes committed therein. I first analyse examples of court proceedings within the Balkans and assess the adjudication of reparation claims, both in criminal and civil proceedings. Then I discuss some examples of cases brought in domestic courts of foreign States (i.e. outside the Balkans) for reparation regarding the crimes committed in the former Yugoslavia. Finally, other domestic mechanisms devised for the purpose of awarding reparation for the international crimes committed during the Balkan conflict are considered.

3. Domestic mechanisms in Bosnia and Herzegovina

In addition to the examples discussed above at the international level concerning crimes committed during the Balkan wars, there have also been initiatives at the domestic level. As Frederiek de Vlaming and Kate Clark have reviewed with great detail, victims have claimed reparation in relation to the war in various different fora[528].

In December 1995, the Dayton Peace Agreement was signed which put a formal end to the conflict. In its Annex 6, the Agreement provided for the establishment of a Commission on Human Rights and a Human Rights Chamber[529]. The Peace Agreement thus provided for two fora for dealing with reparations for victims. Annex 7 established a Commission for Real Property Claims of Displaced Persons and Refugees (CRPC). The study of these two mechanisms demonstrate that they are rather *sui generis* in the sense that they are quasi-international mechanisms set up by a peace agreement.

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[528] Frederiek de Vlaming & Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", in *Narratives of Justice In and Out of the Courtroom*, Zarkov Dubravka & GlasiusMarlies, Springer International Publishing, 2014, pp. 163-185.

[529] See concerning the work of the Human Rights Chamber, David Yeager, "The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice", *International Legal Perspectives* 14 (2004).

According to chapter 2 of Annex 6 of the Dayton Peace Agreement, the Human Rights Chamber was modelled on the basis of the European Court of Human Rights, and was set up to examine allegations of human rights violations of one of the Parties to the Dayton Peace Agreement (that is, the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the *Republika Sprska*)[530]. The Chamber only could hear claims that had occurred after the entry into force of the Dayton Peace Agreement dated 14 December 1995[531].

The Chamber was comprised of 14 members and heard hundreds of cases concerning human rights abuses during the war in Bosnia and Herzegovina. It was set up to be a court of last instance[532]. Naturally, given the number of victims devastated by the conflict, the Chamber had a busy docket and established some practices which aided in dealing with the high volume of cases, such as, for example, relying on ICTY cases to set the historical record of a given case[533]. The Chamber entertained applications from victims or legal entities in relation to allegations of human rights violations by the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the *Republika Sprska.*

The cases decided by the Human Rights Chamber were wide-ranging. In terms of reparations for international crimes committed during the war, it is worth mentioning that the Chamber ordered innovative and varied awards, and had a major impact on victims and society[534]. The Chamber dealt with important issues such as: cases concerning enforced

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[530] Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 486.

[531] *Ibid.*

[532] *Ibid.* at pp. 487-488.

[533] See e.g. *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and Merits, 7 March 2003, where the Human Rights Chamber applied the trial chamber decision of the ICTY in the case of *Prosecutor v. Radislav Krstić*, [IT-98-33-T], to provide the overall context for the events at Srebrenica: "As the *Krstić* judgment contains a comprehensive description of the historical context and underlying facts of the Srebrenica events, established after long adversarial proceedings conducted by a reputable international court, the Chamber will utilise this judgment to set forth the historical context and underlying facts important for a full understanding of the applications considered in the present decision", cited in Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 489.

[534] Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and

disappearances, which was a major problem during the war[535]; repossession of property, and in this regard, the case-law of the Human Rights Chamber played a role in reviewing the laws, policies and practices which related to the return of property[536].

The Commission for Real Property Claims of Refugees and Displaced Persons ("CRPC"), established pursuant to Article XI of Annex 7 of the Dayton Peace Agreement, was a quasi-judicial entity, whose task was described as encompassing "hundreds of thousands of claims in a short period of time" where "the Commission developed a stream-lined approach aimed at maximising efficiency, and its operating procedures bore greater resemblance to a mass arbitration or claims process"[537].

The CRPC faced a few challenges[538] in dealing with property claims, but together with the Human Rights Chamber, provided a domestic mechanism where victims had a forum to claim varied types of reparations[539]. Many of the challenges were connected to the poor state of property books and the impact of this on deciding property claims; the handling of property transfers, and the enforcement of Commission decisions. It is reported that, at the end of the mandate of the Commission, local authorities in Bosnia and Herzegovina had decided approximately 93% of all claims[540]. Although a thorough review

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Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 491.

[535] To the extent that the Chamber deemed that the violation of enforced disappearance was a continuous violation after the entry into force of the Dayton Peace Agreements, such cases were admissible, see: *Palic v. Republika Srpska*, Decision on Admissibility and Merits, 11 January 2001, Case No. CH/99/3196; *Unkovic v. Federation of Bosnia and Herzogovina*, Decision on Admissibility and Merits, 9 November 2001, Case No. CH/99/2150; *Josip, Bozana and Tomislav Matanovic v. the Republika Srpska*, Decision on Admissibility, 13 September 1996, Decision on the Merits, 6 August 1997, Decisions on Admissibility and Merits, March 1996–December 1997,Case No. CH/96/01; *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and the Merits, 7 March 2003, CH/01/8365 et.al,.

[536] Examples of such cases relating to repossession of property: *Rasim Jusufović v. the Republika Srpska*, Decision on Admissibility and Merits, 9 June 2000, Case no. CH/98/698; *Ivica Kevesevic v. the Federation of Bosnia and Herzegovina*, 10 September 1998, Case No. CH/97/46.

[537] Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 502.

[538] *Ibid.*, pp. 507-511.

[539] *Ibid*.

[540] UNDP Access to Justice, 2009-2011, unknown year of publication; Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in*

of the activities of the Commission is outside the scope of this study, it is useful to refer to its activities for purposes of illustrating domestic mechanisms that exist for providing reparation.

In concluding the discussion on domestic mechanisms for reparation set up by the Dayton Peace Agreement in regards to international crimes committed in Bosnia and Herzegovina, it can be said that alongside court proceedings, which I will review next, there can be other forms of domestic mechanisms that deal with the question of reparation for victims.

Interestingly, for the purpose of this study, it can be said that these domestic mechanisms created by the Dayton Peace Agreement served not only to provide an avenue for victims to seek reparation domestically for international crimes they suffered, but also to cross-fertilise and feed other institutions. In this sense, it has been argued that:

> "In many ways, therefore, the Human Rights Chamber was a training ground for the Entities of *Republika Srpska* and the Federation of Bosnia and Herzegovina and State level institutions to bring their laws and practices in line with the European Convention"[541].

In terms of national laws and proceedings in Bosnia and Herzegovina, currently, there does not exist in Bosnia and Herzegovina a governmental reparation system for victims of war crimes committed during the Balkans war: as Popic and Panjeta rightly summarize, in terms of a domestic reparation scheme, Bosnia and Herzegovina count on "a complex array of on-going payments to people who suffered war-related personal harms"[542].

In this light, I turn attention to the activities of Bosnian domestic courts concerning proceedings on reparation. The following discussion of domestic court decisions in Bosnia is relevant both in light of the overall aim of the chapter, (i.e. to assess the current and

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the Making, Carla Ferstman et al., Nijhoff, 2009, p. 511.

[541] Carla Ferstman & Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Carla Ferstman et al., Nijhoff, 2009, p. 511.

[542] Linda Popic & Belma Panjeta, *Compensation, Transitional Justice and Conditional International Credit in Bosnia and Herzegovina*, Independent Research Publication 2010 http://Ibid..justice-report.com/en/file/show//Documents/Publications/Linda_Popic_ENG.pdf .

potential role of national courts concerning reparations for victims of international crimes) and also to address how national courts may fill in the gaps left by international and domestic mechanisms.

4. Proceedings before domestic courts in Bosnia and Herzegovina

In the case study I review in the present chapter concerning reparations for international crimes in Bosnia and Herzegovina, it is important to bear in mind the broader context regarding reparations: at the international level, the ICTY (dealing with international criminal responsibility) and the ICJ (dealing with State responsibility of Serbia) have left victims without any significant form of redress; at the national level, the mechanisms devised by the Dayton Peace Agreement (the Human Rights Chamber and the CRPC discussed above) have halted activities in 2004.

In light of this background, numerous victims initiated suits to try to obtain reparations for international crimes[543]. In this section, this study now focuses on an overview of court cases in Bosnia and Herzegovina.

Most court cases were filed on behalf of collectives of victims, such as former detainees. Usually, the overall goal was to achieve changes from authorities, recognition of harm caused, and a reestablishment of the rule of law. Because they were unsuccessful in obtaining compensation from the governmental authorities, as they did not fall under the scope of the domestic governmental war victims reparation scheme described above, many former detainees filed suits before national courts in Bosnia[544].

[543] For a detailed analysis of case studies, see Frederiek de Vlaming & Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", in *Narratives of Justice In and Out of the Courtroom*, Zarkov Dubravka & GlasiusMarlies, Springer International Publishing, 2014, pp. 179-182.

[544] UNDP, "Access to Justice, Facing the Past and Building Confidence for the Future (2009–2011)", p. 10–12; Selma Boracic, "Bosnia War Victims' Compensation Struggle" (International War and Peace Reporting (IWPR) 3 August 2011, cited in Frederiek de Vlaming & Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", in *Narratives of Justice In and Out of the Courtroom*, Zarkov Dubravka & Glasius Marlies, Springer International Publishing, 2014, p. 182.

In summary, Bosnian courts have awarded compensation in a limited number of cases, were not uniform in terms of the amount, and it is reported that the actual sums of compensation have not yet been paid to victims[545].

While some claims for reparation were brought before national courts in Bosnia and Herzegovina, it is suggested that the gaps left by the international courts (ICTY and ICJ), as well as the scheme set up by the Dayton Peace Accords, could have been ultimately filled by domestic courts. Bosnian courts could have played (and could still play) a more active role in post-war reparation and thus assist in the process of healing and allowing communities to move forward.

In addition to cases brought before national courts and mechanisms in Bosnia and Herzegovina, there were also cases brought before courts of foreign States. These cases are relevant to demonstrate that often victims cannot find relief in the courts of their own countries and thus, end up relying on courts of foreign States by bringing suits based on heads of jurisdiction other than territoriality. This idea, and the associated cases, will be explored in the last section of this chapter, which dwells upon universal civil jurisdiction.

III. FOSTERING CIVIL REDRESS FOR INTERNATIONAL CRIMES IN DOMESTIC COURTS: RATIONALES AND CHALLENGES

The review above of different initiatives and mechanisms that were put in place after the war in Bosnia and Herzegovina demonstrate that there are both advantages and challenges in contouring the award of reparations for international crimes in the context of domestic proceedings, especially in war torn countries. This section addresses the rationales for fostering an active role of domestic courts in the award of reparations for international crimes, as well as some of the obvious challenges of domestic adjudication of such claims. It is not intended to address exhaustively the challenges of bringing reparation claims in domestic courts, but rather to paint a large picture of some important hurdles victims may face in domestic court proceedings.

[545] Denis Dzidic, "Bosnian ex-camp detainees join forces", 2012 *Balkan Transitional Justice*; see also, Selma Boracic, "Bosnia War Victims' Compensation Sttruggle", cited in Frederiek de Vlaming & Kate Clark, *ibid.*, p. 182.

The main rationale for fostering a greater role for domestic courts relates to the scarcity of appropriate international mechanisms and their limited scope of authority (due to limited jurisdiction or temporal limitations). National courts are already in place – i.e. they do not need to be devised to deal specifically with cases of reparations for victims of international crimes; the judicial machinery already exists, and in some form, civil recovery for wrongful conduct already exists under domestic laws, thus sparing the time and resources needed to create a special apparatus to deal with reparation claims.

