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FROM UNIVERSAL CIVIL JURISDICTION TO FORUM OF NECESSITY: REFLECTIONS ON THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN *NAIT-LIMAN*

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NOTE E COMMENTI

FROM UNIVERSAL CIVIL JURISDICTION TO FORUM OF NECESSITY: REFLECTIONS ON THE JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS IN *NAIT-LIMAN*

1. In *Nait-Liman v. Switzerland* (1), the European Court of Human Rights (ECtHR) for the first time confronted head-on the question of universal civil jurisdiction over gross human rights violations. The applicant, a foreigner and alleged victim of torture committed abroad, had asked the Court to consider the failure of a "bystander State" (Switzerland, where the applicant had sought refuge) to offer him a civil remedy as amounting to a violation of his right of access to a court under Article 6 of the European Convention on Human Rights (ECHR). The ECtHR held against the applicant and ruled that Switzerland did not violate Article 6 ECHR when it declined to exercise civil jurisdiction over the case.

In its judgment, the Court engaged both with the principle of universal civil jurisdiction and the related principle of forum of necessity-based jurisdiction. Universal civil jurisdiction can be defined as the exercise of jurisdiction in civil matters without a nexus to the forum. Jurisdiction based on forum of necessity denotes the exercise of civil jurisdiction by the forum with a view to averting a denial of justice;

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(1) *Nait-Liman v. Switzerland*, Application No. 51357/07, Judgment of 21 June 2016 (only available in French), referred to the Grand Chamber on 28 November 2016.

this jurisdiction is nevertheless based on some connection of the case to the forum. In *Nait-Liman*, the ECtHR rejected the claim that universal civil jurisdiction has an obligatory character under international law, and even entertained doubts as to its appropriateness and legality. It acknowledged the existence of jurisdiction based on forum of necessity, but held that, in light of the rarity of relevant practice, there was no obligation to espouse a liberal interpretation of forum of necessity that would de-emphasize the connection requirement.

Nait-Liman prompts a renewed inquiry into the legal nature and scope of both universal civil jurisdiction and jurisdiction based on forum of necessity. This contribution assesses whether States are indeed not under an international obligation to exercise universal civil jurisdiction (Section 3). It also examines whether they may possibly even be *precluded* from exercising universal civil jurisdiction, absent a permissive principle to this effect (Section 4). This assessment is methodologically largely based on the ascertainment of applicable customary international law, derived from actual State practice and *opinio juris*; to a lesser extent it is based on an analysis of applicable treaty law. It is concluded that there is no obligation nor clear authorization for States to exercise universal civil jurisdiction. The contribution then turns to jurisdiction based on forum of necessity, which is a relatively well-accepted private international law technique in a number of States. Section 5, drawing on earlier work done by the International Law Association (ILA), identifies best practices, *i.e.*, practices that maximize the victim's chances of obtaining a remedy while remaining loyal to the connection requirement. It is to be borne in mind that such best practices do not necessarily correspond with *actual* practices regarding forum of necessity. Accordingly, they are partly normative (*de lege ferenda*) and rooted in the moral imperative to provide an "extraterritorial" remedy for human rights violations. In Section 6, it is examined whether the courts' practice in *Nait-Liman* reflects best practices concerning forum of necessity, and whether it was justified for the ECtHR to consider the Swiss Federal Tribunal's decision to decline jurisdiction as compliant with Article 6 ECHR. Section 7 concludes. In Section 2, for the reader's convenience, a concise overview of the main arguments in the ECtHR's judgment is presented. It is hoped that the ECtHR Grand Chamber, when hearing *Nait-Liman*, can draw some inspiration from the discussion in these pages.

2. In this Section, given the overall focus of this contribution, the main conceptual arguments of the ECtHR with respect to the exercise of universal civil jurisdiction and jurisdiction based on forum of

necessity are restated. Reference is made to the judgment itself for a detailed exposition of the facts (2). It suffices to state the following for a proper understanding of the case (3). The applicant, of Tunisian nationality at the time, had allegedly been tortured by security forces in Tunisia in 1992, after having been delivered by the Italian police to the Tunisian consulate in Genova. The applicant sought refuge in Switzerland in 1993, where he was granted political asylum in 1995. In 2001, when the applicant's alleged torturer was hospitalized in Switzerland, the applicant filed a criminal complaint with a Swiss prosecutor, who however declined to proceed. Upon realization that a civil action in Tunisia would be impossible, the applicant filed a civil suit in Switzerland in 2004, based on the forum of necessity provision in the Swiss code of private international law (4). In 2007, the Swiss Federal Tribunal finally decided that Swiss courts did not have jurisdiction over the dispute, as it had no relevant connection to Switzerland. Three days after this judgment, the municipality confirmed that the applicant had been granted Swiss nationality. The same year, the applicant submitted an application to the ECtHR, alleging that the Swiss courts' failure to exercise jurisdiction violated Article 6 ECHR.

