NOTES AND COMMENTS

THE EMERGING RECOGNITION OF UNIVERSAL CIVIL JURISDICTION

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Modern international law takes as a fundamental value the condemnation and redress of certain categories of heinous conduct, such as genocide, torture, and crimes against humanity. Recognizing the need to end impunity for those crimes, international law permits a state, by the principle of universal jurisdiction, to prosecute them even when they take place outside its territory and do not involve its nationals.

In virtually all domestic legal systems, an individual who engages in wrongful conduct causing personal injury or death will be subject not only to criminal prosecution, but to a civil action by the injured party. Yet, though the principle of universal jurisdiction is well established in the criminal sphere, it is still regarded as novel in the civil context.

Recent developments—most notably the decision of the United States Supreme Court in *Sosa v. Alvarez-Machain*[1]—will cause greater examination of the function and scope of universal jurisdiction as authorization for national courts to hear civil claims based on heinous conduct proscribed by international law. We here consider whether a civil dimension of universal jurisdiction has emerged, whether it should correspond to the criminal dimension, and whether its use as a basis of jurisdiction should depend on the absence of effective remedies in jurisdictions with traditional links to the proscribed conduct.

I. THE RATIONALE OF UNIVERSAL JURISDICTION

Limits on jurisdiction flow from the sovereign equality of states and the principle of noninterference. The general presumption is that a state may exercise jurisdiction in relation to its own domestic affairs but may not interfere in the domestic affairs of other states without justification. On the premise that extraterritorial enforcement is more intrusive than extraterritorial regulation, some argue that a state may exercise prescriptive jurisdiction wherever it chooses, absent an express prohibition to the contrary under international law, but that it may not exercise enforcement jurisdiction in foreign territory, absent an affirmative grant of authority under international law.[2] However, as extraterritorial prescription by one state may intrude upon the interests of other states even without coercive extraterritorial enforcement, particularly when the prescription leads to condemnation or induces changed behavior, international

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[1] 542 U.S. 692 (2004); *see* Brad R. Roth, Case Report: Sosa v. Alvarez-Machain; United States v. Alvarez-Machain, *in* 98 AJIL 798 (2004).

[2] S.S. "Lotus" (Fr. v. Turk.), 1927 PCIJ (ser. A) No. 10, at 18–19 (Sept. 7), *available at* <http://www.icj-cij.org>.

law has moved toward requiring a justifying link for the assertion of even prescriptive jurisdiction.[3]

International law generally recognizes that the justifying link for prescriptive jurisdiction may be found in territory, nationality, or the need to protect the state's national or security interests. A state may not exercise such jurisdiction, however, where that exercise would be unreasonable in the circumstances.[4] In addition, by the principle of universal jurisdiction, international law has long recognized that a state may exercise jurisdiction over a limited category of conduct even without a connection by territory, nationality, or need for protection.[5]

Historically, universal jurisdiction was exercised over serious crimes, such as piracy, that were difficult to prosecute using traditional bases of jurisdiction because they occurred beyond state borders, such as on the high seas. In modern times, universal jurisdiction has been founded on the sheer heinousness of certain crimes, such as genocide and torture, which are universally condemned and which every state has an interest in repressing even in the absence of traditional connecting factors.[6] The modern dominance of this rationale reflects the broader reappraisal under international law of the relative importance of fundamental human rights and state sovereignty. Accordingly, though subject to evolution, the roster of crimes currently covered by universal jurisdiction includes, at a minimum, genocide, torture, some war crimes, and crimes against humanity.[7]

Universal jurisdiction is a permissive customary principle: states are permitted but not required to exercise universal jurisdiction. Some oft-cited examples of universal jurisdiction actually involve one or more of the more traditional bases for jurisdiction, and thus are sometimes referred to as "universal jurisdiction plus."[8] The infrequent exercise of pure universal

[3] Vaughan Lowe, *Jurisdiction, in* INTERNATIONAL LAW 336 (Malcolm D. Evans ed., 2003) (stating that the best view is that some clear connecting factor, such as territoriality or nationality, is necessary); *see also* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 ICJ REP. 3, 78, ¶51 (Feb. 14) (joint sep. op. Higgins, Kooijmans, Buergenthal, JJ.) (*Lotus* represents the "high water mark of laissez-faire in international relations"), *available at* <http://www.icj-cij.org>. The argument that international law imposes virtually no limits on civil jurisdiction, as opposed to criminal jurisdiction, is based on *Lotus*, and hence subject to the same criticisms. *Compare* Michael Akehurst, *Jurisdiction in International Law*, 1972–73 BRIT. Y.B. INT'L L. 145, 177 (concluding that customary international law imposes no limits on civil jurisdiction), *and* Gerald Fitzmaurice, *The General Principles of International Law*, 92 RECUEIL DES COURS 1, 218 (1957 II) (same), *with* F. A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 RECUEIL DES COURS 1, 73–81 (1964 I) (substantial limits on civil jurisdiction), *and* F. A. Mann, *The Doctrine of Jurisdiction Revisited After Twenty Years*, 186 RECUEIL DES COURS 19, 20–33, 67–77 (1984 III) (same).

[4] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §403 (1987) [hereinafter RESTATEMENT].

[5] *Id.* §404 cmt. *a.*

[6] These rationales are frequently conflated. *See generally* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004) (criticizing reliance on piracy to support the argument that universal jurisdiction originally existed to permit any nation to punish the most heinous crimes). *See also* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind").

[7] *See* RESTATEMENT, *supra* note 4, §404; Committee on International Human Rights Law and Practice, International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 4–9 (2000) [hereinafter ILA Report]; Africa Legal Aid, The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences, pmbl., princ. 4 (2002), *at* <http://www.kituochakatiba.co.ug/cairo-arusha.htm> [hereinafter Cairo-Arusha Principles] (stating that, in addition to crimes currently recognized under international law, certain crimes that have major economic, social, or cultural consequences should be subject to universal jurisdiction).

[8] Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts, in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 168, 170 (Stephen Macedo ed., 2004) [hereinafter UNIVERSAL JURISDICTION]. For example, *Att'y Gen. v. Eichmann*, 36 ILR 277, 303–04 (1968) (Isr. S.Ct. 1962), and *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582–83 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), can be justified on the basis of protective and passive personality principles as well as universal jurisdiction.

jurisdiction is easy to understand: if the traditional connections to the regulated conduct are absent, so, too, will be the traditional incentives to exercise jurisdiction. Indeed, by exercising pure universal jurisdiction, the prosecuting state may incur not only financial cost, but the diplomatic wrath of other states with traditional connections to the conduct or parties. In any event, a state's restraint in enacting legislation permitting universal jurisdiction or in exercising universal criminal jurisdiction in particular cases does not mean that international law requires such restraint.[9]

Authorities are divided over whether jurisdiction is best understood by using a two- or a three-part schema (prescriptive/enforcement or prescriptive/adjudicatory/enforcement)[10] and how universal jurisdiction should be categorized under each approach.[11] It suffices to consider universal jurisdiction as a form of jurisdiction that allows a state to proscribe extraterritorial conduct with which it has no connection, and to empower its courts to adjudicate such conduct, but that does not permit enforcement of that law or any resulting judgment within a foreign state's territory in the absence of permission.[12] Although universal jurisdiction may permit courts to adjudicate cases with which the state has no connection, many states will still require an independent basis for personal jurisdiction as a matter of national law, such as the presence of the accused for criminal prosecutions, or the existence of reasonable minimum contacts for civil actions.[13]

Given the international source and character of the standards universal jurisdiction authorizes states to apply, it is arguably less problematic than other forms of extraterritorial prescriptive jurisdiction because it is less prone to the criticism that the forum state is seeking to impose its own legal rules on other states. At the same time, given the difficulty of applying broadly articulated norms to specific facts, the legislatures and courts of states exercising universal jurisdiction will necessarily engage in the interpretation and application of those norms—the inevitable consequence of nationalizing international law. In addition, although the sanctionable

[9] *See* Arrest Warrant of 11 April 2000, *supra* note 3, at 76, ¶45 (joint sep. op.) (observing that "a State is not required to legislate up to the full scope of the jurisdiction allowed by international law"). Whether over time such restraint might form the basis for a customary norm will depend on states' *opinio juris* about whether restraint in these circumstances is permitted or mandatory.

[10] Authorities differ over whether and when adjudication corresponds to prescriptive or enforcement jurisdiction, or whether it represents a third form of jurisdiction. *Compare* RESTATEMENT, *supra* note 4, §401 (distinguishing jurisdiction to prescribe, adjudicate, and enforce), *with* LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 25 n.68 (2003) (distinguishing between prescriptive and enforcement jurisdiction, by reference to the substantive power exercised, and legislative, judicial, and executive jurisdiction, by reference to the branches of state authority), *and* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 297 (6th ed. 2003) (distinguishing between legislative, or prescriptive, jurisdiction and executive, or enforcement, jurisdiction).

[11] *See* Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 269–70 (2005) (using a three-part schema, universal jurisdiction can be a form of prescriptive or adjudicatory jurisdiction); Daniel Bodansky, *Human Rights and Universal Jurisdiction, in* WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 1, 9–11 (Mark Gibney ed., 1991) (same); Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 745 (2004) (using a two-part schema, universal jurisdiction is a form of prescriptive jurisdiction).