Another advantage refers to logistical considerations of the conduct of proceedings, for example, in relation to witnesses and collection of evidence. National courts in the areas where international crimes were committed, *in theory*, could be in a privileged position to deal with claims for reparations: they are the closest forum for victims.

Be that as it may, it is not always straight-forward to use national courts for purposes of reparation for international crimes. The first important challenge relates to the lack of political will and functioning judicial institutions capable of entertaining reparation claims. The lack of political will may be connected, among other things, to the involvement of political authorities in the criminal conduct which is object of the proceedings. For example, in the Bosnian case study, victims often requested reparations directly from official authorities, and only once unsuccessful in this enterprise, would they revert to national courts.

As well, in post-war societies, the judicial machinery is often broken, making not only prosecutions but also civil redress difficult to obtain in domestic courts. Without domestic institutions able to address the (international) criminal conduct and the corresponding civil liability, victims are left with no domestic avenue to pursue. Another challenge relates to practical difficulties such as enforcement of decisions when the accused is outside the countries where the crimes were committed or when his/her assets are outside the country.

Thus, while it may initially seem that national courts are the most natural path for reparation, in practice, there are many challenges which victims may face in order to settle their grief domestically.

IV. THE ROAD AHEAD: HOW INTERNATIONAL CRIMINAL LAW AT THE INTERNATIONAL LEVEL CAN INFORM DOMESTIC REPARATION CLAIMS

This chapter has reviewed how different legal systems deal with claims for civil redress in the aftermath of mass violence, and it has discussed a case study emanating from the Balkan wars and the shortcomings in relation to reparations.

Civil claims in national courts may provide an avenue for victims to obtain redress for the crimes they have suffered. Additionally, in cases where bringing a civil suit is not possible or desirable, in many civil law countries, victims may participate in prosecutions as *parties civiles* and seek reparation within the criminal proceedings, if the defendant is convicted[546]. Nevertheless, more needs to be done in this respect for victims to be able to truly benefit from national claims and proceedings in countries torn by war, as discussed previously.

My claim is that international criminal mechanisms should promote the role of national courts and mechanisms regarding civil redress for victims. International criminal justice should not be fragmented in the sense that international and national proceedings and mechanisms operate in a dissociated and parallel manner. I argue that they should feed off each other, and work in conjunction. As Professor Noelkaemper has posited,

> "For one thing, international institutions can develop creative incentives for domestic actors to provide for reparation schemes; for instance, by the prospect that absence of proper domestic reparation will lead to top-down obligations by human rights courts. International institutions also can provide critical knowledge to attorneys, who will have the prime responsibility to raise such issues before the courts and other actors. They also may help to provide financial and material means to actually deliver reparation."[547]

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[546] See in general, Mireille Delmas-Martry & John Spencer, *European Criminal Procedures,* Cambridge University Press, 2002. Victims may also in some cases seek reparation from a civil fund, as for example, in France, where victims of some violent crimes may obtain compensation from the State through a solidarity fund where offenders do not have the necessary funds, Criminal code of France, Arts. 706-3.

[547] André Noelkamper, "The Contribution of International Institutions to Domestic Reparation for International Crimes", *Proceedings of the Annual Meeting (American Society of International Law)* 103 (2009), pp. 203-207.

It is further argued that a way in which international mechanisms can foster domestic initiatives is by means of implementing legislation. For example, States Parties to the ICC, in implementing the ICC Statute, may well institute in their own legislation avenues for victims to seek redress for international crimes. This would counter the practical difficulty experienced by victims who cannot turn to their own domestic courts for civil claims because victims' redress is not available, due to lack of legislation or legal tools, or for lack of political will in relation to reparation requests.

V. UNIVERSAL CIVIL JURISDICTION AS AN ALTERNATIVE AVENUE TO SEEK REDRESS FOR INTERNATIONAL CRIMES?

As already discussed[548], some jurisdictions combine criminal and civil dimensions in the same proceedings, allowing for a claim of reparation to be made in the context of criminal prosecutions[549]. Hence, in such systems, often as *parties civiles,* victims of international crimes may claim reparations within the same proceedings. Alternatively, depending on the intricacies of the precise legal system, victims may also initiate separate civil proceedings for reparation for a crime for which they have been victimised. A challenge can arise, as it has been discussed, when crimes are committed in a jurisdiction where access to the Courts is difficult due to, for example, collapsed justice mechanisms or political undue interferences. Another important challenge to bringing reparation claims in the State where crimes have been committed is the absence of the perpetrator from that jurisdiction. In this manner, by being outside the country where the crimes were committed, or by having assets located outside the territory where the crimes were committed, alleged perpetrators of international crimes may be shielded from legal action concerning reparations.

With this hypothesis in mind, this chapter now explores the possibilities and challenges of reverting to universal jurisdiction as a means to claim reparations from

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[548] See Part I of the present chapter.

[549] See references in chapter V of this study. See also, Marion E. Brienen & Ernestine IBID.. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure*, Wolf Legal Publisher, 2000.

individual perpetrators[550] for international crimes committed outside the jurisdiction of the forum State. In this respect, it enquires whether the rationales that supported the development of the doctrine in its criminal dimension permit its use in suits for civil redress. What is the current state of international law in this area? In this respect, I explore whether universal civil jurisdiction could provide an alternative means for victims to seek reparations from perpetrators of international crimes by countering the limitations of national courts operating under territorial jurisdiction.

In this light, this section proceeds as follows: first, it discusses the definition of the doctrine of universal jurisdiction; then it examines whether under the current state of international law, a civil dimension is permitted; the scope of this dimension – whether civil claims are connected with criminal trials or are completely separate civil proceedings– and how universal civil jurisdiction should develop. In this perspective, the discussion of universal civil jurisdiction takes into account new developments in the field and examines whether universal jurisdiction may assist in establishing new possibilities for reparation claims for international crimes in national courts.

1. The doctrine of universal criminal jurisdiction: definition, genesis and rationales

In a time of global concern about impunity for grave human rights atrocities that amount to international crimes[551], universal criminal jurisdiction has received much

[550] As already explained, procedures to obtain reparation from States are largely outside the scope of the present study. In any event, the examination of universal jurisdiction for claims of reparation does not concern claims against States.

[551] In recent years, many authors, governments and non-governmental organizations have expressed growing concern about human rights violations that happen within borders and across frontiers. The concern seems to be focusing around the idea of a need to end impunity and to achieve justice. Especially in an era where 'never again' is not a mirror image of reality when it comes to genocide and crimes against humanity, great efforts have been deployed to make the case for expanding national jurisdiction to prosecute serious human rights offenses. In the Annex to the question of the Impunity of Perpetrators of Human Rights Violations (civil and political), revised final report prepared by Mr. Joinet, impunity is "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to make reparation to their victims." *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.

scholarly attention[552]. The exercise of criminal jurisdiction over non-nationals is by no means a new phenomenon[553], yet in the past few decades, discussions over the doctrine have re-emerged[554].

The exercise of jurisdiction is generally limited by dictates of the sovereign equality of States and the principle of non-interference[555]. International law generally requires some connection or link for the exercise of jurisdiction[556]. Such link is often found in territory[557],

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[552] In the past decades, scholarly literature and a great number of human rights defenders dedicated attention to the topic of universal jurisdiction. Some of the prominent efforts to describe the theory and practice of universal jurisdiction in modern international law: Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press, 2005; Stephen Macedo, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2003; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, 2003, (in this study, the author not only addresses a comprehensive analysis of universal jurisdiction in international law but also provides an insightful account for the approach of national legal systems to universal jurisdiction). Amongst the non-governmental efforts to promote universal jurisdiction for human rights atrocities, some studies have proved insightful in the description and analysis of the principle: Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, (September 2001), AI Index: IOR 53/002/2001 and Amnesty International, *Universal Jurisdiction: 14 Principles on Effective Exercise of Universal Jurisdiction* (1999); International Council on Human Rights Policy, *Hard Cases: Bringing Human Rights Violators to Justice Abroad- A Guide to Universal Jurisdiction*, (1999); Redress, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide* (1999); International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, London Conference (2000).

[553] Universal jurisdiction was the subject of various studies in the beginning of the past century: see e.g. IBID.. Eric Beckett, "Criminal Jurisdiction over Foreigners", *British Yearbook of International Law* 8 (1927). Universal jurisdiction was originally used as a means to prosecute piracy and slave trade.

[554] See *e.g.*, Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (2001). Scholarly collective initiatives have also created materials concerning universal jurisdiction: *cf.* TMC Asser Institute for International Law, *Universal Jurisdiction in Theory and Practice*; Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction*.

[555] See Donald Donovan & Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction", *American Journal of International Law* 100 (2006), p. 142.

[556] *Ibid.*, pp. 142-143.

[557] This principle stands for the proposition that acts committed within the limits of a State are subject to the laws of that State. The most interesting point to underscore about the territoriality principle relates to acts that have not been committed entirely in the territory of a certain State. The conduct of States varies with regards to the application of the territoriality principle. Thus, if part of an act occurred within the boundaries of the forum State, this is an exercise of the territoriality principle and not the universality principle.

the nationality of the offender[558] (or the victim)[559], or the need to protect the national security interests of the State[560].

By contrast, universal jurisdiction is based upon the premise that certain crimes are so grave that they should become universally abolished. As such, any State is entitled to prosecute the offender of said crimes regardless of the nationality of the accused or the victim, or the territory where the crime occurred[561]. The universality principle is not based upon a direct nexus between the offender and the forum; the reasoning behind its existence is rooted in law and morality, fundamental ethical values[562] and the "conscience of humankind"[563].

As one author puts it, universal jurisdiction holds the potential for a global system of accountability[564]. It can be argued that, from a time where universal jurisdiction played a role in the prosecution of piracy and slave trade[565], to an era of grave human rights

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[558] This principle concerns the jurisdiction of a State in relation to its nationals abroad. In this case, the nexus between the State exercising jurisdiction and the conduct is the nationality of the alleged criminal. States have competence to extend the application of their laws to nationals even when they are outside the territory. State practice under this principle varies greatly depending on the legal system.

[559] According to this principle, the national State of the victim of a crime committed abroad can assert prescriptive jurisdiction over the offender. This principle is intimately connected to certain offences, often targeted at nationals of certain countries, such as the offence of terrorism. See generally Geoffrey R. Watson, "The Passive Personality Principle", *Texas International Law Journal* 28 (1993), p.1.

[560] According to this principle, a State can exercise prescriptive jurisdiction over aliens for acts done abroad which affect certain "vital" interests of the State. This principle is often justified by reference to a State's right of self-defense. Common offenses for a claim of the protective principle are treason, espionage and attacks against embassies, see Manuel R. Garcia-Mora, "Criminal Jurisdiction over Foreigners for Treason and Offences Against the Safety of the State Committed Upon Foreign Territory", *University of Pittsburgh Law Review* 19 (1958), p. 567.

[561] See M. Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, Stephen Macedo, University of Pennsylvania Press, 2004.

[562] See Christopher Keith Hall, "Universal jurisdiction: New Uses for an Old Tool", in *Justice for Crimes Against Humanity*, Mark Lattimer & Philipe Sands, Hart, 2007, pp. 55-56.

[563] A. Bailleux, La compétence universelle au carrefour de la pyramide et du réseau, Bruxelles, Bruylant (2005), p. 137, cited in Antônio Augusto Cançado Trindade, International Law for Humankind: Towards a New Jus Gentium, Nijhoff, 2010, p. 386.