The ECtHR appeared to be of the view that the applicant sought the Court's recognition of universal civil jurisdiction in connection with Article 6 ECHR. The Court was however decidedly sceptical as to the desirability, and even legality, of the exercise of universal civil jurisdiction. It held that such jurisdiction risked creating considerable practical difficulties for the courts, notably in terms of evidence-gathering and the enforcement of judicial decisions (5). Furthermore, the Court "did not exclude" that accepting universal jurisdiction could lead to undesirable interference of one State in the internal affairs of another State (6). Consequently, according to the Court, the refusal of Swiss courts to examine the merits of the applicant's civil suit pursued legitimate goals, and could thus justify a restriction of the right of

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(2) *Nait-Liman*, paras. 6-23.

(3) See at length on the legal reasoning of the ECtHR and of the judges' individual opinions: Bonafè, *La Corte europea dei diritti dell'uomo e la giurisdizione universale in materia civile*, *Rivista di diritto int*., vol. 99, 2016, p. 1100 ff.

(4) Article 3, Loi fédérale sur le droit international privé du 18 décembre 1987 (LDIP; RS 291) ("Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes").

(5) *Nait-Liman,* para. 107.

(6) *Ibid.*

access to a court enshrined in Article 6 ECHR (7). As to the proportionality of the restriction of the applicant's right of access — the second leg of the analysis of lawfulness of a restriction — the Court readily deferred to the Swiss courts' interpretation of Swiss law. In so doing, it applied its long-standing interpretative principle that it falls to national authorities, in particular courts, to interpret and apply domestic law, and that the ECtHR's review is limited to legal errors that are arbitrary or manifestly unreasonable (8). While conceding that the Swiss courts' interpretation of the provision relating to the forum of necessity was "restrictive" — the courts had ruled that there was no link between the applicant's action and Switzerland, even if Switzerland had granted him political asylum as early as 1995 — the Court did not consider it to be "arbitrary", precisely because of the aforementioned practical problems connected with the exercise of universal civil jurisdiction (9). The Court went on to point out that only a minority of ECHR Contracting Parties recognize the concept of forum of necessity, and that those who do require important conditions on its actual application, in particular the availability of a sufficient connecting link with the forum State. According to the Court, compared to that of other States, the relevant Swiss provision was hardly exceptional (10). For that matter, the victim could always join, as a civil party, criminal proceedings under the universality principle, an option that exists under Swiss law (11).

Also, in the Court's view, there was *no international obligation* to exercise universal civil jurisdiction over torture — the alleged offense in the case — even if the prohibition of torture is considered as *jus cogens* (12). The Court admitted that Article 14 of the United Nations Torture Convention, which Switzerland (like most other States) had ratified, requires States to grant reparation to victims, but held that it did not have extraterritorial application, or at least that the provision was ambiguous in this respect (13). It took note of the Committee against Torture's view that an obligation to exercise universal civil jurisdiction followed from Article 14 of the United Nations Torture Convention, but observed that States Parties to the Convention have not followed this approach, as they all require a connection with the

(7) *Ibid.*
(8) *Ibid.*, para. 109.
(9) *Ibid.*, para. 112.
(10) *Ibid.*, para. 114.
(11) *Ibid.*, para. 119.
(12) *Ibid.*, para. 116.
(13) *Ibid.*, para. 117.

forum for civil jurisdiction to be exercised (14). The Court concluded that there was no international obligation to exercise universal civil jurisdiction under treaty law, nor, given the absence of relevant practice, under customary international law (15).

3. While the Court's reasoning is *prima facie* convincing, there is no complete doctrinal consensus on the matter. In fact, in his 2014 Hague Course, Andreas Bucher, argued that an obligation to exercise universal civil jurisdiction *does exist* under international law (16). This view had a major impact on the formulation of a 2015 resolution on universal civil jurisdiction of the Institut de Droit International (IDI), of which Bucher was the rapporteur (17). This resolution is the first collective doctrinal effort which couches the exercise of universal civil jurisdiction in obligatory terms, although the use of the verb "should" instead of "shall" (which features in an earlier version) betrays the *de lega ferenda* character of the text. Bucher himself, however, clearly argued in favour of the *lex lata* character of obligatory universal civil jurisdiction. In this section, I briefly discuss the IDI resolution, before engaging with Bucher's argument that the *erga omnes* character of the (human) right to a remedy gives rise to a subsidiary State obligation to exercise universal civil jurisdiction.

The IDI's resolution on universal civil jurisdiction is specifically concerned with devising principles governing remedies and reparations for the commission of international crimes. The IDI relates these principles explicitly to prosecution and punishment under the principle of universal criminal jurisdiction, which it considers to provide "only a partial satisfaction to the victims" (18). It considers universal civil jurisdiction to be "a means of avoiding the deprivation of the victims of international crimes to obtain reparation of the harm suffered, in particular because the courts ordinarily having jurisdiction do

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(14) *Ibid.*, para. 118.