[12] As a form of prescriptive jurisdiction, universal jurisdiction would displace ordinary choice-of-law rules, permitting the forum state to apply its own substantive laws (including those derived from international law) to the conduct instead of the laws of the jurisdiction where, for example, the criminal act or tort took place. As a form of adjudicatory jurisdiction, universal jurisdiction would permit the court to hear a case with which the state had no connection but would not dictate the governing substantive law.

[13] For example, U.S. courts have found that they cannot proceed without an independent basis for personal jurisdiction that satisfies the Constitution's due process requirements even over offenses listed as being of universal concern in the RESTATEMENT, *supra* note 4, §404. U.S. CONST. amends. V, XIV. It remains to be considered whether the requirements of due process must themselves take account of the universally proscribed character of the conduct giving rise to universal jurisdiction.

conduct may be defined by international law, national law will inevitably influence enforcement—in the criminal sphere, for example, by the choice between lay juries and professional judges, and by the application of a national penalty regime; and in the civil sphere, for example, by the application of national law procedures, such as class actions, and remedies, such as moral or punitive damages. Although the prospect of nationalizing international law in this way does not undermine the justification for exercising universal jurisdiction, it may be relevant in determining the reasonableness of exercising that jurisdiction when a state with a traditional link could provide a fair and effective alternative forum.

Because universal jurisdiction provides a mechanism for enhancing accountability for the most serious violations of international law, commentators often link the principle with *jus cogens* norms and *erga omnes* obligations, though many express divergent views on their relationship.[14] In one view, these concepts directly support one another, as *jus cogens* norms give rise to *erga omnes* obligations and also require or permit states to exercise universal jurisdiction.[15] In another view, *jus cogens* norms and *erga omnes* obligations are primarily or exclusively concerned with state responsibility, while universal jurisdiction deals primarily or exclusively with individual responsibility, so that the former concepts provide analogous support for the latter.[16] In yet another view, universal jurisdiction should extend to all serious crimes under international law, not just *jus cogens* norms.[17]

Whatever view ultimately prevails, the considerable convergence of *jus cogens* norms, *erga omnes* obligations, and universal jurisdiction reflects the growing acceptance by international law of two important points. First, some norms are fundamental because the conduct they proscribe is so heinous that they bind every state and every individual, without exception. Second, international law must increase the prospect of enforcing these norms by expanding the scope of concepts such as standing and jurisdiction that might otherwise circumscribe the possibility of adjudication. Thus, while these bodies of law are not coextensive, they are, at a minimum, mutually reinforcing, and the extent of their correspondence is likely to increase.

II. THE ROLE OF REPARATIONS IN REDRESSING HEINOUS CONDUCT

While universal criminal jurisdiction remains little exercised, albeit well accepted, plaintiffs and academics have increasingly invoked the concept of universal jurisdiction in considering whether civil remedies may serve as an independent or supplementary means of enforcing international law norms proscribing defined categories of heinous conduct.[18]

[14] *See generally* HAZEL FOX, THE LAW OF STATE IMMUNITY 523–29 (2002); MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* 189–218 (1997).

[15] Prosecutor v. Furundžija, No. IT–95–17/1–T, ¶156 (Dec. 10, 1998), *reprinted in* 38 ILM 317 (1999); M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and Obligations* erga Omnes, L. & CONTEMP. PROBS., Autumn 1996, at 63, 72.

[16] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 829–31 (1988). *But see* ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 57 (1994) (arguing that *Barcelona Traction* dictum concerning *erga omnes* obligations cannot justify national exercises of universal criminal jurisdiction).

[17] *See* Lori F. Damrosch, *Comment: Connecting the Threads in the Fabric of International Law, in* UNIVERSAL JURISDICTION, *supra* note 8, at 91, 94; *cf.* PRINCETON UNIV. PROGRAM IN LAW & PUB. AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29, princ. 2 (2001) [hereinafter PRINCETON PRINCIPLES] (stating that universal jurisdiction over *jus cogens* crimes is "without prejudice" to universal jurisdiction over other international crimes).

[18] *See generally Universal Civil Jurisdiction—The Next Frontier?* 99 ASIL PROC. 117 (2005).

The Alien Tort Statute in the United States

First enacted in 1789, the Alien Tort Statute (ATS) gives federal courts in the United States jurisdiction over "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."[19] The ATS lay largely dormant until the much-discussed 1980 decision by the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*,[20] and it recently received its first thorough analysis by the United States Supreme Court in *Sosa v. Alvarez-Machain*.[21]

The statute and lower court decisions. Starting with *Filartiga*, U.S. courts read the statute to reach violations of "well-established, universally recognized" or "specific, universal, and obligatory" norms of international law.[22] The ATS does not require the tort to be committed on U.S. territory or by a U.S. national, and U.S. courts have not imposed any such requirements.[23] As a result, many ATS cases have involved conduct and parties with no connection to the United States.[24] Yet the status of the statute as an exercise of universal jurisdiction received little consideration in the cases. When the issue was raised, U.S. courts recognized that they were exercising universal jurisdiction but relied on the *Restatement (Third) of the Foreign Relations Law of the United States* for the propriety of doing so.[25] Without citing authority, that work states: "In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy."[26]

The international community has also recognized the ATS as an exercise in universal jurisdiction, albeit with varying reactions. The report on universal jurisdiction of the International Law Association, for example, observed that the United States had exercised universal jurisdiction under the ATS for the purpose of obtaining civil law remedies, "with some success."[27] In the *Arrest Warrant* case, Judges Rosalyn Higgins, Pieter Kooijmans, and Thomas Buergenthal recognized the character of the exercise but expressed greater skepticism:

> In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States . . . has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. . . . While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.[28]

[19] 28 U.S.C. §1350 (2000).

[20] 630 F.2d 876 (2d Cir. 1980).

[21] 542 U.S. 692 (2004).

[22] *Filartiga*, 630 F.2d at 888; *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

[23] As noted *supra* note 13, however, U.S. courts still require personal jurisdiction to be established, but this may be done by using tag jurisdiction, so that cases can proceed without any connection to the United States other than the transitory presence of the defendant at the time of service.

[24] *See, e.g.*, *Filartiga*, 630 F.2d at 878–80 (claim about torture committed in Paraguay by Paraguayan official); Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995) (claim about atrocities committed in Bosnia by leader of Bosnian Serb forces); *In re* Estate of Marcos, Human Rights Litig., 978 F.2d 493, 495–96 (9th Cir. 1992) (claim for torture and wrongful death committed in the Philippines by former Philippine president).

[25] *See, e.g.*, *Kadic*, 70 F.3d at 240; Presbyterian Church v. Talisman Energy, 244 F.Supp.2d 289, 306 (S.D.N.Y. 2003); Beanal v. Freeport-McMoRan, Inc., 969 F.Supp. 362, 371 (E.D. La. 1997).

[26] RESTATEMENT, *supra* note 4, §404, cmt. *b*.

[27] ILA Report, *supra* note 7, at 3 n.6.

[28] Arrest Warrant of 11 April 2000, *supra* note 3, at 77, ¶48 (joint sep. op.).

Sovereign states and the European Commission as amici in Sosa. In the *Sosa* case, Australia, Switzerland, and the United Kingdom, acting jointly, and the European Commission submitted amicus briefs to the Supreme Court that addressed, among other issues, the ATS as an exercise in universal jurisdiction.

Australia, Switzerland, and the United Kingdom argued that, to prevent infringing the sovereignty of other states, the ATS should be restricted to cases with an appropriate connection to the United States or involving activities by U.S. nationals.[29] These states cautioned that broad assertions of extraterritorial jurisdiction would increase the risk of conflicting legal commands and proceedings, and expose foreign nationals and enterprises to costly and uncertain legal proceedings before foreign courts. By taking an expansive approach to jurisdiction, one state could undermine policy choices made by other states regarding the appropriate means of redressing civil wrongs, such as whether to permit punitive damages, cost awards, class actions, or contingency fees, and whether to address violations through the courts or through alternative means of justice, such as truth and reconciliation commissions.

While acknowledging that universal civil jurisdiction might eventually gain status under international law, these states argued that it had not yet done so: 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."[30] The brief cited the U.S. Torture Victim Protection Act (TVPA)[31] as an example of a broader assertion of jurisdiction passed partly to implement the Convention Against Torture.[32] The states noted, however, that if U.S. courts required ATS claimants to exhaust local remedies in the manner required by the TVPA, it would "ameliorate, but not eliminate," their concern about the exercise by the United States of universal civil jurisdiction.[33]

The European Commission acknowledged that neither the existence nor the scope of universal civil jurisdiction was currently well established under international law, but it urged that, to the extent universal civil jurisdiction was recognized, it should be applied only to a narrow category of cases that were already subject to universal criminal jurisdiction.[34] According to the Commission, the exercise of universal civil jurisdiction should be limited in accordance with the rationale for such jurisdiction of ending impunity for violations of the most fundamental norms of international law. States should thus permit their courts to hear cases based on universal civil jurisdiction only with regard to norms already subject to universal criminal jurisdiction and only when the claimant would otherwise face a denial of justice by being unable to bring the case in any state with a traditional link or before an international tribunal. The Commission concluded that this rule could be implemented through existing doctrines, such as exhaustion of local remedies.