[564] Stephen Macedo , Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law, University of Pennsylvania Press, 2003, Introduction, p. 4.

[565] See M. Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in

atrocities, universal jurisdiction has been instrumental in addressing human rights violations and providing an important tool to combat impunity and enforce accountability[566].

A) Conceptualizing universal jurisdiction: legal basis and conditions for exercise

There are two main forms of jurisdiction within international law: prescribing jurisdiction and enforcement jurisdiction. Universal jurisdiction is an additional principle for exercising jurisdiction alongside other heads of jurisdiction in international law (i.e. territoriality principle, nationality principle, passive personality principle and protective principle). As Professor Cryer explains, universal jurisdiction

> "refers to jurisdiction established over a crime without reference to the place of perpetration, the nationality of the suspect or the victim or any other recognized linking point between the crime and the prosecuting State. It is a principle of jurisdiction limited to specific crimes"[567].

For the purposes of the present study, I refer to universal jurisdiction, in its criminal dimension, as a State having jurisdiction over foreigners for crimes committed abroad, when foreigners (alleged perpetrators) are present in their territory.

i. Legal basis for exercising universal jurisdiction: permissibility and the Lotus principle[568]

There are two main sources that may provide for the exercise of universal jurisdiction: customary international law and treaty law[569]. In this chapter, I will not focus

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International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, Stephen Macedo (ed.), University of Pennsylvania Press, 2004.

[566] Non-governmental organizations and human rights activists advocate for a broader use of universal jurisdiction for perpetrators of mass human rights violations. See *also* generally, Henry Steiner, "Three Cheers for Universal Jurisdiction- Or Is it Only Two?", *Theoretical Inquiries in Law* 6 (2004), p. 200. See *also*, Kenneth Roth, "The Case for Universal Jurisdiction", *Foreign Affairs* 80 (2001). See Menno T. Kamminga, "Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses", *Human Rights Quarterly* 23 (2003).

[567] Robert Cryer et al., *An Introduction to International Criminal and Procedure*, Cambridge University Press, 2007, p. 44. See also, Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, 2003, p. 220

[568] The *Lotus* principle refers to the Judgment of the PCIJ in the case of *The S.S. Lotus Case P.C.I.J. Ser. A, No. 10, p. 4 (1927)* ("Lotus case"). The principle per se will be explained in the following section of this chapter.

[569] A thorough study of whether a certain crime is a universal jurisdiction crime as a matter of treaty law or customary international law is outside the scope of this paper, see Luc Reydams,

on whether, as a matter of treaty or customary international law, a specific international crime is subject to universal jurisdiction[570]. The focus here is to first conceptualize and discuss the scope of universal jurisdiction and then explore the concept of universal civil (or tort) jurisdiction.

At this juncture, it is important to address the question as to whether it is necessary under international law to have a legal basis to exercise universal jurisdiction or whether the absence of prohibition is enough to allow a State to exercise universal jurisdiction. In other words, I address the question of permissibility or mandatory exercise of universal jurisdiction. To address this question, it is important to analyze the so-called *Lotus* principle.

The *Lotus* case involved a collision between a French ship (the S.S. Lotus) and a Turkish ship, leading to the death of Turkish sailors. France claimed before the Permanent Court of International Justice (P.C.I.J.) that Turkey did not have *jurisdiction* to try the French officers, because they were on a French boat in international waters at the time of the accident. The Court essentially decided that sovereign States may act in any way they wish, as long as they do not contravene an explicit prohibition. More precisely, in the words of the Court: "Restrictions upon the independence of States cannot . . . be presumed" as international law accords to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules."[571]

The question at this juncture is whether one can use the *Lotus* principle to adopt a permissible approach towards universal jurisdiction, that is, in the absence of express prohibition of universal jurisdiction, are States permitted to exercise universal jurisdiction? Thus, the lawful exercise of universal jurisdiction can be traced back to the *Lotus*

Universal Jurisdiction: International and Municipal Legal Perspectives, Oxford University Press, 2003 (for a thorough study of treaties and state practice regarding universal jurisdiction). See *also*, Jon B. Jordan, "Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crimes", *Michigan State University-DCL Journal of International Law* 9 (2000) (noting that treaties themselves can become customary international law; if they are accepted by a great number of countries, the treaty will become customary international law and will be binding upon all nations, even non-signatories).

[570] Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press, 2003 (for a thorough analysis of domestic legislation supporting universal jurisdiction and an examination of treaties establishing universal jurisdiction).

[571] Lotus case, p. 18.

principle[572], and the permissibility to exercise universal jurisdiction, in the absence of prohibition. In this sense, Professor Scharf posited that:

> "In the setting of international criminal law, the contemporary logic of the *Lotus* Principle is supported by the nature of State sovereignty and the embryonic status of international law relative to domestic law. The continued growth and evolution of international criminal law requires a permissive legal culture, which encourages the collective expansion of extraterritorial jurisdiction over international crimes."[573]

Be that as it may, under customary international law, jurisdiction is primarily territorial[574]. The *Lotus* principle is not widely used as a justification for the exercise of universal jurisdiction. Ryngaert, upon providing a detailed study of jurisdiction under international law, has succinctly summarised the state of the law:

> "[A] jurisdictional assertion is lawful if it is justified under a generally accepted principle authorizing the exercise of jurisdiction. Only to the extent that there is uniformity of State practice as to the *lawfulness* of the exercise of universal criminal jurisdiction over core crimes could a State establish such jurisdiction"[575].

Universal jurisdiction under international law is either treaty-based (i.e. it is recognized as a basis for the exercise of jurisdiction under a treaty regime) or it is based on customary international law[576]. Some scholars claim that universal jurisdiction for a core international crime (i.e. war crimes, crimes against humanity, genocide) is lawful under

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[572] Cedric Ryngaert, *Jurisdiction under International Law,* Oxford University Press, 2nd ed., 2015, p. 128.

[573] Michael P. Scharf, "Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States", *New England Law Review* 35 (2000), p. 368.

[574] Cedric Ryngaert, *Jurisdiction under International Law,* Oxford University Press, 2nd ed., 2015, p. 35.

[575] *Ibid.*, p. 129.

[576] Michael P. Scharf, "Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States", *New England Law Review* 35 (2000), p. 363. See also, Lee A. Steven, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", *Virginia Journal of International Law* 39 (1999); *see also* M. Cherif Bassiouni & Edward M. Wise, "Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law", Brill, 1995 (according to whom under international law, nations may agree through treaties to exercise universal jurisdiction over offenses that might not otherwise allow such exercise of jurisdiction).

customary international law[577]. Under current treaty law, a number of treaties recognize universal jurisdiction: 1949 Geneva Conventions, the 1958 Law of the Sea Convention, the 1970 Hijacking Convention, the 1971 Aircraft Sabotage Convention, the 1973 Internationally Protected Persons Convention, the 1979 Hostage Taking Convention, the 1984 Torture Convention, the 1988 Airport Security Protocol, the 1988 Maritime Terrorism Convention, the 1994 Convention on the Safety of United Nations Peacekeepers, and the 1998 International Convention for the Suppression of Terrorist Bombings[578]. Thus, to assert universal jurisdiction over a certain crime, it is necessary that there be an applicable treaty or rule under customary international law.

ii. The presence of the accused as a pre-condition for the exercise of universal jurisdiction?

Universal jurisdiction involves two sub-categories[579]: the jurisdiction over offenses when the accused is present in the territory of the State asserting jurisdiction; and the jurisdiction of a State to try offences regardless of the offender's whereabouts. The latter is often called "pure universal jurisdiction"[580] or universal jurisdiction *in absentia*[581]. The manner in which universal jurisdiction is enforced according to the latter sub-category depends upon the cooperation of States to bring the accused to trial in the territory of the forum State[582], since the forum State does not have custody of the offender.

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[577] Cedric Ryngaert, *Jurisdiction under International Law,* Oxford University Press, 2nd ed., 2015, p. 129.

[578] See Michael P. Scharf, "Application of Treaty-Based Universal Jurisdiction on Nationals of Non-Party States", *New England Law Review* 35 (2000), pp. 363-364 for full references and comments on each treaty.

[579] Robert Cryer et al., *An Introduction to International Criminal and Procedure,* Cambridge University Press (2007), at p. 45. See *also*, Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction", 1 *Journal of Int'l Criminal Justice* 589 (2003) (for a discussion of this distinction).

[580] See Robert Cryer et al., *ibid*.

[581] For an analysis of the exercise of universal jurisdiction *in absentia,* see Ryan Rabinovitch, "Universal Jurisdiction *in Absentia*", 28 *Fordham Int'l Law Journal* 500 (2004-2005); Luc Reydams, "Belgium's First Application of Universal Jurisdiction: The Butare Four Case", 1 *Journal Int'l Criminal Justice* 428 (2003); Anthony J. Colangelo, "The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes", 36 *Geo. J. Int'l L.* 537 (2004-2005).

[582] See Stephen Ratner, "Belgium's War Crimes Statute: A Postmortem", 97 *American Journal of International Law* 888 (2003) (narrating the saga of Belgium concerning the exercise of universal jurisdiction over foreigners that are found outside of Belgium).

In this sense, the prescribing State is similar to an international criminal court that issues an international arrest warrant and requests that any State with custody of the alleged offender surrender him or her. The controversies that universal jurisdiction *in absentia* raise are complex and have been explored by scholars[583]. In the traditional conception of universal jurisdiction, States exercise jurisdiction over offenders present in their territory[584]. It may be argued that the presence of the accused is a criterion that justifies the interest of the prosecuting State to exercise jurisdiction over individuals present in its territory[585]. Under treaties that recognize universal criminal jurisdiction, none provide an express legal basis for universal jurisdiction *in absentia*[586]. The complexities and controversies of universal criminal jurisdiction *in absentia* are numerous and outside the scope of this study, thus, I will not examine in detail the practical and legal implications of the different uses of the principle, or the controversies relating to the use of universal jurisdiction *in absentia*.

iii. Some technical legal aspects

In analysing universal jurisdiction, some technical legal aspects need to be briefly discussed in light of some examples from State practice. These legal aspects may also be transposed to the civil dimension of universal jurisdiction, which will be examined later in the section.

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[583] For an example of some of the controversies raised by the exercise of universal jurisdiction *in absentia* relate, see Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press (2003); See also, *Arrest Warrant Case (Democratic Republic of Congo v. Belgium), ICJ Reports 3 (2002),* p. 43, Opinions of Judges Guillaume and Rezek.

[584] See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press (2005), p. 103, cited in Cedric Ryngaert, *Jurisdiction under International Law*, Oxford University Press, 2nd ed., 2015, p. 133.

[585] In The Netherlands, for example, there have been prosecutions on the basis of universal jurisdiction involving suspects who were residing in The Netherlands when the proceedings started. Under Dutch law, presence on the territory is a necessary precondition for the exercise of jurisdiction of national courts, see Liesbeth Zegveld and Jeff Handmaker (eds.), "Universal Jurisdiction: State of Affairs and Ways Ahead A policy paper", January 2012, p. 6 (Larissa van den Herik).

[586] Cedric Ryngaert, *Jurisdiction under International Law,* Oxford University Press, 2nd ed., 2015, p. 133.

The first one refers to national statutes of limitations in relation to international crimes which may bar prosecution. The United Nations Convention on the Non-Applicability of Statutes of Limitations for War Crimes and Crimes Against Humanity[587] and the more recent European Convention on Non-Applicability of Statutes of Limitations for Crimes against Humanity and War Crimes (Inter-European)[588] have very few ratifications. For example, under domestic French law, while crimes against humanity and genocide are not subject to a statute of limitations, war crimes are subject to a 20 or 30 year limitation period (depending on the type of war crime)[589].

Another technical legal question that is relevant relates to the collection of evidence. Given that criminal prosecutions based on universal jurisdiction relate to conduct that happened outside of the forum State, the process of gathering evidence to build a case is of utmost importance. The complexity involved in collecting evidence is well-illustrated by Guus Kouwenhoven, a case involving a Dutch businessman who was charged with war crimes committed in Liberia in early 2000. In this case, there was much difficulty in collecting evidence and cooperation[590].

B) The evolution of theoretical rationales for universal jurisdiction: from piracy to crimes of universal concern

Piracy was the "traditional" universal jurisdiction crime[591]. Universal jurisdiction grew from its traditional application to piracy based upon some specific rationales[592].

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[587] 26 November 1968, 754 U.N.T.S. 73.

[588] Europ. T.S. No. 82.

[589] French Penal Code, arts. 462(10) and 213(5).

[590] See a discussion of this case at: Liesbeth Zegveld and Jeff Handmaker (eds.), "Universal Jurisdiction: State of Affairs and Ways Ahead A policy paper", January 2012, p. 6 (Larissa van den Herik).

[591] See *e.g*, Mark IBID.. Janis, *An Introduction to International Law* 325 (2003) (explaining universal jurisdiction as the jurisdiction of every State traditionally over pirates); see *also*, Eugene Kontorovich, "International Legal Responses to Piracy", 13 *American Society of Int'l Law* 2 (2009) ("Piracy is the original universal jurisdiction crime") and Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harvard Int'l Law Journal* 183 (2004) (the author criticizes the analogy between piracy and human rights violations for the purposes of applying universal jurisdiction).

[592] See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of

Because of its central relevance to the foundation and development of universal jurisdiction, the next section focuses on conceptualizing piracy on the high seas and outlines the rationales justifying the exercise of universal jurisdiction for piracy[593]. This discussion will lay the foundations of the rationales for universal jurisdiction in order to then make an argument concerning the civil dimension of the doctrine[594].

Piracy is ancient[595] and, as one author states, it is the oldest offense that invokes the assertion of universal jurisdiction[596]. Piracy has been a crime of universal concern: "even before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a '*hostis humani generis*"'. [597] The *United Nations Convention on the Law of the Sea* establishes universal jurisdiction over piracy in article 105:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith" [598].

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dissertation defended at Utrecht University on 27 October 2004, Oxford University Press (2005), at pp. 45-60 (discussing the two main rationales for the development of universal jurisdiction).

[593] Understanding the crime of piracy in international law is not only important because it was the precursor of the doctrine of universality, see M. Cheriff Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", 42 *Va. J. Int'l L.* 81 (2000-2001) (for an analysis of the evolution of universal jurisdiction). The importance of discussing piracy relies *also* on the premise that piracy is the precursor of the conception of international crimes. However important the study of the crime of piracy may be to understanding the broad scope of universal jurisdiction in contemporary international law, the majority of the literature concerning universal jurisdiction deals very superficially with the crime of piracy. The analogy between piracy and other crimes is done in a very subtle manner in scholarly writings and very few studies have been devoted to an in-depth analysis of this analogy.

[594] The focus on the crime of piracy in this section is because this is the genesis of universal jurisdiction and it provides an adequate framework to discuss the rationales underpinning universal jurisdiction.

[595] See Joshua Michael Goodwin, "Universal Jurisdiction and the Pirate: Time for an Old Couple to Part", 39 *Vanderbilt Journal Transnational l Law* 973 (2006); see Willard Cowles, "Universality of Jurisdiction over War Crimes", 33 *California Law Review* 177 (1945), at pp. 181-194 (noting that jurisdiction over piracy has occurred since the sixteenth century).

[596] *Ibid.*, p. 791. See generally, Dickinson, "Is the Crime of Piracy Obsolete?", 38 *Harvard Law Review* 334, 337-339 (1925) cited in Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988), at p. 791.

[597] Oppenheim, *International Law* (1992), at 609.

[598] *1982 United Nations Convention on the Law of the Sea*, 21 ILM 1261 (1982), article 105.

Piracy involves acts of robbery and violence[599]. An important feature of the definition of piracy is the fact that it happens on the high seas, outside the jurisdiction of any State, "a global commons"[600]. Every State has an equal right to navigate the high seas. This characteristic of the high seas is sometimes argued to be one rationale for the exercise of universal jurisdiction since other traditional principles of jurisdiction would be inapplicable[601].

i. Theoretical rationales of universal jurisdiction in relation to crimes of universal concern

As it can be perceived from the discussion above, universal jurisdiction is not a recent phenomenon[602]. The principle that States can punish foreigners for crimes committed outside their territorial boundaries is a concept that has existed for a long time in international law[603]. Without purporting to provide a thorough analysis of the formation of

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This provision states the right, but not the obligation, to assert universal jurisdiction over acts of piracy, see Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988), p. 792.

[599] See *Fitfield v. Ins. Co. of Pa*., 47 Pa. 166, 187 (1864) (concluding that pirates are sea robbers); see *also*, Alfred Rubin, *The Law of Piracy* 213 (1998) (noting that States can define statutorily what constitutes acts of piracy).

[600] Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harvard Int'l Law Journal* 183 (2004), at p. 190. The occurrence of piracy on the high seas could be seen as a third rationale (in addition to the ones I study in this paper). I will not examine this question in this paper. One interesting note is that universal jurisdiction, by definition, is exercised regardless of where the offense occurs, see Luc Reydams, "Universal Criminal Jurisdiction: The Belgian State of Affairs", 11 *Criminal Law Forum* 183, 185 (2000).

[601] See generally, *Sosa v Alvarez-Machain*, 124 US 2739, 2775 (2004) (Scalia, J., concurring in part and dissenting in part) (suggesting that the norm for piracy was developed because pirates were "beyond all…territorial jurisdictions"); Lee A. Casey, "The Case Against the International Criminal Court", 25 *Fordham Int'l Law Journal* 840, 855 (2002) (contending that universal jurisdiction for piracy has been accepted since it takes place "on the high seas, beyond the territorial jurisdiction of any single State"), cited in Eugene Kontorovich, "Implementing *Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute", 80 *Notre Dame L. Review* 111, (2004), at p. 151.

[602] See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium, Nijhoff (2010), p. 383 (affirming that universal jurisdiction "has a long history, which dates back to the thinking of the founding fathers of the law of nations").

[603] See generally, Harvard Research in International Law, "Draft Convention on Jurisdiction with Respect to Crime", 29 *American Journal of InternationaL Law* 435 (1935), p. 739; Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988), pp. 785, 793.

the principle of universality, this chapter analyses a few basic points in the evolution of this doctrine.

As already discussed, universal jurisdiction was developed to combat the crime of piracy based on the rationale that because the crime occurred on the high seas[604], no State could have jurisdiction over pirates unless they claimed the universality of jurisdiction[605]. The doctrine changed with time and the basis for a claim of universal jurisdiction shifted to the grave nature of the crime and the need to combat impunity for such conduct[606]. Thus, the underlying principles for asserting universal jurisdiction over certain crimes can be seen as two ends of a spectrum: the place where the offence occurred - outside the jurisdiction of any State - or the grave nature of the crime.[607]

In the case of universal jurisdiction over grave offences, "because a state exercising universal jurisdiction does so on behalf of the international community, it must place the overall interests of the international community above its own."[608] In its criminal dimensions, universal jurisdiction is mostly acclaimed to be an effective tool to fight impunity and to fill in the gaps of international criminal tribunals' proceedings[609]. In

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[604] It is often argued that the heinous nature of piracy is the basis for universal jurisdiction, see Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988). This rationale has been criticized, see Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation", 45 *Harvard International Law Journal* 183 (2004).

[605] See Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988); Cheriff M. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", 42 *Virginia Journal of International Law* 81 (2000-2001).

[606] *Ibid.*. The authors claim that the modern basis for universal jurisdiction is the grave nature of the crime and the need to combat impunity for those crimes.

[607] See Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press (2005); Chandra Lekha Sriram, Globalizing Justice for Mass Atrocities, Routledge (2005).

[608] Cheriff M. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", 42 *Virginia Journal of International Law* 81 (2000-2001), pp. 88-89.

[609] See Hays Butler, "Universal Jurisdiction: a Review of the Literature", *Criminal Law Forum* 11 (2000), pp**.** 353–373, citing Daniel T. Ntanda Nsereko, "The International Criminal Court: Jurisdictional and Related Issues", 10 *Criminal Law Forum* 87 (1999), p. 105 (concerning the limited scope of the Court's jurisdiction and arguing for an increased role of universal jurisdiction of national courts to complete the gaps of international institutions in prosecuting egregious crimes.

addition to being a resource for prosecuting serious human rights violations, universal jurisdiction is also esteemed as a tool for global justice, especially with regards to countries that are unwilling or unable to prosecute criminals[610].

Universal jurisdiction is premised upon the idea that, contrary to other principles of international jurisdiction, the heinous nature of the crime justifies the exercise of jurisdiction by any State[611]. In this sense, the seriousness of the crime allows for any State to prosecute the offender[612]. Due to the gravity of certain crimes, their consequences stretch beyond victims and their communities, and affect the international community as a whole[613].

These ideas can be traced back to the writings of the philosopher and political scientist Cesare Beccaria[614]. In his work *Dei Delliti e Delle Pene*[615], Beccaria appeals to the notion of rationality and humanity in the law. In line with the latter, Beccaria also claims that "an act of cruelty committed, for example, in Constantinople, may be punished at Paris for this exact reason, that he who offends humanity should have enemies in all mankind"[616]. I take Professor Bassiouni's point in concluding that Beccaria "did not propound universal criminal jurisdiction"[617] as it is understood today; however, the foundations for universal jurisdiction concerning crimes of grave nature can be said to find some explanation in Beccaria's work.

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[610] Anne IBID. Geraghty, "Universal Jurisdiction and Drug Trafficking: a tool for fighting one of the World's Most Pervasive Problems", 16 *Florida Journal of International Law* 371 (2004), p. 372.

[611] Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2004, p. 42.

[612] *Ibid.*, pp. 41-44.

[613] *Ibid.*, pp. 42-43.

[614] See a discussion in Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2004, p. 40.

[615] (1974), translation available at: http://Ibid..constitution.org/cb/crim_pun.htm.

[616] Cesare Beccaria, *Dei Delliti e Delle Penne* (1974), Translation.

[617] Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2004, p. 43.

On the other end of the same spectrum, Hugo Grotius, in *The Law of War and Peace*[618] argued that freedom of navigation was applicable universally and, as a consequence, any infringement upon this right would provoke universal punishment[619]. In Grotius' conception, pirates were "enemies of human race"[620]. His theory of universal punishment is based on the nature and effect of the crime on all nations[621].

There thus seems to be three main points which have provided a theoretical basis for the development of universal jurisdiction in relation to the (original) crime of piracy. First, the fact that pirates are "stateless" and that no country can have jurisdiction over them based on the nationality principle. Secondly, the idea that crimes of piracy happen on the high seas where no State has jurisdiction based on the territoriality principle. Under these two rationales, States are not acting in violation of each other's sovereignty, but rather for a common objective, a sort of "mutual self-interest" to combat a crime that potentially affects all nations. The third rationale for universal jurisdiction is based on the claim that some crimes are so heinous that they are perpetrated against the international community and not only individual States[622]. Under this rationale, in exercising universal jurisdiction, States are acting on behalf of the interests of the international community as a whole, for the pursuit of the ultimate goal of justice. This last rationale provided the basis for the expansion of universal jurisdiction from piracy to crimes of universal concern.