The Sosa *decision and Justice Breyer's concurrence.* Holding that a short arbitrary detention did not violate the law of nations, the Supreme Court had no occasion to consider the jurisdictional basis for the ATS under international law in cases with no connection by territory or

[29] 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* at 2–3, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) [hereinafter Governments' Brief].

[30] *Id.* at 6 (footnote omitted).

[31] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. §1350 note).

[32] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 UNTS 112; Governments' Brief, *supra* note 29, at 6 n.8.

[33] Governments' Brief, *supra* note 29, at 24–25 n.36.

[34] Brief of *Amicus Curiae* the European Commission at 17–22, *Sosa*, 542 U.S. 692 (No. 03-339).

nationality to the United States. However, the Court stated that it would be willing to consider appropriate limits on the availability of relief in such cases, including an exhaustion-of-local-remedies requirement.[35]

In a concurring opinion, Justice Stephen Breyer endorsed the principle of universal civil jurisdiction as a safeguard of international comity.[36] Justice Breyer argued that when non-U.S. nationals injured in foreign states bring actions for damages in the United States, courts must consider not only whether the substantive behavior is prohibited by international law, but also whether there is "procedural agreement that universal jurisdiction exists to prosecute" the condemned behavior.[37] He reasoned that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well" because many nations allow victims to attach claims for civil compensation to criminal prosecutions. As a result, universal civil jurisdiction "would be no more threatening" than universal criminal jurisdiction.[38]

The Convention Against Torture and the TVPA

Article 5(2) of the Convention Against Torture contemplates universal criminal jurisdiction over torture by requiring states to prosecute suspected torturers found within their territory or to extradite them for the purpose of prosecution by the state where the offense was committed or the state of nationality of the offender or the victim.[39] Article 14(1) of the Convention provides that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[40] Article 14(2) further provides that "[n]othing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."[41]

The text of Article 14(1) does not specify whether a state must provide an enforceable right of compensation for any victim within its territory regardless of where the torture took place or the nationality of the victim or defendant. Such a reading, however, is consistent with the text, as it would promote the purpose of the Convention to bring torturers to justice. The drafting history also offers some support for this reading because the phrase "committed in any territory under its jurisdiction" was added to, and then deleted from, the relevant text. However, why this territorial qualification was deleted was not really discussed, though some states and scholars have argued that it was because the territorial limitation was already implicit or was inadvertently omitted from the final text.[42] Either way, universal jurisdiction itself appears not to have been discussed during the drafting of Article 14.

When ratifying the Convention, the United States attached an "understanding" that Article 14 "requires a State Party to provide a private right of action for damages only for acts of torture

[35] *Sosa*, 542 U.S. at 733 n.21.

[36] *Id.* at 760–63.

[37] *Id.* at 762.

[38] *Id.* at 762, 763.

[39] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 32, Art. 5(2).

[40] *Id.*, Art. 14(1).

[41] *Id.*, Art. 14(2).

[42] Andrew Byrnes, *Civil Remedies for Torture Committed Abroad: An Obligation Under the Convention Against Torture? in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 537, 545–48 (Craig Scott ed., 2001) (noting the U.S. argument that the omission of the territorial qualifier was inadvertent); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 346 n.102 (noting the U.S. "understanding" that Article 14 was limited to acts of torture occurring within a state's jurisdiction).

committed in territory under the jurisdiction of that State Party."[43] In 1991, in implementation of the Convention, the United States enacted the TVPA, which creates a cause of action and civil remedies for torture victims.[44] The TVPA authorizes the exercise of jurisdiction over conduct without a traditional jurisdictional nexus with the United States. Hence, the statute takes the Convention to permit, if not require, the exercise of universal civil jurisdiction over torture.[45] However, the TVPA might be justified under Article 14(2), without resort to Article 14(1).[46]

Developments in Other National and International Jurisdictions

No other states have enacted equivalents to the ATS or the TVPA.[47] Many reasons have been suggested as to why the exercise of universal civil litigation has largely been confined to the United States: U.S. courts take a wide approach to personal jurisdiction, permitting jurisdiction over persons temporarily present in the jurisdiction at the time of service and over corporations with minimum contacts with the jurisdiction; the United States has a history of public law litigation where courts are seen as a legitimate forum for advocating large-scale social change; and the U.S. legal system has a host of procedural rules that make bringing such claims attractive, including the absence of fee shifting to the losing party and the availability of contingency fees, punitive damages, and default judgments.[48] Still, although precise analogues to the ATS and the TVPA may not exist elsewhere, case law and commentary on universal civil jurisdiction are beginning to emerge outside the United States.

International Criminal Tribunal for the Former Yugoslavia. The Tribunal made a brief reference to extraterritorial civil remedies in *Prosecutor v. Furundžija*, where it observed that, if a national law purported to authorize a violation of a *jus cogens* norm such as torture, "the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act."[49]

The United Kingdom. The British branch of the International Law Association investigated the prospects for suits in the English courts for civil redress of human rights violations committed abroad.[50] The ensuing report noted that while the responsible state bears the primary responsibility to provide a remedy, and international complaints-based mechanisms constitute a secondary means of redress, the interests of justice might require other national legal systems

[43] 136 CONG. REC. S17,486, S17,492 (daily ed. Oct. 27, 1990), *reprinted in* Contemporary Practice of the United States, 85 AJIL 335, 337 (1991).

[44] Torture Victim Protection Act, *supra* note 31.

[45] HOUSE COMM. ON THE JUDICIARY, TORTURE VICTIM PROTECTION ACT OF 1991, H.R. REP. NO. 102-367 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 84–88.

[46] Craig Scott, Remarks, *in The Alien Tort Claims Act Under Attack*, 98 ASIL PROC. 58, 60–61 (2004) (suggesting that Article 14(2) may be read as both creating permissive jurisdictional space and encouraging states to enter that space).

[47] Another relevant form of state practice, however, is that most states have acquiesced in the assertion of universal civil jurisdiction by U.S. courts, even if they have not emulated it. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 290–91 n.29 (2003).

[48] *See* Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 10–17 (2002); *see also* Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 RECUEIL DES COURS 9, 183–86 (1997) (discussing reasons for the lack of international human rights cases in countries other than the United States).

[49] Prosecutor v. Furundžija, No. IT–95–17/1–T, ¶155 (Dec. 10, 1998), *reprinted in* 38 ILM 317 (1999). Standing alone, this statement could be consistent with an endorsement of either universal jurisdiction or the application of ordinary choice-of-law principles, subject to a refusal to give effect to national laws prohibited by international law.

[50] Human Rights Committee, International Law Association (British Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2001 EUR. HUM. RTS. L. REV. 129, 131 [hereinafter *British ILA Report*].

to hear claims when these avenues are not available.[51] The report concluded, however, that under current English law, the hurdles facing claimants would bar suit in most, though not necessarily all, cases. Such hurdles include immunities under public international law and obstacles to jurisdiction under private international law.[52]

In 1992 Sulaiman Al-Adsani, a dual British/Kuwaiti national, filed suit for compensation in the English courts for torture allegedly committed by the government of Kuwait and three individuals in Kuwait.[53] He obtained permission to serve outside the jurisdiction on the basis that there was a good argument that the United Kingdom's statutory grant of sovereign immunity did not apply to claims arising from torture in violation of international law, and that he had suffered physical and psychological damage in the United Kingdom as a result of mistreatment in Kuwait and subsequent threatening phone calls received in the United Kingdom.[54] The court did not purport to rest on universal civil jurisdiction, and given both Al-Adsani's nationality and the link, albeit slight, to British territory, the case cannot be characterized as an exercise in universal jurisdiction. Still, it was widely seen as a potential bridge to such an exercise. Ultimately, the case against Kuwait was dismissed on the basis of sovereign immunity[55] and the case against the individual defendants was not pursued.[56]

Following *Al-Adsani*, four persons of British nationality brought a claim against the Saudi Ministry of the Interior and named Saudi officials for systematic torture allegedly occurring while the claimants were imprisoned in Saudi Arabia.[57] Given the nationality of the claimants, the case did not serve as an example of universal civil jurisdiction, but it did provoke discussion of the doctrine. The English Court of Appeal held that "Article 14(1) [of the Torture Convention] is not designed to *require* every other state (state B) to provide redress in its civil legal system for acts of torture committed in state A," but noted that "under article 14(2) it remains *permissible* for state B to provide [such] redress."[58] The court observed that the ATS might be an example of the wider jurisdiction permitted by Article 14(2).[59] In the end, the court found that the claim against the Saudi ministry was barred by sovereign immunity, but the claim against the state officials could proceed.[60] The House of Lords has granted leave to appeal the decision.

Canada. Houshang Bouzari, an Iranian national who later applied for Canadian citizenship, sued the Islamic Republic of Iran in Canada for torture allegedly committed while he was in Iran. The Court of Appeal for Ontario held that treaty and customary international law did not require Canada to apply a rule of universal jurisdiction to a civil action for torture committed abroad by a foreign state.[61] In particular, the court held that Article 14 requires states

[51] *Id.* at 132–34.

[52] *Id.* at 165.

[53] Al-Adsani v. Kuwait, 103 ILR 420 (Q.B. 1995).

[54] Al-Adsani v. Kuwait, 100 ILR 463 (C.A. 1994).

[55] Al-Adsani v. Kuwait, 107 ILR 536 (C.A. 1996). A challenge to the immunity decision, based on the prohibition of torture and guarantee of access to courts contained in the European Convention on Human Rights, was rejected by the European Court of Human Rights. Al-Adsani v. United Kingdom, App. No. 35763/97, 2001-XI Eur. Ct. H.R., ¶¶ 40, 66–67 (Nov. 21, 2001). The Court, however, divided 9-8 on the question of access to courts, with the minority arguing that *jus cogens* prohibitions supersede national immunity laws in both the civil and the criminal contexts. *See id.* (Rozakis, Caflisch, JJ., dissenting) (Bravo, J., dissenting) (Loucaides, J., dissenting).

[56] *Al-Adsani*, 107 ILR at 536 (C.A. 1996).

[57] Jones v. Saudi Arabia, [2004] EWCA (Civ) 1394, [1], *available at* <http://www.bailii.org>.

[58] *Id.* ¶21.

[59] *Id.*

[60] *Id.* ¶99.

[61] Bouzari v. Iran, C38295, [2004] O.J. 2800, ¶¶81, 95 (Ont. Ct. App. June 30, 2004), *available at* <http://www.ontariocourts.on.ca/decisions/2004/june/bouzariC38295.htm>.

parties to provide a civil remedy only for acts of torture committed within their territory.[62] The court did not address whether treaty or customary international law might permit a state to exercise broader jurisdiction in appropriate circumstances. The court ultimately held that the action against Iran was barred by the doctrine of sovereign immunity, and Bouzari's request for leave to appeal to the Supreme Court of Canada was denied.

Italy. Luigi Ferrini, an Italian national, filed a civil action in the Italian courts against the Federal Republic of Germany for violations of customary international law on deportation and forced labor committed during World War II. Although the lower courts found the claim barred by sovereign immunity, the Court of Cassation held that Germany did not enjoy sovereign immunity for international crimes.[63] The Court reasoned that the peremptory nature of norms prohibiting international crimes gave all states the power to repress them, regardless of where they took place, under the doctrine of universal jurisdiction. The Court concluded that there was no reason to doubt the applicability of universal jurisdiction to civil proceedings based on such crimes, and that immunity could not be invoked because of the peremptory nature of the relevant norms.[64]

Despite this broad conclusion, the Court distinguished *Al-Adsani* and *Bouzari*, partly on the basis that the criminal act in question had begun on Italian territory because Ferrini had been captured there before being deported to Germany.[65] Why the Court drew this distinction is unclear: if Italy could exercise universal civil jurisdiction on the basis of the character of the conduct giving rise to liability, the location of that conduct would not affect its jurisdiction. The Court eventually so recognized, stating in conclusion that while it had highlighted events in Italy, it could have exercised jurisdiction anyhow on the basis of universal jurisdiction.[66]

The Hague Judgments Convention

In its work on the proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, the Hague Conference on Private International Law also considered universal jurisdiction in the civil sphere. The draft convention listed accepted bases of jurisdiction (called the "white list") that would permit a contracting state to hear a case and would require other contracting states to enforce a resulting judgment, and prohibited bases (called the "black list") that would prohibit both a contracting state from hearing a case and other contracting states from enforcing any resulting judgment. The draft convention also contained a "grey list" of bases that permitted contracting states to exercise jurisdiction but did not require other contracting states to enforce the resulting judgment. For this reason, the draft convention was known as a "mixed" convention.

The prohibited bases of jurisdiction, listed in Article 18, included instances where there was no substantial connection between the case and the state exercising jurisdiction. Article 18(3), however, provided:

[62] *Id.* ¶¶72–81.

[63] Cass., sez. un., 6 Nov. 2003, n.5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE 539, ¶12 (2004) [hereinafter Ferrini v. Germany]; *see* Andrea Bianchi, Case Report: Ferrini v. Federal Republic of Germany, 99 AJIL 242 (2005).

[64] Ferrini v. Germany, *supra* note 63, ¶9. *But see* Andrea Gattini, *War Crimes and State Immunity in the* Ferrini *Decision*, 3 J. INT'L CRIM. JUST. 224, 229 (2005) (criticizing the Court for failing to distinguish between individual and state crimes); Bianchi, *supra* note 63, at 246 (same).

[65] Ferrini v. Germany, *supra* note 63, ¶10.

[66] *Id.* ¶12.

> Nothing in this Article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes—
>
> [Variant One:
>
> [*a)* genocide, a crime against humanity or a war crime[, as defined in the Statute of the International Criminal Court]; or]
>
> [*b)* a serious crime against a natural person under international law; or]
>
> [*c)* a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour and disappeared persons].
>
> [Sub-paragraphs [*b)* and] *c)* above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.]
>
> Variant Two:
>
> a serious crime under international law, provided that this State has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.][67]

Occasionally referred to as the human rights exception, this provision was drafted with universal civil jurisdiction over violations of certain core human rights in mind.[68] It contemplated the exercise by states of universal jurisdiction in civil actions for redress of such violations and would have permitted, but not required, other states to recognize judgments in those cases.

Article 18(3) was controversial in whole and in many of its parts, and it remained in square brackets until disagreement on a range of issues brought work on the draft convention to a halt. In 2001 a decision was taken to postpone work on the draft convention on the basis that it would take too long to draw up a satisfactory text for a mixed convention.[69] However, the bracketed text of the draft convention still reflects the support of at least some states for the exercise, subject in some cases to conditions, of universal jurisdiction to make civil remedies available for a narrow category of serious offenses.

Proposed Standards on Universal Jurisdiction

In 1999 Amnesty International issued its 14 Principles on the Effective Exercise of Universal Jurisdiction. They provide that, in cases of grave crimes under international law, national

[67] Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999, Prel. Doc. No. 11 (Aug. 2000), *at* <http://www.hcch.net/upload/wop/jdgmpd11.pdf>.

[68] For the drafting history of this provision, see Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141, 182–89 (2001).

[69] *See* Masato Dogauchi & Trevor C. Hartley, Preliminary Draft Convention on Exclusive Choice of Court Agreements, Draft Report, Prel. Doc. No. 26, ¶¶4–5 (Dec. 2004), *at* <http://www.hcch.net/upload/wop/jdgm_pd26e.pdf>. In order to move past this stalemate, work continued on certain core jurisdictional issues, starting with a convention on exclusive choice of court agreements in business-to-business cases. *Id.* ¶¶5–6. Given the narrowed focus, the resulting Convention on Choice of Court Agreements no longer has implications for universal civil jurisdiction. *Id.* ¶7; *see also* Hague Conference on Private International Law, Convention on Choice of Court Agreements (June 30, 2005), *at* <http://www.hcch.net>.

courts "must award victims and their families with adequate redress. . . . includ[ing] restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."[70]

In 2001 and 2002, Africa Legal Aid convened two meetings of expert academics and practitioners from across Africa and around the world to "discuss and devise principles on universal jurisdiction from an African perspective."[71] Principle 17 of the resulting Cairo-Arusha Principles on Universal Jurisdiction provides that "[r]esponses to gross human rights offences shall include a requirement for the offender or other available mechanism to make appropriate reparation to the victims of the offences, to the extent possible."[72]

In 2001 the Princeton Project adopted the Princeton Principles on Universal Jurisdiction, which dealt only with universal criminal jurisdiction and did not address civil jurisdiction or remedies.[73]

III. THE CIVIL DIMENSION OF UNIVERSAL JURISDICTION

It could be said, then, that though embryonic, state practice endorsing the exercise of universal civil jurisdiction as a permissive customary norm is beginning to emerge. It might be more accurate to characterize these developments, however, as an increasing recognition that the well-accepted modern rationale for exercising universal jurisdiction to impose criminal penalties also justifies exercising it to provide civil remedies. That is, rather than looking solely or primarily for separate and independent evidence of an emerging principle of universal civil jurisdiction, we might be better served by considering whether our existing understanding of universal jurisdiction encompasses a civil dimension and, if so, its appropriate scope and limits.

The general law of state responsibility provides that breaches of international law involve an obligation to make reparations.[74] In the human rights field, many international instruments oblige states parties to afford an effective remedy for violations of fundamental rights.[75] Increasingly, reparation—in the form of restitution, compensation, and rehabilitation—is being viewed as a key element of an effective remedy and as an important adjunct to international criminal law.[76] For example, the UN Commission on Human Rights recently adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[77] Given this growing recognition, the acceptance of universal criminal

[70] AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION, princ. 11 (AI Index IOR 53/01/99, 1999) [hereinafter AMNESTY PRINCIPLES].

[71] Cairo-Arusha Principles, *supra* note 7, pmbl.

[72] *Id.*, princ. 17. *See generally* Edward Kwakwa, *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: Developing the Frontiers of the Principle of Universal Jurisdiction*, 2002 AFR. Y.B. INT'L L. 407, 417 (deeming Cairo-Arusha Principles' reparations idea "relatively new").

[73] PRINCETON PRINCIPLES, *supra* note 17.