Currently, universal jurisdiction arises from the concept that some kinds of crimes are so heinous that shock all humankind and thus preclude any claims against extraterritoriality. In this regard, it has been asserted that:

> "universal jurisdiction [is] founded on the sheer heinousness of certain crimes, such as genocide and torture, which are universally condemned

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[618] Translated by FW Kelsey, (1925).

[619] *Ibid.*

[620] *Ibid.*

[621] See Cheriff Bassiouni, "The History of Universal Jurisdiction and Its Place in International Law", in *Universal Jurisdiction – National Courts and the Prosecution of Serious Crimes under International Law*, University of Pennsylvania Press, 2004, claiming that Grotius' theory is the basis for universal jurisdiction for international crimes.

[622] See M. Itsouhou Mbadinga, "Le recours à la compétence universelle pour la répression des crimes internationaux : étude de quelques cas", 81 *Revue de droit international et de sciences diplomatiques et politiques* (2003), pp. 286-287.

> and which every state has an interest in repressing even in the absence of traditional connecting factors. . . . [T]hough subject to evolution, the roster of crimes presently covered by universal jurisdiction includes . . . genocide, torture, some war crimes, and crimes against humanity"[623].

Thus, universal criminal jurisdiction as it is currently conceived has gone beyond the original crimes of piracy and slave trade to include international crimes such as genocide, torture, war crimes and crimes against humanity that shock the conscience of humankind[624].

Concerns based on comity and international relations between States are often cited against the human rights enforcement benefits of universal jurisdiction. In looking ahead at the development, or rather the retreat of universal jurisdiction, it may be wise, rather than balancing the pros and cons, the support against the criticisms of the doctrine, to actually focus on a reasonable exercise and development of the doctrine[625]. That would mean that States making use of universal jurisdiction would follow certain principles regarding, for example, comity, requests for extradition, the ability and willingness of the State having stronger grounds of jurisdiction (e.g. based on nationality or territoriality) to assert jurisdiction over the offender.

ii. Measuring universal jurisdiction: advantages and critiques

As already discussed, the main rationale for the modern exercise of universal jurisdiction is based on the nature of the crime[626]. Universal criminal jurisdiction is claimed to be a tool for combating impunity and bringing perpetrators to justice. The advantages of relying on universal jurisdiction are plenty. For instance, it stands against safe havens for perpetrators of international crimes. In its criminal dimensions, universal jurisdiction is mostly acclaimed as an effective tool to fight impunity, secure accountability

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[623] Donald Francis Donovan & Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction", 100 *American Journal of International Law* 142 (2006), p. 143.

[624] See e.g., ICTY, *Prosecutor v. Furundžija,* Trial Chamber, Judgment of 10 December 1998 (no. IT-95-17/1-T).

[625] See on this point also, Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2nd ed., 2015.

[626] Noora Arajärvi, "Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?", *Tilburg Law Review 16 (2011) 5-29,* p. 7.

and to fill in the gaps that international criminal tribunals leave[627] with regards to countries that do not prosecute crimes committed in their territories[628]. Universal jurisdiction can also be used as a means of prosecuting crimes that occur outside the territory of any State (i.e. piracy on the high seas) that would otherwise go unpunished[629].

The criticisms of universal jurisdiction refer to the risks that it poses and the scope of its exercise. For example, Judge Guillaume in his Separate Opinion in the *Arrest Warrant* case before the ICJ stated that universal jurisdiction can create "total judicial chaos" and "encourage the arbitrary for the benefit of the powerful, acting as agent for an ill-defended 'international community'"[630]. This view summarizes the main points of criticism of universal jurisdiction: a tool that powerful States may use without proper checks and balances.

2. Towards a victim-orientated approach: a civil dimension of universal jurisdiction?

In this part of the chapter, I investigate the enforcement of victims' reparation through the doctrine of universal jurisdiction. This doctrine, as explained above, is grounded in concepts such as the fight against impunity and accountability for certain crimes of universal concern. The key question as it pertains to the further development of universal civil jurisdiction is whether the foundation of the doctrine, in its criminal dimension, can be expanded to include a civil dimension.

In this perspective, I first address the broader doctrinal question of criminal punishment and reparation. Then I examine the intricacies of universal civil jurisdiction in

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[627] See Hays Butler, "The Doctrine of Universal Jurisdiction: A Review of the Literature", 11 *Criminal Law Forum* 353, 355 (2000), citing Daniel Ntanda Nsereko, "The International Criminal Court: Jurisdictional and Related Issues", 10 *Criminal Law Forum* 87 (1999), at 105 (concerning the limited scope of the Court's jurisdiction and arguing for an increased role of universal jurisdiction of national courts to complete the gaps of international institutions in prosecuting egregious crimes).

[628] See Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation* (2001). See International Council on Human Rights Policy, *Hard Cases: Bringing Human rights violators to Justice Abroad- A Guide to Universal Jurisdiction* (1999).

[629] See Harvard Research in International Law, "Draft Convention on Jurisdiction with Respect to Crime", 29 *American Journal of Int'l Law 439* (Supp. 1935), p. 739

[630] *Arrest Warrant Case (Democratic Republic of Congo v. Belgium),* Judgment, *ICJ Reports* 2002, p. 43.

order to dwell upon the rationale underpinning the inclusion of a civil dimension in universal jurisdiction. I also consider whether the doctrine can be an effective tool for bridging the gaps of justice and providing an effective mechanism to enforce victims' right to reparation. The *fil conducteur* of my analysis is that the relationship between criminal and civil dimensions of justice, offenders and victims, criminal sanctions and civil remedies, needs to be aligned for the ultimate goal of justice to be attained.

A) Defining the civil dimension of universal jurisdiction

Universal civil jurisdiction, often also called universal tort jurisdiction[631], similar to that of universal criminal jurisdiction, does not require any jurisdictional link between the forum and the wrongful act[632]. It has been defined "as the principle under which civil proceedings may be brought in a domestic court irrespective of the location of the unlawful conduct and irrespective of the nationality of the perpetrator or the victim, on the grounds that the unlawful conduct is a matter of international concern."[633]

The concept of universal civil or tort jurisdiction is less known and less common than its counterpart, universal criminal jurisdiction. In short, as the other side of the coin, universal tort jurisdiction refers to civil action taken against perpetrators of international crimes, in any forum, irrespective of where the crime was committed and the nationality of the offender or the victim[634]. While universal criminal jurisdiction is reserved primarily for international crimes (see above), universal civil jurisdiction has been claimed for gross human rights violations, wherever they may have occurred[635]. Thus, at the current print of international law, it is not possible to refer to a clearly circumscribed list of criminal

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[631] See Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2015, 2nd ed., pp. 135 *et suiv.* In this chapter, I will use the terms "universal civil jurisdiction" and "universal tort jurisdiction" interchangeably.

[632] Donald Donovan, "Universal Jurisdiction - The Next Frontier?", 99 *American Society of International Law Proceedings* 123 (2005), p. 117.

[633] Menno T. Kamminga, "Universal Civil Jurisdiction : Is it Legal ? Is it Desirable?", 99 *American Society of International Law Proceedings* 123 (2005), p. 123.

[634] See generally on the concept of universal tort jurisdiction, Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2nd ed., 2015, pp. 135 *et seq.* and Donald Donovan, *Universal Jurisdiction - The Next Frontier?*, 99 *American Society of International Law Proceedings* 123 (2005).

[635] See Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2nd ed., 2015, p. 135.

conduct that may be subject to universal civil jurisdiction. In saying this, the State practice reviewed below will demonstrate some of the conduct subject to universal civil jurisdiction.

Concerning the presence requirement, beyond questioning whether it is permissible under international law, it does not seem that universal civil jurisdiction *in absentia* is desirable. In order to obtain enforcement of civil awards of reparation, a minimal territorial connection such as the mere presence of the perpetrator in the forum State during the proceedings[636] may be necessary, without the need for formal links such as residence or nationality[637].

As to the scope and reach of universal civil jurisdiction, State practice, as discussed below, demonstrates that victims may claim reparation under this doctrine against individual perpetrators - as it is shown by cases against individuals alleged to be guilty of war crimes during the former Yugoslavia wars; against corporations - as it is shown by diverse cases brought before United States courts[638]; and (with more difficulty due to claims of State immunity) against States- as it is shown by the recent cases against Germany[639].

B) Lawfulness of universal civil jurisdiction

In this context, a question arises as to the lawfulness of universal civil jurisdiction and whether such exercise of universal jurisdiction is permitted by international law. It has been rightly observed that a general international treaty allowing for universal civil jurisdiction is lacking[640]. It can be stated at this stage that, unlike universal criminal jurisdiction, there is not yet enough State practice and *opinion juris* to ground unequivocally the argument that customary international law allows for the exercise of

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[636] See Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2015, 2nd ed., p. 135, n. 216.

[637] *Ibid*.

[638] See discussion of cases and references in the following section of this chapter.

[639] See the *Case concerning Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)*, Judgment, *ICJ Reports* 2011 and related national proceedings in Italy and Greece.

[640] Luc Reydams, "Universal Jurisdiction in Context", 99 *American Society of International Law Proceedings* 123 (2005), p. 118.

universal civil jurisdiction for the same crimes as those allowing universal criminal jurisdiction.

This study reviews further below some State practice in regards to universal jurisdiction and it will be made clear that international law has not yet reached a stage where universal civil jurisdiction is recognized under customary international law. Nevertheless, an argument has been made that: "It would make sense to assume that the exercise of universal civil jurisdiction is permitted in respect of the same unlawful conduct as universal criminal jurisdiction and that similar conditions apply" [641]; and that "[i]nternational law authorizes universal civil jurisdiction, in part because it operates as a less intrusive form of jurisdiction than universal criminal jurisdiction." [642] In a similar vein, in a concurring opinion to the United States Supreme Court Decision in *Sosa* v. *Alvarez-Machain*, Justice Breyer stated that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well" and that the exercise of universal civil jurisdiction is no more threatening than that of universal criminal jurisdiction[643].

In discussing the lawfulness of universal civil jurisdiction, Cédric Ryngaert posits that "the fact that only a limited number of states allow the exercise of universal tort jurisdiction is not fatal to the lawfulness of such jurisdiction under international law". He goes on to claim that "[t]hese states may not provide for universal tort jurisdiction because they prefer criminal justice solutions, rather than because they consider such jurisdiction to be internationally unlawful"[644]. With regards to whether universal jurisdiction is actually permissible under international law, the author concludes that although only a few States have actually exercised universal civil jurisdiction, there is no crystallised customary rule that prohibits universal civil jurisdiction[645]. Thus, by looking at the lawfulness of universal

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[641] Menno T. Kamminga, "Universal Civil Jurisdiction : Is it Legal ? Is it Desirable?", 99 *American Society of International Law Proceedings* 123 (2005), pp. 124-125.

[642] Beth Van Schaack, "Justice without Borders: Universal Civil Jurisdiction", 99 *American Society of International Law Proceedings* 123 (2005), p. 120.

[643] 542 U.S. 692 (2004), p. 763.

[644] Cédric Ryngaert, "Universal tort jurisdiction over gross human rights violations", *Netherlands Yearbook of International Law* 38 (2007) 3-60.

[645] *Ibid*.

civil jurisdiction from a perspective of whether it is prohibited (rather than permitted), it is argued that universal civil jurisdiction is allowed.

Be that as it may, it does not seem that universal civil jurisdiction (in relation to international crimes) is uniformly accepted under international law. Some States have expressed the view that, although international law recognizes universal criminal jurisdiction, it does not "recognize universal civil jurisdiction for any category of cases at all, unless the relevant states have consented to it in a treaty or it has been accepted in customary international law."[646]

In any event, at this early stage of the development of the doctrine under international law, the examination of individual States' practice is not of much help to defining the contours of universal civil jurisdiction. In the author's view, universal civil jurisdiction should be justified on reliance on principles of international law, such as the right of victims to receive reparation, which transcends the realm of international human rights law. It is in this perspective that attention is now turned to recent State practice and possible *rationales* that may justify adding a civil dimension to universal jurisdiction.

C) Rationales for adding a civil dimension to universal jurisdiction

It is appropriate at this juncture to examine State practice and possible rationales that could eventually underpin universal civil jurisdiction. Universal jurisdiction (in its criminal dimension) has strengthened its foundation pursuant to the principle of combating impunity and providing accountability for serious violations of international law[647] by allowing prosecution in any State of certain crimes - such as, for example, piracy, genocide, slave trade, war crimes, torture - that defy traditional boundaries of criminal

[646] Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

[647] *Cf.* Kenneth C. Randall, "Universal Jurisdiction Under International Law", 66 *Texas Law Review* (1988); Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* 28-29 (2001); Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press, 2005.

justice and which shock the conscience of humankind[648]. Hence, at first sight, to include civil dimensions in universal jurisdiction may seem inappropriate[649].

As explained above, universal jurisdiction for international crimes has developed pursuant to the rationale that some crimes are so heinous that any State can prosecute the perpetrator, no matter where he/she may be found[650]. This rationale, based on the heinous nature of the conduct, provides, it may be contended, a foundation for the development of the civil dimension of universal jurisdiction: the same rationale that supported the expansion of universal jurisdiction for "crimes of universal concern" could potentially justify the exercise of universal civil jurisdiction[651]. Thus, victims of crimes subject to universal jurisdiction would be able to claim reparation in any forum, without necessarily a jurisdictional link to the offender or the place where the heinous conduct took place.

The question as to how to transpose from a criminal dimension to a civil dimension of universal jurisdiction poses itself from theoretical and practical perspectives. As to the practical perspective, as discussed above, it has been argued that universal criminal jurisdiction contemplates a degree of civil recovery.

The link between the criminal and civil dimensions of universal jurisdiction is the heinous nature of the criminal conduct and the gravity of the crime, which exclude a territorial nexus[652]. In its civil dimension, universal jurisdiction can serve as an alternative for victims of international crimes to seek and obtain reparation. Furthermore, civil proceedings provide victims a chance to tell their stories and have their day in court. It is also important to bear in mind that civil remedies may serve as an independent means of

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[648] American Law Institute, Restatement (Third), *The Foreign Relations Law of the United States* (1987), section 404; see *also Sosa v Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), Concurring Opinion of Justice Breyer.

[649] See Beth Van Schaack, "Justice without Borders: Universal Civil Jurisdiction", 99 *American Society of International Law Proceedings* 123 (2005).

[650] See discussion in the chapter above.

[651] Donald Donovan, "Universal Jurisdiction - The Next Frontier?", 99 *American Society of International Law Proceedings* 123 (2005), p. 117.

[652] Cedric Ryngaert, *Jurisdiction in International Law*, Cambridge University Press, 2015, 2nd ed., p. 135.

enforcing international norms proscribing defined criminal conduct, and as a means to give victims access to international criminal justice pertaining international crimes[653].

The civil dimension of universal jurisdiction is also a means by which the goal of putting an end to impunity and creating a culture of accountability may be achieved, a goal which was one of the driving forces behind the modern expansion of universal jurisdiction. Civil judgments have an important declarative function as identifying conduct which is condemned by the international community as a whole.

These above considerations are necessarily abstract and there certainly remain some open questions and challenges regarding the exercise of universal civil jurisdiction in practice and its further development in international law. It remains however that Courts exercising (universal) jurisdiction over civil claims for reparations will usually have to follow their procedural rules and domestic laws. In this regard, the above discussion regarding some technical legal aspects, e.g. statutes of limitations, may also apply to civil claims in relation to international crimes, depending on the laws of the forum State. Other relevant questions include, for example, the impact of claims of State or official immunity on the exercise of universal jurisdiction for international crimes and breaches of *jus cogens* norms, the grants of amnesties and the enforcement of judgments based on universal jurisdiction. While a detailed analysis of such questions is outside the scope of the present chapter, the review of State practice that follows will shed some light on how these questions have been treated in practice.

D) Recent State practice and possible rationales for a civil dimension of universal jurisdiction

Universal jurisdiction in its civil dimension has developed in the case law of some States. I now turn to review some recent and select State practice. The following analysis is meant to be illustrative rather than exhaustive, and is thus necessarily selective, with reference to some relevant cases.

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[653] See Linda Malone, "Enforcing International Criminal Law Violations with Civil Remedies: The US Alien Tort Claims Act," in *International Criminal Law*, Brill, 3rd ed., Vol. III, 2008.

The main country where something akin to a civil dimension of universal jurisdiction has developed is the United States. This is because in the United States, there are two statutes that have been interpreted to allow for the exercise of a sort of universal civil jurisdiction. The *Alien Tort Claims Statute* ("ATS")[654], from 1789, states that "[t]he 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". Additionally, the *Torture Victims Protection Act* ("TVPA") provides a cause of action for any victim of torture and extrajudicial killing, wherever the crime was committed[655].

The majority of cases that relied on the ATS concern corporate liability rather than individual civil liability[656]. Without purporting to pursue a detailed analysis of all cases that dealt with individual civil liability for international crimes, this study discusses the some relevant examples and highlights of the ATS jurisprudence with a focus on transnational tort litigation.

While in the past decades there has been a great number of cases relying on the ATS concerning torts committed outside the United States[657], a notable recent case before the Supreme Court of the United States has somewhat changed the panorama for ATS litigation. While not dealing with individual civil liability for international crimes (which is the paradigm of the present study), this case is worth discussing due to its impact on the development of universal civil jurisdiction before US Courts. Recently, in 2013, the United States Supreme Court decided the case *Kiobel v. Royal Dutch Petroleum*[658] which dealt

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[654] 28 U.S.C. § 1350 (2006) ("ATS").

[655] Pub. L. 102-256, 12 March 1992, 106 Stat. 73, in particular Section 2(a) of the TVPA.

[656] For a list of ATS cases concerning corporations, see Michael D. Goldhaber, "Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard", *UC Irvine Law Review* 3, 2013, Appendix A (list of cases compiled by Jonathan Drimmer concerning corporate cases).

[657] See *ibid.*

[658] 133 S. Ct. 1659 (2013). Not long after the Judgment of the Supreme Court was rendered, many scholars commented on it, see e.g. Janine M. Stanisz, "The Expansion of Limited Liability Protection in the Corporate Form: The Aftermath of Kiobel v. Royal Dutch Petroleum Co.," *Brook. J. Corp. Fin. & Com. L.* 5 (2010), 573 (for a commentary before the Supreme Court Judgment); Frank Cruz-Alvarez and Laura E. Wade, "The Second Circuit Correctly Interprets the Alien Tort Statute: Kiobel v. Royal Dutch", *University of Miami Law Review* 65 (2010), 1109 (for a piece before the Supreme Court Judgment). For commentary on the Supreme Court Judgment, see e.g.: Ingrid Wuerth, "The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co.", *American Journal of International Law* 107 (2013), pp. 13-26; Anthony J. Colangelo, "The Alien Tort Statute and the Law of Nations in Kiobel and Beyond", *Georgetown Journal of*

with allegations that Shell entities planned, conspired and facilitated extrajudicial executions, torture and crimes against humanity by Nigeria in the Niger Delta between 1992 and 1995. The case was based on the ATS.

One of the main issues in the case hinged upon the question of the extraterritorial nature of the ATS, and more specifically, whether the United States Courts can rely on the ATS to hear civil claims concerning human rights violations that have no connection to the United States, that is, the violations were not committed on United States soil, or by an American national or against an American victim[659]. Thus, under these parameters, this case fell squarely within the conception of universal civil jurisdiction. Although this case centred on *corporate* civil liability, which is not the focus of this study, it also has implications for the development of universal civil jurisdiction concerning international crimes committed by individuals.

The Supreme Court made a decision that has a negative impact on the development of universal jurisdiction civil claims under the ATS. The Supreme Court decided that the ATS could not be applied in civil suit cases for acts committed outside the United States; it

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International Law 44 (2013); Vivian G. Curran, "Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co.", 28 *Md. J. Int'l L.* 76 (2013), available at: http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/6; Humberto Fernando Cantú Rivera, "Recent Developments in Kiobel vs. Royal Dutch Petroleum: An Important Human Rights Forum In Peril?." *Cuestiones Constitucionales* 28 (2013), pp. 243-254; Angelica Bonfanti, "No Extraterritorial Jurisdiction under the Alien Tort Statute: Which Forum for Disputes on Overseas Corporate Human Rights Violations after Kiobel?." *Diritti umani e diritto internazionale* (2013), pp. 377-398.

[659] The questions presented to the Supreme Court of the United States, on appeal from the Second Circuit, were:

"1. Whether the issue of corporate civil tort liability under the Alien Tort treated by all other courts prior to the decision below, or an issue of subject matter jurisdiction, as the court of appeals held for the first time.

2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held." Petition for Writ of Certiorari at, Kiobel, 133 S. Ct. 1659 (No. 10-1491).

In the oral arguments phase, the Court ordered the Parties to argue the following point: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Kiobel* v. *Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (mem.). See on this question: Vivian G. Curran, "Extraterritoriality, Universal Jurisdiction, and the Challenge of Kiobel v. Royal Dutch Petroleum Co.", 28 *Md. J. Int'l L.* 76 (2013), available at: http://digitalcommons.law.umaryland.edu/mjil/vol28/iss1/6

thus closed the extraterritoriality door of ATS suits. According to the United States Supreme Court, claims under the ATS cannot be brought before federal courts in the United States for violations of the law of nations occurring within the territory of a sovereign State other than the United States[660].

It may be argued, based on the focused questions before the Court[661], that this interpretation of the ATS applies only to cases concerning torts for violations of the law of nations, and not to a treaty of the United States, as the second prong for the application of the ATS. It has also been argued that the "Court's misunderstanding has not completely erased the possibility of future claims involving foreign elements from being brought under the [ATS]. The Court left the door open for claims that sufficiently 'touch and concern' the United States"[662].

As regretful as this precedent may seem for the development of a civil dimension of universal jurisdiction cases – the United States, under the ATS, represented a valuable avenue for the development of universal civil jurisdiction – it is not the end of the road just yet.

I turn now to examine other cases from Europe. A recent example may be cited in defense of universal civil jurisdiction. In 2012, a Dutch Court in The Hague awarded reparation in the form of compensation to a Palestinian doctor who was imprisoned in Libya for allegedly infecting children with HIV/Aids. The claimant alleged that he was unjustly detained and tortured by the defendants. The claimant, born in Egypt, who resided in The Netherlands, sued 12 Libyan officials pursuant to a universal jurisdiction Dutch law[663]. The plaintiff sought both material and non-material damages[664].

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[660] See *Kiobel* v. *Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013).

[661] See "2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decision provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held." Petition for Writ of Certiorari at, Kiobel, 133 S. Ct. 1659 (No. 10-1491).

[662] Anthony J. Colangelo, "The Alien Tort Statute and the Law of Nations in Kiobel and Beyond", *Georgetown Journal of International Law* 44 (2013), p. 1329.