[74] Factory at Chorzów (Ger. v. Pol.), Indemnity, 1928 PCIJ (ser. A) No. 17, at 29 (Sept. 13). *See generally* CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW (1987).

[75] *See, e.g.*, Universal Declaration of Human Rights, GA Res. 217A (III), Art. 8, UN Doc. A/810, at 71 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 2(3), 999 UNTS 171. *See generally* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (2d ed. 2005).

[76] *See* Rome Statute of the International Criminal Court, July 17, 1998, Art. 75(2), 2187 UNTS 3 [hereinafter Rome Statute] (Court may order convicted person to pay reparations); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, annex, paras. 8–17 (Nov. 29, 1985) (addressing restitution, compensation, and assistance to victims). *See generally* Fiona McKay, *Civil Reparation in National Courts for Victims of Human Rights Abuse, in* JUSTICE FOR CRIMES AGAINST HUMANITY 283 (Mark Lattimer & Philippe Sands eds., 2003).

[77] UN Comm'n on Hum. Rts. Res. 2005/35, UN Doc. E/CN.4/2005/L.10/Add.11; *see also, e.g.*, UN Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination & Protection of Minorities, Study Concerning the

jurisdiction should carry over to the exercise of universal civil jurisdiction for at least the same range of conduct.

The goals of criminal and tort law overlap. Most fundamentally, criminal conviction and civil judgment both play an important declarative function in society.[78] Although by tort claims private parties may seek vindication of private interests,[79] judgments in these cases affirm much wider interests manifested in the norms that the community is prepared to enforce. Punishment and compensation represent two distinct, but complementary, ways of condemning past, and deterring future, wrongdoing.[80] Like criminal prosecutions, civil tort suits allow public authorities in the form of courts or other tribunals to determine whether proscribed conduct has occurred and the consequences that should follow from that conduct. A judicial determination, even in a civil suit, may itself constitute an important form of recognition and closure to victims. And just as in the criminal sphere both physical incarceration and monetary fines are intended not only to punish but also to deter, so the prospect of having to compensate a victim under tort law is intended not only to redress but also to deter.[81]

The close relationship between criminal sanctions and civil remedies is confirmed by the *action civile* recognized in many civil law states, by which a civil claim for compensation is attached to a criminal prosecution. Hence, in these states, when universal or extraterritorial jurisdiction is exercised over offenses such as genocide, crimes against humanity, and war crimes, a victim may seek monetary compensation in that proceeding.[82] Without making the same distinction between criminal and civil jurisdiction as in many common law states,[83] these countries would indirectly permit a form of universal civil jurisdiction.[84]

Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/Sub.2/1993/8 (prepared by Theo van Boven); UN Comm'n on Hum. Rts., The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, UN Doc. E/CN.4/2000/62, annex (prepared by M. Cherif Bassiouni).

[78] *See* Stephens, *supra* note 48, at 51.

[79] M. O. Chibundu, *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, 39 VA. J. INT'L L. 1069, 1133 (1999).

[80] *See* Van Schaack, *supra* note 68, at 156–59.

[81] *See id.* at 157–58 (discussing deterrence rationale for tort law). Some commentators object that treating gross human rights violations as torts for purposes of compensatory regimes reduces them from serious international crimes to mere domestic wrongs. *See* LYAL S. SUNGA, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 113 (1992). It is hard to see, however, how enlarging the range of available sanctions to include compensation of the victim, without eliminating the right to prosecute, could be viewed as diminishing the seriousness of the conduct, as opposed to increasing the options for enforcement and accountability, unless the possibility of civil claims were to lessen the likelihood of criminal prosecutions by states.

[82] *See, e.g.*, CODE DE PROCÉDURE PÉNALE Arts. 689-2 to -10 (universal jurisdiction), Arts. 2–3 (*action civile*) (Fr.); VÖLKERSTRAFGESETZBUCH [Code of Crimes Against International Law] §1 (universal jurisdiction) (Ger.); STRAFPROZESSORDNUNG [StPO] [Federal Criminal Procedure Code] §§403–406c (*action civile*) (Ger.); Ley orgánica del poder judicial [Organic Law of the Judiciary] Art. 23(4) (universal jurisdiction); Ley de enjuiciamiento criminal [Criminal Proceedings Law] Art. 112 (criminal complaint also a civil claim unless victim expressly states otherwise); *see also* Redress, *Universal Jurisdiction in the European Union*, *at* <http://www.redress.org/conferences/country-%20studies.pdf> (document for conference entitled Legal Remedies for Victims of "International Crimes," Nov. 24–25, 2002).

[83] Even some common law states, such as the United States, are amending their criminal statutes to incorporate provisions for reparations. *See* Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 FORDHAM L. REV. 2711 (2005) (discussing restitution provisions under the Victims Witness and Protection Act of 1982 (codified as amended in scattered sections of 18 U.S.C., with restitution provision at 18 U.S.C. §3663 (2000)) and the Mandatory Victim Restitution Act of 1996 (18 U.S.C. §3663A (2000))).

[84] *Cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 763 (2004) (Breyer, J., concurring) (stating that acceptance of universal criminal jurisdiction for certain crimes implies acceptance of "a significant degree" of civil liability for the same crimes, given that some legal systems permit civil damages as part of criminal proceedings). Although several civil actions have been attached to criminal cases brought on the basis of universal jurisdiction, no such case appears to have yet resulted in a monetary award.

The same relationship is reflected in international practice. For example, the Rome Statute confers upon the International Criminal Court (ICC) the power to "make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[85] This innovative article was controversial during the negotiation of the Statute, particularly as awards of reparations in the criminal context were not available in many legal systems.[86] Concerns were ultimately overcome, however, by the recognition that the Court would need a wider focus than purely retributive justice and that reparations to victims "could contribute to a process of reconciliation."[87] Similarly, the Convention Against Torture and the Amnesty International and Cairo-Arusha principles on universal jurisdiction also propose mechanisms for reparations as well as criminal sanctions.[88]

Although the exercise of civil jurisdiction can be viewed as less intrusive than that of criminal jurisdiction,[89] structural differences between the two forms of jurisdiction may counsel caution. The most significant objection to the exercise of universal civil jurisdiction is the reduced degree of control by public authorities. In most states, criminal prosecutions are initiated and controlled by public authorities, who can exert plenary discretion over whether to bring a case, how to pursue it, and when to terminate it.[90] In using that discretion, state authorities may weigh competing public policy factors, including considerations of foreign policy and international comity, that private plaintiffs have neither reason nor competence to entertain.[91] Although some civil law countries allow victims to initiate criminal prosecutions and investigations, that very circumstance has caused controversy in the context of universal criminal jurisdiction.[92]

Of course, in legal systems where public authorities do not control private claims for damages, those authorities are not absent from the process. In a civil suit, courts still make the determination of liability and assess damages. Courts may also resort to a range of generally applicable legal and procedural doctrines, such as personal jurisdiction, *forum non conveniens*, sovereign immunity, and act of state, by which they are authorized to ferret out cases that

[85] Rome Statute, *supra* note 76, Art. 75; *see also* International Criminal Court, Rules of Procedure and Evidence, Doc. ICC–ASP/1/3 (pt. 11–A), Rules 94–98 (Sept. 9, 2002) (outlining procedure for requesting, assessing, and paying reparations for victims).

[86] *See* Frank Terrier, *The Procedure Before the Trial Chamber, in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1277, 1317 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002) (noting that reparations provisions were borrowed from civil law model).

[87] Christopher Muttukumaru, *Reparation to Victims, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 262, 264 (Roy S. Lee ed., 1999); *see also* David Donat-Cattin, *Article 75: Reparations to Victims, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 965, 967 (Otto Triffterer ed., 1999) (noting acceptance of reparations provision because it was necessary for full vindication of victims' rights).

[88] *See supra* notes 40, 70–71 and corresponding text.

[89] *See* REYDAMS, *supra* note 10, at 3 (recognition of universal criminal jurisdiction requires recognition of universal civil jurisdiction, because "*qui peut le plus peut le moins*, the greater includes the lesser").

[90] *Cf. Sosa*, 542 U.S. 692, 727 (2004) (noting concern over whether to "permit enforcement without the check imposed by prosecutorial discretion"); Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AJIL 888, 896 (2003) (advocating prosecutorial screening).

[91] Bradley, *supra* note 42, at 347.

[92] For example, victim-initiated investigations and investigations of high-ranking foreign officials under Belgium's universal jurisdiction laws led to an outcry by other states, resulting in amendments to the legislation that require a link between Belgium and the nationality or residence of the plaintiff or accused, recognize immunity of high-ranking foreign officials while in office, and prohibit victim-initiated cases where the only basis for jurisdiction is the victim's nationality. *See* Ratner, *supra* note 90, at 889–91 (discussing Loi relative aux violations graves du droit humanitaire, Aug. 5, 2003, MONITEUR BELGE, Aug. 7, 2003).

should not proceed in a given forum.[93] However, these doctrines do not, and are not intended to, equate to the plenary discretion exercised by prosecutors.[94]

Universal jurisdiction is justified by the need to facilitate enforcement of fundamental norms that, at the present stage of national and international enforcement mechanisms, are not at risk of overenforcement. The paucity of universal criminal prosecutions may help minimize international tension, but it also means that the grant of jurisdiction has not been fully utilized for its purpose of ending impunity for serious violations of international law. If the recognition of universal jurisdiction necessarily entails a balancing of traditional sovereign prerogatives and fundamental human values, the balance should be struck by according those with the greatest incentive to pursue reparations—that is, the victims of the heinous conduct—the right to do so in civil actions, while reserving to public authorities the decision to seek penal sanctions.