[663] *El-Hojouj c*. *Amer Derbas* et al., 21 mars 2012, Case No. 400882/HA ZA 11-2252. See also, "Dutch court compensates Palestinian for Libya jail", BBC news, 28 March 2012, available at: http://Ibid..bbc.co.uk/news/world-middle-east-17537597 For a commentary, see Eugene

This case, decided by a first instance court in The Hague, proceeded on the basis that, as the case was of an international character, it had to be determined whether the Dutch court had jurisdiction. The alleged basis for jurisdiction was Article 9(c) of the Code of Civil Procedure. This provision states that jurisdiction is found when the case is "sufficiently connected with the Dutch legal order" and when "it would be unacceptable to ask of the plaintiff that he bring the case before a foreign court". The Court found jurisdiction on the basis that it was unacceptable to require the claimant to take the case before a court in Libya, considering the circumstances in Libya at the time of the initial filing of the case (in July 2011), and the claimant was a resident in The Netherlands[665].

While this is a judgment of a first instance court without much substantive analysis, it serves as an insightful and recent example of the use of universal civil jurisdiction through domestic laws and procedures – in this case, the crimes were committed abroad, the victim and alleged perpetrators were not nationals of the forum State. The Dutch court looked at two important aspects in order to found its jurisdiction: the first one is the fact that the claimant was a resident in The Netherlands, providing an important link with the forum State and a procedural basis upon which to found jurisdiction. The second important aspect of this case is the fact that the Court found that the criterion of "unacceptable to ask the claimant to bring the case in a foreign court" was met. These aspects point to two potential guiding principles for the development of universal civil jurisdiction in a sensible manner and with respect for certain international legal principles such as international comity. The first is the existence of a sufficient link with the forum State (e.g. a residency requirement); the second is the notion of "forum of necessity", where the claimants allege that their case could not be heard in another jurisdiction.

On this latter point, before turning to examine other important cases, it should be noted that the *Institut de Droit International*, in a recent report (2015) concerning universal

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Kontorovich, "Kiobel (IV): Precedent-setting Dutch Civil Universal Jurisdiction Case", *Opinio Juris*, 28 March 2012, available at: http://opiniojuris.org/2012/03/28/precedent-setting-dutch-civil-universal-jurisdiction-case/

[664] The analysis of this case is based on an unofficial translation of the Judgment (original in Dutch).

[665] *El-Hojouj c. Amer Derbas* et al., 21 mars 2012, Case No. 400882/HA ZA 11-2252.

civil jurisdiction for international crimes, provides a detailed review of State practice (concerning claims against individuals, corporations and States), and posits that

> "l'évolution du droit international européen est sensible à l'opportunité d'une certaine ouverture des tribunaux aux litiges portant sur des graves violations des droits fondamentaux même en l'absence d'un for fondé sur les règles ordinaires. L'existence d'un for de sauvegarde en tant que « for de nécessité » est de tradition dans plusieurs pays européens. Cependant, si l'opinion publique est plutôt favorable à un tel for, les positions politiques sont plus reservés"[666].

In reviewing the practice of States in Europe, including France and The Netherlands, as well as Canada, on the question of the applicability of the "forum of necessity," the report notes that:

> "La question n'est pas, dès lors, de savoir si des intérêts nationaux sont en jeu au point que le pouvoir juridictionnel doit être à disposition afin de fournir un remède à des crimes contre l'humanité commis par les «ennemis de l'humanité». La question est plutôt de savoir si les intérêts de la communauté internationale militent pour qu'un tel remède soit fourni par une juridiction appropriée de telle manière à ce qu'aucun « havre sûr » ne subsiste qui pourrait en fin de compte opérer comme un écran protecteur à l'encontre des demandes légitimes des victimes de torture, de génocide et d'autres atrocités de ce genre. Afin d'éviter une telle issue, le droit international devrait assurer l'existence et le bon fonctionnement de tribunaux aptes à en juger afin de protéger les victimes face à un déni de justice. Les quelques procès qui ont été menés ont permis, en raison de leurs effets désastreux sur l'image des sociétés visées, de provoquer une prise de conscience débouchant sur une approche de prévention par rapport aux droits de l'homme"[667].

Concerning cases relating to the Balkans war, in addition to cases brought before domestic courts and mechanisms in the Balkans reviewed above, domestic courts outside

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[666] *Institut de droit international, Commission I*, "La compétence universelle civile en matière de réparation pour crimes internationaux - Universal civil jurisdiction with regard to reparation for international crimes", Rapport par Andreas Bucher, p. 22, available on the site of the *Institut* (session of 2015, Tallinn) at: http://justitiaetpace.org/annuaire_resultat.php?id=16 (last accessed 10 May 2016).

[667] *Institut de droit international, Commission I*, "La compétence universelle civile en matière de réparation pour crimes internationaux - Universal civil jurisdiction with regard to reparation for international crimes", Rapport par Andreas Bucher, p. 26, available on the site of the *Institut* (session of 2015, Tallinn) at: http://justitiaetpace.org/annuaire_resultat.php?id=16 (last accessed 10 May 2016).

Bosnia and Herzegovina[668] have heard reparation claims from victims of the crimes perpetrated during the war[669]. Interestingly, such suits were mainly brought against alleged individual perpetrators. In the United States Courts[670], in the 90's, there were two cases brought against Radovan Karadzić, which concluded in default judgments[671].

These cases concerned civil suits brought by two individuals who claimed to be victims of the crimes allegedly perpetrated by Mr. Karadzić. The alleged crimes for which compensation was being sought included: "genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death"[672]. In the first instance district Court, the claims were dismissed on the basis of lack of jurisdiction under the ATS (which the plaintiffs used as a basis of their action).

Nevertheless, the Second District Court reversed the decision of the first instance Court and found that there was subject-matter jurisdiction under the ATS for a violation of the law of nations committed by a non-state actor, such as the defendant, Mr. Karadzić. The Court thus decided that individual non-state actors could be held liable for crimes such as genocide and war crimes[673] and that individuals could bring a suit against the perpetrator

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[668] These cases are very detailed in the chapter by Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, pp. 167-175.

[669] See Carla Ferstman and Sheri P. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina" in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, Nijhoff, 2009, pp. 484-485.

[670] Commentators have affirmed that "'[. . . it] appears these cases, when taken together with other anti-impunity efforts around the world, are also helping to create a climate of deterrence and [to] catalyze efforts in several countries to prosecute their own human rights abusers': Sandra Coliver, Jennie Green, and Paul Hoffman, "Holding human rights violators accountable by using international law in U.S. courts: Advocacy efforts and complementary strategies", 2005 *Emory International Law Review* 19 (1): 174–175. For a commentary from the representative of some of the victims, see Catherine MacKinnon, "Remedies for war crimes at the national level", 1998 *The Journal of the International Institute* 6. http://hdl.handle.net/2027/spo.4750978.0006.103 Accessed on 12 February 2015.

[671] *Kadic v. Karadzic*, 70 F.3d 232 (2d. Circ. 1995), cert. denied, 518 US 1005 (1996). For a commentary, see David P. Kunstle, "Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations Under the Alien Tort Claims Act?", 6 *Duke Journal of Comparative & International Law* 319-346 (1996).

[672] Cf. *Kadic v. Karadzic*, 70 F.3d, 232.

[673] *Kadic v. Karadzic*, 70 F.3d, 241-43.

for redress for such violation. Given the decision of the Court, the jury awarded a total of US$ 745 million to the 14 plaintiffs (US$ 265 million compensatory damages and US$ 480 million punitive damages)[674].

Similarly, in 1998, a case was brought before a US court by four Bosnian Muslim plaintiffs against NikolaVucković, a Bosnian Serb soldier[675]. The claimants sought compensation and punitive damages for allegations of crimes committed against them during the course of the conflict. The claimants alleged they were victims of arbitrary detention, torture and abuse allegedly committed against Bosnian Muslims and Croats, and the forced relocation of Bosnian Muslim and Croat families living in the municipality of Bosanski Samac in Bosnia and Herzegovina. The Court found for the claimants and awarded US$ 10 million each in compensatory damages and US$ 25 million each in punitive damages[676].

These cases were remarkable having been brought to domestic courts even before the ICTY had custody of the accused. As one of the claimants against Mr. Karadzić stated: "verdict was not about monetary damages, but about gaining recognition of the acts committed by Bosnian Serb ultra-nationalists"[677]. The question then is whether the symbolic value of the judgment is sufficient when the enforcement of the award does not follow. This question is relevant as there were many other accused in the Balkans wars but there weren't as many civil suits brought in domestic courts – why was this precedent not followed? There are certainly many hurdles to bring cases of this magnitude. In the end, when examining civil suits before domestic courts, it is important to bear in mind what is the ultimate goal of bringing these cases as often monetary damages do not get enforced.

In addition to cases brought before the United States Courts, there have also been other cases brought before Courts in Europe, including in Serbia. The first case in Europe

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[674] *Kadic v. Karadžic*, No. 93 Civ. 1163, judgment (S.D.N.IBID.. August 16, 2000).

[675] *Mehinovic, Kemal, et al. 2009. v Nikola Vuckovic*, Civil Section 1:98-cv-2470-MHS US District Court, Northern District of Georgia, 29 July 2009.

[676] *Mehinovic, Kemal, et al. 2009. v Nikola Vuckovic*, Civil Section 1:98-cv-2470-MHS US District Court, Northern District of Georgia, 29 July 2009.

[677] David Rohde, "A Jury in New York Orders Bosnian Serb to Pay Billions, *New York Times,* 26 September 2000, available at*:* *http://Ibid..nytimes.com/2000/09/26/world/jury-in-new-york-orders-bosnian-serb-to-pay-billions.html*

in relation to the Balkan wars, in courts outside the region, took place in France, before the *Tribunal de Grande Instance.* The case concerned allegations of crimes committed during the Bosnian war by Bosnian Serb defendants, Radovan Karadzić and Biljana Plavsić. The Court ordered R. Karadzic and B. Plavsic to pay € 200,000 as reparation to the victims[678].

Another case was brought before Norway courts. A series of decisions from the District Court of Oslo (lower court) culminated with the 2010 decision of the Supreme Court of Norway's finding that former member of the Croatian Armed Forces, Mirsad Repak, who was a guard in the Dretelj detention camp in Bosnia and Herzegovina, and had been allegedly involved in the arrest and unlawful detention of civilian non-combatants, including allegations of torture. The defendant was found guilty and sentenced to imprisonment, and the victims were awarded compensation from 4.000-12.000 euros[679].

Commenting on the series of decisions in Norway, Frederiek de Vlaming and Kate Clark rightly posited that:

> "The case against Repak was the first of its kind in Norway. It demonstrates how judicial reasoning succeeded in weaving together domestic and international legal provisions that came into being at different times but were nonetheless aimed at protecting the same interests. Moreover, the extensive investigations that led to the indictment were done by the Norwegian prosecutor in cooperation with the Serbian war crimes prosecutor, and they involved the statements of at least 211 former detainees of the Detelj camp, almost all the prisoners who were detained in the camp at the time. The above points taken together show once again that the criminal prosecution of individual war crimes perpetrators can bring benefits to more than the small group of witnesses/victims involved in the case: They can help facilitate the intermeshing of national and international law to achieve broader jurisdiction over war criminals, and such cooperation between national and foreign prosecutors signals that

[678] See Ann Riley, 2011, "France court awards Bosnia civil war victims damages for injuries", *Jurist*, 14 March. http://jurist.org/paperchase/2011/03/france-court-awards-bosnia-civil-war-victimsdamages-for-injuries.php, and Irwin, Rachel, *Civil actions offer some closure for Bosnia victims*, Institute for War and Peace Reporting (IWPR), 26 April. http://iwpr.net/report-news/civil-actions-offersome-closure-bosnia-victims, cited in Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 170.