A second objection to the recognition of universal jurisdiction in the civil sphere is the potential for multiple proceedings on the same events. Even though some support can be found for the exercise of universal criminal jurisdiction *in absentia*, particularly in civil law states,[95] most states generally prosecute defendants for crimes only when they are in the state's custody.[96] Hence, only one state is likely to exercise universal criminal jurisdiction or civil jurisdiction attendant to it. By contrast, victims might bring civil actions in any state where they could meet otherwise applicable procedural requirements. Particular concern is raised about this issue with regard to states, such as the United States, that permit *in personam* jurisdiction over persons temporarily present in the jurisdiction at the time of service and corporations with minimum

[93] According to one study, approximately 80 percent of the human rights cases brought under the ATS and the TVPA in the United States since 1980 have been dismissed on these and similar bases. K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT'L L.J. 1, 2 & n.6 (2004); *see also id.* at 12–42 (describing how a variety of legal doctrines and procedural limits are used to restrict universal jurisdiction in the United States).

[94] In the United States, for example, the federal executive branch, which is responsible for the conduct of foreign relations, has the opportunity to bring to a court's attention interests akin to those that might be considered by a public prosecutor, *see, e.g.*, 28 U.S.C. §517 (2000), but those views are not controlling. *See* Republic of Austria v. Altmann, 541 U.S. 677, 702 & n.23 (2004) (Department of State's opinion regarding immunity in a particular case, while not conclusive, "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy"); Presbyterian Church v. Talisman Energy, Inc., No. 01 Civ. 9882 (S.D.N.Y. Aug. 30, 2005) (denying motion to dismiss based on international comity and undue interference with foreign affairs power, despite statements of interest by the U.S. and Canadian governments); *see also* Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 111, 141 (*Altmann* "confirmed the continuing significance of law as an element of foreign relations" by giving executive views on sovereign immunity "serious weight, not controlling effect").

[95] *Compare, e.g.*, Arrest Warrant of 11 April 2000, *supra* note 3, at 39–40, ¶¶9–12 (Feb. 14) (Guillaume, J. & Pres., sep. op.) (finding no basis in international law for exercise of universal jurisdiction *in absentia*), *with id.* at 80–81, ¶¶53–58 (joint sep. op.) (arguing that universal jurisdiction *in absentia* is permissible), *and id.* at 170–73, ¶¶54–58 (Van den Wyngaert, J. *ad hoc*, dissenting) (concluding that international law does not prohibit universal jurisdiction *in absentia*).

[96] 1 OPPENHEIM'S INTERNATIONAL LAW 467 (Robert Jennings & Arthur Watts eds., 9th ed. 1996); *see also* Law No. 95-1 of January 2, 1995, tit. 1, ch. 1, Art. 2, Journal officiel de la République Française [J.O.] [Official Gazette of France], Jan. 3, 1995, p. 71 (requiring individuals alleged to have committed war crimes in the territory of the former Yugoslavia to be in France in order to be prosecuted by French courts); Cass. crim., Jan. 6, 1998 (decision), *in* Denis Alland & Frédérique Ferand, *Jurisprudence française en matière de droit international public*, 102 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 825, 827 (1998) (requiring individuals alleged to have committed war crimes in the territory of Rwanda to be in France in order to be prosecuted by French courts); *In re* Bouterse, Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands], Sept. 18, 2001, No. 749/01 (CW 2323) §8.5 (finding no jurisdiction to prosecute under legislation implementing Convention Against Torture where accused was not arrested in or in the custody of the Netherlands); StPO Art. 153f(2)(3)–(4), as amended by Law introducing VÖLKERSTRAFGESETZBUCH Art. 3(5), June 26, 2002, *in* Bundesgesetzblatt [Federal Official Journal], Teil I at 2253, 2259 (Ger.) (presence of suspect not required, but prosecutor has discretion to close investigation if suspect's presence not expected).

contacts with the jurisdiction. The prospect of suit in multiple jurisdictions would be especially troubling for corporations, which may operate, and hence be amenable to suit, in many states.[97]

Again, however, national law would impose its own rules for asserting jurisdiction in any particular case, including personal jurisdiction and *forum non conveniens*, which may require or permit a court to decline to hear a particular case. Moreover, any state asked to give effect to a judgment resulting from proceedings in another state would impose, in turn, basic requirements for recognition and enforcement of that judgment. Individuals and corporations that operate across borders regularly take account of the prospect of suit in various fora as a consequence of their operations in the relevant jurisdictions, and the prospect of suit in a state prepared to exercise universal jurisdiction in civil cases would constitute just one more consideration guiding the individual's or corporation's conduct. If the prospect of suit in multiple fora raises a concern, moreover, it should be addressed not by denying civil adjudication of the norm, but by developing criteria for determining which among those jurisdictions capable of adjudicating the norm is in the best position to do so.

IV. THE SCOPE OF UNIVERSAL CIVIL JURISDICTION

As traditional limits on the exercise of jurisdiction are designed to avoid interstate friction, but the international community is prepared to set aside those limits in the interest of increasing enforcement of its most fundamental norms, the authority to exercise jurisdiction in the civil sphere when more than one state is willing and able to do so should be allocated under international law. If avoiding unnecessary intrusion by one state in the affairs of another and preventing conflict between the courts of several states are worthy goals, the exercise of universal civil jurisdiction might still take those goals into account, so long as the imperative to enforce fundamental norms is preserved. Thus, instead of relying solely on domestic doctrines to assess a victim's right to pursue justice in a particular forum, international law would define the scope of universal civil jurisdiction to correspond to the need that justifies it.

The exercise of universal jurisdiction in the civil sphere should therefore take account of the important practical and symbolic considerations that favor, where possible, the local resolution of disputes. As a practical matter, disputes can often be resolved most efficiently in the place where the parties live or the conduct took place, because of the location of the parties, the witnesses, and the physical evidence.[98] On the symbolic level, states have an interest in resolving human rights violations occurring within their own jurisdiction, which gives victims a forum for their grievances and helps the country come to terms with its history.[99] "In-country justice" may do more to help a wounded country than "remote justice," so that local trials, as long as they are viewed as legitimate, are more likely than foreign or international ones to inspire a sense of ownership in the afflicted society.[100]

[97] Whether corporations can be held liable for violations of international law under the ATS is currently the subject of litigation in U.S. courts. The recent case against Unocal was settled out of court, *see* International Labor Rights Fund, Settlement of Unocal Case, December 2004 (Dec. 13, 2004), *at* <http://www.laborrights.org/projects/corporate/unocal/settlement1204.htm>. Other cases have recognized the possibility of corporate liability under the ATS and international law, though no final judgment against a corporation has yet been issued. *See, e.g.*, Presbyterian Church v. Talisman Energy, Inc., 374 F.Supp.2d 331, 333–35 (S.D.N.Y. 2005) (denying motion to dismiss and holding that corporation could be liable under ATS); *see also* Cairo-Arusha Principles, *supra* note 7, princ. 2 (universal jurisdiction applies to natural persons and "other legal entities").

[98] Van Schaack, *supra* note 68, at 198.

[99] *Id.*

[100] Diane F. Orentlicher, *The Future of Universal Jurisdiction in the New Architecture of Transnational Justice*, *in* UNIVERSAL JURISDICTION, *supra* note 8, at 214, 236.

International law increasingly recognizes that a state with a clear nexus to a case may have an interest in resolving that case in its own domestic tribunals before it is heard by an international body or other national court. When it comes to criminal enforcement on the international plane, the principle of complementarity reflected in the Rome Statute gives states with a traditional connection to the crime based on territory or nationality the first opportunity to investigate and prosecute alleged offenders; an ICC prosecution would not be possible unless those states were "unwilling or unable genuinely" to proceed.[101] On the national plane, universal criminal jurisdiction is generally exercised in a manner that shows deference to local remedies over transnational remedies. While the duty to extradite or prosecute does not establish a legal hierarchy, deference is usually paid to states exercising jurisdiction under traditional bases,[102] and that deference is sometimes characterized as a rule.[103] Similarly, in the field of universal jurisdiction, some advocate giving priority to the state of territoriality when it is willing and able to prosecute.[104]

The Princeton Principles, which address only universal criminal jurisdiction, also favor resolving conflicts between competing fora by giving priority to traditional bases of jurisdiction where doing so does not offend the interests of justice. The drafters considered ranking the different bases of jurisdiction, giving territorial jurisdiction preeminence, on the ground that "societies that have been victimized by political crimes should have the opportunity to bring the perpetrators to justice, provided their judiciaries are able and willing to do so."[105] Ultimately, however, the committee created a list of factors that states should consider in determining whether to prosecute or extradite an alleged offender, including the place of the crime, the nationality of the alleged perpetrator and victim, the fairness and impartiality of the potential proceedings, the convenience of the parties and the witnesses, and the interests of justice.[106] Although they do not create a strict hierarchy, these factors favor traditional bases of jurisdiction where the state is able to provide an effective remedy.[107]

An analogous principle was adopted in the TVPA, which requires U.S. courts to decline to hear cases if the claimant has failed to exhaust adequate and available remedies in the place where the conduct giving rise to the claim occurred.[108] Although the U.S. Congress recognized that "[j]udicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent," it included an exhaustion requirement to ensure that U.S. courts would not entertain cases that would be more appropriately handled

[101] Rome Statute, *supra* note 76, Art. 17(1)(a); *see also id.*, Art. 17(1)(b) (precluding ICC jurisdiction where a state has investigated but, in good faith, decided not to prosecute); *id.*, pmbl. (emphasizing that ICC is complementary to national criminal jurisdictions).

[102] *See, e.g.*, StPO Art. 153f(2)(4) (Ger.) (prosecutors may decline to investigate case where prosecution has begun in country that has jurisdiction based on territoriality or nationality of the victim or suspect); Loi relative aux violations graves du droit humanitaire (Belg.), *supra* note 92, Art. 16 (amending Code of Criminal Procedure Art. 10 §1*bis* (4) to state that prosecutor will request magistrate to investigate complaint unless the interests of justice or international obligations require that the matter be brought before an international tribunal or tribunal of another state, provided that alternative tribunal is competent, independent, impartial, and fair).

[103] Arrest Warrant of 11 April 2000, *supra* note 3, at 81–82, ¶59 (joint sep. op.).

[104] *See* ILA Report, *supra* note 7, at 20–21; Cairo-Arusha Principles, *supra* note 7, pmbl.; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 91 n.37 (2001); Ratner, *supra* note 92, at 895.

[105] PRINCETON PRINCIPLES, *supra* note 17, at 53 (Commentary).

[106] *Id.* at 32, princ. 8.

[107] *Cf.* Orentlicher, *supra* note 100, at 236 (noting that the jurisdictional preference, embodied in Princeton Principles, for states with significant links to the acts in question may enhance legitimacy of universal jurisdiction).

[108] Torture Victim Protection Act, *supra* note 31, §2(b).

by other states.[109] Similarly, as indicated above, Article 18(3) of the draft Hague Convention limited jurisdiction over serious crimes against the person, other than genocide, crimes against humanity, and war crimes, to cases where the victim would risk "a denial of justice" because other proceedings were "not possible or cannot reasonably be required."[110]

By definition, universal jurisdiction applies to norms whose enforcement has been made imperative by the international community. Accordingly, exhaustion requirements developed in other contexts should not be uncritically converted into conditions that might block the exercise of universal jurisdiction.[111] At the same time, if the rationale of universal jurisdiction is the need to end impunity for heinous conduct, the case for its exercise in the civil sphere becomes less compelling when a state that may exercise jurisdiction on a traditional basis offers an effective means of civil redress. Thus, courts must find a way to ensure that an effective remedy is available under universal jurisdiction while respecting the right of states with traditional connections to exercise jurisdiction where they are willing and able to provide an accessible forum and effective remedy.

One approach, consistent with the Princeton Principles in the context of universal criminal jurisdiction and the *Restatement* with respect to the exercise of prescriptive jurisdiction generally, would be a balancing test.[112] The advantages and disadvantages of legal rules expressed as balancing tests are well rehearsed: balancing provides flexibility but, no matter how well accepted the factors, risks indeterminacy, inconsistency, and the appearance of subjectivity.[113] Hence, it would be preferable for the conditions that might warrant a court's declining to exercise universal civil jurisdiction to be more precisely defined and consistently applied.

Either way, the test would have to incorporate, as the minimum condition for ceding jurisdiction to a state with traditional connections, the availability in that state of a readily accessible forum and fully effective remedies, because anything less would be inconsistent with the rationale for universal jurisdiction. Consequently, whether the rule stated this and any other conditions as part of a balancing test or as the rule itself, courts might decline to exercise universal civil jurisdiction where either the defendant, or a state with a traditional connection, demonstrates that those conditions obtained, or the plaintiff demonstrates that they did not. Wherever the burden of proof is placed, if the rule were expressed as minimum conditions, it would operate in a manner analogous to complementarity under the Rome Statute[114] or exhaustion under the TVPA.[115]

[109] H.R. REP. NO. 102-367, *supra* note 45, 1992 U.S.C.C.A.N. at 85, 87–88.

[110] Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *supra* note 67, Art. 18(3). The provision is quoted in full in text at note 67 *supra*.

[111] *Compare* Dubinsky, *supra* note 11, at 315–16 (advocating exhaustion requirement), *with* Van Schaack, *supra* note 68, at 192–93 (opposing exhaustion requirement).

[112] *See* PRINCETON PRINCIPLES, *supra* note 17, at 32–33, princ. 8; RESTATEMENT, *supra* note 4, §403; *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 818–22 (1993) (Scalia, J., dissenting) (applying *Restatement* factors to determine whether Sherman Act should apply extraterritorially).

[113] For example, the use of balancing tests in other controversial bases of jurisdiction, such as the effects doctrine, *e.g.*, Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155 (2004); Timberlane Lumber Co. v. Bank of Am. N.T. & S.A., 549 F.2d 597, 614–15 (9th Cir. 1976), has been criticized as a mere fig leaf to cover unwarranted assertions of extraterritorial jurisdiction.

[114] *See supra* note 101 and corresponding text. Some national courts have also considered whether universal jurisdiction should operate as a subsidiary form of jurisdiction. *See, e.g.*, Sentencia del Tribunal Constitucional español reconociendo el principio de jurisdicción penal universal en los casos de crímines contra la humanidad, II. Fundamentos jurídicos ¶4, STC 237/2005 (Sept. 26, 2005), *available at* <http://www.derechos.org/nizkor/guatemala/doc/tcgtm1.html> (recognizing universal jurisdiction but declaring it subsidiary to the jurisdiction of the territorial state).

[115] *See* Torture Victim Protection Act, *supra* note 31, Art. 2(b); *see also* S. REP. NO. 102-249, pt. IV(F), 1991 WL 258662, at *9–10 (Judiciary Committee report on TVPA) (defendants bear the burden of demonstrating that

In determining whether to exercise or refrain from exercising jurisdiction, courts should remain open to submissions on the question by an affected state, which may endorse or protest the exercise of jurisdiction,[116] though they should view with skepticism submissions by a state implicated in the events forming the gravamen of the suit. Courts should also remain sensitive to the substantial transaction costs imposed by litigation over threshold issues and should take account of the individual circumstances of the claimant.[117] It should follow, too, from the effect of universal jurisdiction to permit an individual state to vindicate the interests of the international community that the assertion of universal jurisdiction in a civil case could be trumped by the availability of a multilateral international tribunal authorized to provide effective civil redress.[118]

The conditions in which a court might decline to exercise universal jurisdiction in a civil matter should gain greater definition over time through successive application in different national courts and the "transjurisdictional communication" that would ensue.[119] At a minimum, universal civil jurisdiction should be exercisable where no state with traditional links can provide an effective forum. For example, the case may have arisen out of atrocities that destroyed the judicial system,[120] or the courts may remain under the control of the alleged wrongdoers,[121] or the judicial system may not manifest sufficient indicia of fairness and reliability for plaintiffs to risk making a futile or unduly burdensome effort to seek redress there.[122] Even the availability of a functioning judicial system in a state may not serve as sufficient reason to refrain from exercising universal jurisdiction. For example, arguments over the effectiveness of the remedy in an alternative forum may arise where that forum would treat the conduct as a domestic tort only, rather than as a violation of an international norm—for example, assault and battery instead of torture, or wrongful death instead of summary execution. Debates may also arise where symbolic reparations alone are available, rather than compensation corresponding to the injury suffered, or where class actions are permitted in one forum but not the other.

domestic remedies were not exhausted, which victim may rebut by showing such remedies were "ineffective, unobtainable, unduly prolonged, inadequate or obviously futile," but "the ultimate burden of proof and persuasion on the issue of exhaustion of remedies . . . lies with the defendant"); *see also* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 96, at 522–26 (under general international law, defendant state must show existence of local remedies, thus requiring opponent to show that such remedies were "exhausted or inadequate").

[116] For example, both the legal adviser of the U.S. State Department and the minister of justice and constitutional development of the Republic of South Africa filed letters in *In re S. Afr. Apartheid Litig.*, 346 F.Supp.2d 538, 553 (S.D.N.Y. 2004), arguing, respectively, that the case concerning reparations for apartheid imposed a risk to the foreign policy objectives of the United States and interfered with South Africa's sovereign right to address issues of domestic concern. While the views of the United States on its foreign policy interests would be relevant as a matter of U.S. law, the willingness and ability of South Africa to provide a forum and remedy would be relevant to the propriety of the exercise of universal civil jurisdiction as a matter of international law.

[117] For example, the forum court should consider whether the individual circumstances of the plaintiff might make illusory the prospect of resort to the local tribunal. *Cf.* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18–19 (1972) (forum selection clause enforceable in absence of a showing that enforcing would "effectively deprive[]" plaintiff of its right to bring claim).

[118] *See* Brief of *Amicus Curiae* the European Commission, *supra* note 34, at 24; *British ILA Report*, *supra* note 50, at 132. *But see* Rome Statute, *supra* note 76, Art. 75(6) (right to reparation under the ICC not to be interpreted as "prejudicing the rights of victims under national or international law").