[679] For all judgments, see *The Public Prosecuting Authority vs Mirsad Repak*, Oslo District Court case no: 08-018985MEDOTIR/08, 2 December 2008; Borgarting Lagmannsretten, Court of Appeal, Judgement of 12 April 2010 (case summary at International Red Cross database on Humanitarian Law available at: http://Ibid..icrc.org/customaryihl/eng/docs/v2_cou_no_rule99. Supreme Court of Norway Judgement, case no. 2010/934, 3 December 2010).

crossing a border may no longer be enough to save a war criminal from prosecution"[680].

Similar to the Norway decisions, in Sweden, a district Court of Stockholm convicted another Dretelj camp officer, Mr Ahmet Makitan, of participation in the abuse of 21 Serb civilian prisoners and he was sentenced to 5 years in prison. In addition to the prison sentence, the defendant was also ordered to pay Krona 1.5 million (approximately € 170,000) in the form of compensation to victims[681].

Another interesting example currently under development refers to the case against Hissène Habré, a former Chadian dictator, who has been living in Senegal for decades. After much delay in prosecution, in 2016 Extraordinary African Chambers in the Senegal court system (created to prosecute crimes allegedly committed during Habré's regime in Chad) convicted Mr. Habré of torture, crimes against humanity and torture for life imprisonment[682]. In 2016, he was convicted for crimes against humanity. This case is worth mentioning since reparations proceedings are happening within the same Special Chamber, and within the same proceedings that tried and convicted Mr. Habré. At the time of writing, the judgment concerning reparations is under deliberation, but it has been reported that should there be a reparations award this would be against Mr. Habré, which would thus recognize his civil liability towards victims, in addition to his criminal responsibility, and within the same proceedings.

It is relevant to note that a year earlier, in 2015, twenty top security agents were convicted of murder, torture, kidnapping, and arbitrary detention perpetrated during the Habré dictatorship and sentenced to pay, along with the Chadian Government, US$125

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[680] Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 171.

[681] Stockholms Tingsrätt (Stockholm District Court), case no. B 382-10, 8 April 2011. See also, International Review of the Red Cross, Volume 93, Number 883, September 2011, English language summary, available at: http://Ibid..icrc.org/eng/assets/files/review/2011/irrc-883-reportsdocuments.pdf .

[682] See https://Ibid..theguardian.com/world/2016/may/30/chad-hissene-habre-guilty-crimes-against-humanity-senegal

million in reparations to more than 7.000 victims. Symbolic measures such as the construction of a monument and a museum to honour the victims were also ordered[683].

These examples of cases across the United States and Europe demonstrate that domestic courts, even in States outside the region, have indeed played a role in the adjudication and award of reparations for victims of international crimes. It is also interesting to note that victims turned to foreign courts often after it had become clear that they would not be able to settle their case with the authorities[684]. This is an important example of the argument that State and individual responsibility for reparation for international crimes are not mutually exclusive. While on doctrinal and symbolic levels the Court's order on reparations is very important, a year after the order, it is reported that reparations were still not implemented. This highlights how there is still a disconnect between theory and practice in reparations for international crimes.

E) Desirability, advantages and criticism of a civil dimension for universal jurisdiction

Having discussed the scope and lawfulness of universal civil jurisdiction under international law, based on State practice, it is important to turn attention to the advantages and downfalls of a civil dimension of the doctrine. The question to be asked is why States may wish to assert civil jurisdiction for crimes committed abroad, to non-nationals? This section highlights many of the underlying questions of adding a civil dimension to international justice: what features make it "civil"? What precisely is the difference to "criminal"? Why is this distinction useful and what are the contrasts with a criminal dimension (e.g. burden proof, procedural status, duties of Judges? In discussing the advantages and disadvantages of a civil dimension of universal jurisdiction, some of these inquiries are touched on.

[683] See https://Ibid..hrw.org/news/2015/03/25/chad-habre-era-agents-convicted-torture

[684] Frederiek de Vlaming and Kate Clark, "War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests", *Narratives of Justice In and Out of the Courtroom*, Springer International Publishing, 2014, p. 174.

These questions have been dealt with in detail by Ryngaert in his exhaustive analysis of universal tort jurisdiction, balancing the advantages and issues raised by universal tort jurisdiction[685]. The present section briefly weighs the advantages and disadvantages of universal civil jurisdiction in order to discuss the desirability of using universal civil jurisdiction as a means of claiming reparations for international crimes, the central question of this thesis.

Arguments in favour of universal tort litigation include the fact that it is a victim-orientated approach in the aftermath of mass atrocities. This means that victims may initiate proceedings (rather than prosecutorial bodies), they have control over the proceedings, they have their day in court and their voices and stories are heard (which can be a form of healing). Civil actions controlled by victim plaintiffs could also be effective in preserving the collective memory[686].

Another advantage is that the involvement of the State is limited in civil suits. This might work to preserve foreign relations concerning extraterritorial litigation, since "the greater involvement of the State in criminal prosecutions appears to be more likely to produce adverse effects on the conduct of foreign relations than the adjudicatory practice of civil judges"[687].

It may also be argued that universal civil jurisdiction complements the goals of international criminal justice, of which universal criminal jurisdiction is a tool. Civil awards may also bear a sanctioning effect, especially with the award of punitive damages, which, in addition to repairing, may also foster punitive goals. As to the deterrent effect which universal criminal jurisdiction (and international criminal justice in general) seek to attain, universal civil jurisdiction, through the award of reparation to victims, may also

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[685] Cedric Ryngaert, "Universal tort jurisdiction over gross human rights violations", *Netherlands Yearbook of International Law* 38 (2007), pp. 6-17.

[686] See Jose E. Alvarez, "Rush to Closure: Lessons of the *Tadić* judgment", 96 *Michigan Law Review* (1998), pp. 2101-2102.

[687] Cedric Ryngaert, "Universal tort jurisdiction over gross human rights violations", *Netherlands Yearbook of International Law* 38 (2007), pp. 7-8.

contribute to this goal, where individuals might be concerned with civil suits, and losing their assets[688].

As to criticisms and disadvantages of universal jurisdiction, the first one to be mentioned is the difficulty in enforcing judgments. Freezing assets and actually obtaining compensation for victims are not always straight-forward. Another difficulty is that of gathering evidence (although the burden of proof is less stringent in civil suits than in criminal prosecutions), for crimes committed elsewhere might lengthen proceedings or make it difficult for victims to actually make use of universal civil jurisdiction. In this regard, for example, in relation to civil suits brought against Mr. Karadzić in the United States and more recently in France, the Institute for War and Peace Reporting states that while victims are unlikely to ever receive the payments, this "does not diminish the enormous symbolic significance of these decisions"; such cases "contribute to the growing body of State practice relevant to the implementation of the right to reparation for violations of International Humanitarian Law"[689].

Another criticism is related to the private nature of civil suits and the community condemnation that international crimes call for. It may be argued that because universal civil jurisdiction does not involve prosecution and punishment, only private interests are pursued rather than community interests.

It has furthermore been claimed that, especially in regards to the exercise of universal civil jurisdiction as it relates to corporations, it could impinge on a foreign nation's prerogative to "regulate its own commercial affairs" and "affect much needed foreign investment in host countries"[690].

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[688] See however Cedric Ryngaert, "Universal tort jurisdiction over gross human rights violations", *Netherlands Yearbook of International Law* 38 (2007), pp. 11-12 stating that "it is no doubt true that universal tort litigation may hardly deter future human rights violations", p. 12.

[689] Rachel Irwin, *Civil Actions Offer Some Closure for Bosnia Victims*: *Huge damages demanded of perpetrators unlikely to be recovered, but the judgements do provide a degree of justice for the victims*, cited in Nuhanovic Foundation, *Center for War Reparations*, available at: http://Ibid..nuhanovicfoundation.org/en/reparations-cases/france-tribunal-de-grande-instance-kovac-vs-karadzic-march-2011/ (last accessed on 10 May 2016).

[690] See Supplemental Brief of the Governments of the Kingdom of the Netherlands and the United Kingdoms of Great Britain and Northern Ireland as *Amici Curiae* in support of neither party, *Kiobel v. Royal Dutch Petroleum Co.,* 133 S Ct 1659 (2013) (No 10-1491).

Having briefly discussed some of the reasons invoked in favour and against the exercise of universal jurisdiction, I will now review some recent State practice using universal civil jurisdiction in various States. This review is not intended to examine whether or not customary international law has formed in relation to universal civil jurisdiction for (certain) international crimes or to provide an exhaustive review of cases that have decided in favour or against universal jurisdiction. The following review is intended to illustrate the rationales and modalities of application of universal civil jurisdiction. It is also, and principally, intended to demonstrate whether universal civil jurisdiction might serve as a tool for victims to claim civil redress for international crimes where the crime was committed in another State. It also serves to argue for a legal basis for the claim of universal civil jurisdiction.

VI. ASSESSING UNIVERSAL CIVIL JURISDICTION AS A WAY TO SEEK REDRESS FOR VICTIMS OF INTERNATIONAL CRIMES

Certain criminal conduct is so heinous that it shocks the universal conscience of mankind and it affects the international community as a whole, which acts to repress the criminal conduct and punish the offender. It still remains, however, that often heinous conduct leaves victim(s) grieving the consequences thereof. Their grievances are rooted in the same conduct that prompted the juridical conscience of humankind to punish the offenders. Universal civil jurisdiction, on a normative level, offers the possibility for justice for international crimes not to be solely centred on the trial and punishment of the perpetrators of the offence, but also to take into account the internationally recognized right of victims to receive reparation.

The right to reparation transcends the realm of international human rights law and is established under general international law and, more recently, under international criminal law, as previously discussed. Offenders and victims are the cause and consequence of one another; the punishment of the offender cannot be oblivious to the consequences of the criminal act for which the offender is being punished.

While universal civil jurisdiction may provide an alternative avenue on a normative level, at the current print of international law, it is still not widely accepted. As well, customary international law has not crystallized to a rule of universal civil jurisdiction for international crimes. Nevertheless, as discussed, State practice reviewed above demonstrates that there is an emerging recognition of some form of universal civil jurisdiction, despite the recent retreat in the United States. At a minimum, it has been demonstrated that there is no customary international law prohibiting universal civil jurisdiction. If one applies the *Lotus* principle described above (if universal civil jurisdiction is not prohibited under international law), then States can exercise it.

In the wake of heinous conduct, the international community should, in addition to punishing the offender, have victims' rights at heart. In this sense, the criminal and civil dimensions in the aftermath of an international crime cannot be completely dissociated. In its civil dimensions, universal jurisdiction can prove to be an effective alternative model to enforce the right of victims to receive reparation. This is so because often claiming reparation under the domestic courts where the crime occurred can prove to be difficult, especially if the judicial system of the State concerned has fallen or if the offender is no longer in the territory where the crimes were committed, as discussed in this chapter. Nevertheless, the time is not yet ripe for affirming that universal jurisdiction can be exercised to pursue claims of civil redress, despite the progress in this direction.

As demonstrated by some State practice, universal civil jurisdiction in relation to international crimes could be further developed by taking into account the doctrine of "forum of necessity", which is in line with the notion of ensuring that victims have an avenue to claim a right to reparation from perpetrators and requiring some link between the alleged perpetrator and the forum State.