[119] Orentlicher, *supra* note 100, at 229.

[120] *See* Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409, at *5 (S.D.N.Y. Apr. 9, 1996) (TVPA exhaustion requirement met where Rwandan judicial system virtually inoperative).

[121] *See* Tachiona v. Mugabe, 216 F.Supp.2d 262, 275 (S.D.N.Y. 2002) (TVPA exhaustion requirement met where Zimbabwean judicial system sufficiently under control of defendant).

[122] *See* Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 U.S. Dist. LEXIS 3293, at *56–57 (S.D.N.Y. Feb. 28, 2002) (defendant failed to show nonexhaustion under TVPA by failing to demonstrate that Nigerian courts were just and amenable to suit); Xuncax v. Gramajo, 886 F.Supp. 162, 178 (D. Mass. 1995) (TVPA exhaustion not required when foreign remedies are "'unobtainable, ineffective, inadequate, or obviously futile'") (quoting S. REP. NO. 102-249, *supra* note 115).

In assessing the availability of effective relief in another forum, one area already creating controversy is whether, and in what circumstances, one state's grant of amnesty or use of an alternative form of justice, such as a truth and reconciliation commission or *gacaca*-style courts, might preclude other states from exercising universal jurisdiction. Given the tensions between transitional justice and international criminal law, it is not surprising that similar conflicts would arise with exercises of universal civil jurisdiction. Indeed, in the case against corporations alleged to have aided and abetted the South African apartheid regime, South African president Thabo Mbeki strongly objected to the hearing by U.S. courts of apartheid-related claims, which were subject to its Truth and Reconciliation Commission and domestic courts. He stated that it is "completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."[123]

Grants of amnesty are particularly controversial because they can undermine the quest for accountability but may be useful in negotiating a transition to a more human-rights-friendly regime. Some international tribunals have concluded that amnesties granted by one state for the violation of *jus cogens* norms cannot preclude perpetrators from being subject to criminal and civil liability in foreign states, international tribunals, or their own state under a new regime, because it would be senseless to view treaties providing for the violation of *jus cogens* norms as void but to give effect to national amnesties absolving perpetrators of responsibility.[124] Others have held that an amnesty granted by one state does not undermine the right of another state to exercise universal jurisdiction over international crimes because "a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[125]

Amnesties also come in a variety of forms, ranging from blanket amnesties granted by a dictator that offer no accountability, to conditional amnesties granted pursuant to a democratically created process that facilitate a transition toward a more human-rights-friendly regime. If the goal of universal jurisdiction is to vindicate international norms, blanket grants of amnesty should not be given effect because they undermine the quest for accountability.[126] At the same time, conditional amnesties, granted on an individualized basis pursuant to an open and accountable process that makes provision for the interests of the victims, may present a stronger case for recognition by the international community, and hence by a court asked to exercise universal civil jurisdiction.[127]

[123] President Thabo Mbeki, Statement to the National Houses of Parliament and the Nation, at the Tabling of the Report of the Truth and Reconciliation Commission (Apr. 15, 2003), *available at* <http://www.anc.org.za/ancdocs/history/mbeki/2003/tm0415.html>; *see also supra* note 116. *But see* Cairo-Arusha Principles, *supra* note 7, princ. 14 (alternative forms of justice do not relieve duty to prosecute or extradite).

[124] Prosecutor v. Furundžija, No. IT–95–17/1–T, ¶155 (Dec. 10, 1998), *reprinted in* 38 ILM 317 (1999).

[125] Prosecutor v. Kallon, Kamara, Decision on Challenge to Jurisdiction, Nos. SCSL–2004–15–AR72(E), SCSL–2004–16–AR72(E), ¶71 (Mar. 13, 2004); *see also* María del Carmen Márquez Carrasco & Joaquín Alcaide Fernández, Case Report: *In re* Pinochet, *in* 93 AJIL 690, 694 (1999) (discussing Spanish court holding that Chilean amnesty law did not preclude exercise of universal criminal jurisdiction over *jus cogens* crimes committed by Gen. Augusto Pinochet).

[126] *See* AMNESTY PRINCIPLES, *supra* note 70, princ. 6; Cairo-Arusha Principles, *supra* note 7, princ. 15; PRINCETON PRINCIPLES, *supra note* 17, at 31, princ. 7.

[127] For example, Slye argues that to merit recognition as legitimate, an amnesty must be democratically created, carve out those most responsible for serious violations of international law, impose some form of public procedure or accountability on its recipients, allow victims to challenge the amnesty, provide for reparations to the victims, and facilitate the transition to a more human-rights-friendly regime. Ronald C. Slye, *The Legitimacy of Amnesties*

A final area in need of examination, though beyond the scope of this comment, is the relationship between universal civil jurisdiction and state immunity—specifically, whether state immunity must prevail because it is essential for international stability, or whether an exception should be made for violations of sufficient gravity to be subject to universal jurisdiction, whether criminal or civil. Substantial inroads have been made into the application of state immunity in the criminal context, but it remains unclear whether corresponding developments will occur in the civil sphere.[128] A key difference between universal criminal jurisdiction and its civil counterpart is that the former concerns individual responsibility only, whereas the latter could potentially reach individual and state defendants. A civil action brought in one state against another state involves a more direct subjection of one state to the jurisdiction of another than the criminal prosecution of a foreign national or foreign official. Consequently, courts have diverged on whether restrictions on immunity in the criminal sphere should also be applied in the civil realm.[129]

V. CONCLUSION

Although respect for fundamental human rights has become an imperative of modern international law, stability in international relations remains an important objective. As a result, one of the great challenges of modern international law is to reconcile the two. The disciplined exercise of universal civil jurisdiction provides one means of doing so.

First, the modern rationale for universal jurisdiction as easily encompasses civil remedies as criminal ones. In the face of horrific conduct, the international community should have as its objective the care of the victims as much as the punishment of the offenders. In those circumstances, the civil dimension of universal jurisdiction should develop as an integral part of the authority that the doctrine confers.

Second, the rationale for the authority should define its limits, and increasing resort to that authority will supply more occasions to examine its appropriate bounds. In other words, even if universal, the jurisdiction should be subject to rules of application that reflect respect for the exercise of jurisdiction by states with traditional links to the conduct when those states will provide a readily accessible forum and fully effective remedy. If so disciplined, a state exercising universal jurisdiction in the civil sphere will avoid the charge of judicial imperialism.

Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible? 43 VA. J. INT'L L. 173, 245–46 (2002); *see also* Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable, in* UNIVERSAL JURISDICTION, *supra* note 8, at 193, 194 (amnesties should be "presumptively invalid," but presumption may be overcome).

[128] For example, the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1441(d), 1602–1611, continues to apply in cases brought under the Alien Tort Statute, 28 U.S.C. §1350. Argentine Republic v. Amerada Hess Shipping, 488 U.S. 428, 438 (1989).

[129] *See, e.g.*, Regina v. Bow St. Metro. Stipendiary Magistrate, *Ex parte* Pinochet (No. 3), [2001] 1 A.C. 147, 264 (Lord Hutton), 278 (Lord Millett), 287 (Lord Phillips) (*obiter* comments supporting state immunity in civil proceedings); Al-Adsani v. United Kingdom, *supra* note 55, ¶66 (finding state immunity can apply to civil claims for torture committed abroad); Bouzari v. Islamic Republic of Iran, *supra* note 61 (same); Jones v. Saudi Arabia, *supra* note 57, ¶¶82–92 (state immunity applies to civil claims against states but not necessarily those against state officials); Prefecture of Voiotia v. Federal Republic of Germany, Areios Pagos [AP] [Supreme Court] 11/2000 (Greece) (state immunity does not apply to violations of *jus cogens* norms); Ferrini v. Germany, *supra* note 63 (state immunity does not apply to norms subject to universal criminal or civil jurisdiction); *see also* Maria Gavouneli & Ilias Bantekas, Case Report: Prefecture of Voiotia v. Federal Republic of Germany, *in* 95 AJIL 198 (2001); *cf.* United Nations Convention on Jurisdictional Immunities of States and Their Property, *opened for signature* Jan. 17, 2005, GA Res. 59/38, Art. 12 (Dec. 2, 2004) (no general exception to sovereign immunity for *jus cogens* violations; unless otherwise agreed between the states, sovereign immunity is precluded in actions seeking pecuniary damages for death or personal injury when those acts occurred in whole or in part in the territory of the state hearing the claim).

Finally, if exercised with respect for the legitimate interests of states most affected by the offensive conduct, universal civil jurisdiction is more likely to yield results that are accepted by other states. Acceptance is important not only for the legitimacy of the determinations embodied in the judgment, but also for the effectiveness of the judgment as a tool of reparation, because in many cases the judgment will need to be enforced outside the rendering jurisdiction if it is to have any effect. The prospect of the assertion of universal jurisdiction by other states may also help to propel the local state into supplying effective remedies where the political will to do so might otherwise be lacking.[130]

Exercised with respect for the rationale that justifies it, universal civil jurisdiction should serve as an accepted means of advancing the international community's fight against impunity.

[130] NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS 194–95 (2005).