(15) *Ibid.*, para. 120.

(16) BUCHER, *La compétence universelle civile*, *Recueil des cours*, vol. 372, 2014, p. 9 ff.

(17) IDI, Universal Civil Jurisdiction with Regard to Reparation for International Crimes, Resolution, *Yearbook of the Institute of Int. Law*, *Tallinn Session*, vol. 76, 2015, pp. 265-266. The underlying report, *ibid*., p. 3 ff. (hereinafter *IDI Report*) corresponded to Bucher's entire course.

(18) Penultimate preambular paragraph IDI resolution 2015. The IDI had earlier addressed the issue of universal criminal jurisdiction. IDI, Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes, *Yearbook of the Institute of Int. Law, Krakow Session*, vol. 71-II, 2005.

not provide for an appropriate remedy" (19). Basing such jurisdiction on victims' right to reparation and access to justice under international human rights law, it *requires* the exercise of universal civil jurisdiction on a subsidiary basis, *i.e.*, jurisdiction exercised by a bystander State in case no other State can offer a remedy (20).

Pursuant to the IDI resolution, forum States should exercise universal civil jurisdiction *as a last resort*, in case a more strongly connected State or international court or authority fails to properly provide a remedy. This exercise of subsidiary jurisdiction is *not* dependent on the existence of a connection of any kind with the forum. This means that, if a victim faces a denial of justice elsewhere, courts could not decline their jurisdiction for the reason that the dispute has no connection with the forum. For the *Nait-Liman* case, the IDI principles would mean that Swiss courts were under an obligation to establish their jurisdiction. Indeed, it was not seriously in doubt that the victim did not have a remedy in Tunisia or in another connected State (21), regardless of whether the case had a substantial connection with Switzerland as required under Swiss law (22).

Given the far-reaching consequences of the IDI resolution — courts would indeed be *required* to exercise universal civil jurisdiction under some circumstances, whereas in some quarters it had previously been argued that courts were not even *allowed* to exercise such

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(19) Ultimate preambular paragraph IDI resolution 2015.

(20) Article 2 of the resolution reads as follows: "1. A court should exercise jurisdiction over claims for reparation by victims provided that: (*a*) no other State has stronger connections with the claim, taking into account the connection with the victims and the defendants and the relevant facts and circumstances; or (*b*) even though one or more other States have such stronger connections, such victims do not have available remedies in the courts of any such other State. 2. For the purposes of paragraph 1 (*b*), courts shall be considered to provide an available remedy if they have jurisdiction and if they are capable of dealing with the claim in compliance with the requirements of due process and of providing remedies that afford appropriate and effective redress. 3. The court where claims for relief by victims have been brought should decline to entertain the claims or suspend the proceedings, in view of the circumstances, when the victims' claims have also been brought before: (*a*) an international jurisdiction, such as the International Criminal Court; (*b*) an authority for conciliation or indemnification established under international law; or (*c*) the court of another State having stronger connections and available remedies within the meaning of the foregoing paragraphs".

(21) But see the Swiss Government's argument in *Nait-Liman*, regarding the availability of Italian tribunals, para. 96 ("Le requérant n'a par ailleurs pas démontré que l'introduction d'une procédure à l'époque n'était pas possible devant les tribunaux italiens").

(22) That the case did have some connections with Switzerland could be used as an *a fortiori* argument to establish jurisdiction.

jurisdiction (23) — it was no surprise that a substantial number of IDI members had concerns over the wording of the resolution. Ultimately, the IDI settled for the use of the verb "should" instead of "shall", which reflects the *de lege ferenda* nature of the resolution (24), but even when a substantial number of IDI members voted against the resolution (25).

What is of interest to us in this section, is that Bucher's initial draft of the resolution as well as his underlying report — basically his Hague course — considered the exercise of universal civil jurisdiction to be an international legal obligation *de lege lata*.

It should be noted at the outset that Bucher is not the first one to advance the idea of an international obligation to exercise universal civil jurisdiction. However, so far the discussion on obligatory universal civil jurisdiction has been limited to Article 14, para. 1, of the United Nations Torture Convention, which 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". It has been argued, notably by the Committee against Torture — the United Nations body supervising the application of the Torture Convention —, that, going by its wording, this article requires that "all victims of torture" are able to access a remedy, even on an extraterritorial basis (26). Accordingly, for the Committee against Torture, States Parties to the Convention would be required to exercise universal civil jurisdiction. This interpretation has been resisted by domestic courts and by the ECtHR in *Nait-Liman*, however (27). Moreover, on a

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(23) *E.g.*, MORA, *The Alien Tort Statute After Kiobel: the Possibility for Unlawful Assertions of Universal Civil Jurisdiciton Still Remains*, *Int. and Comparative Law Quarterly*, vol. 63, 2014, p. 699 ff. The argument as to whether international law *authorizes* the exercise of universal civil jurisdiction is addressed in Section 3.

(24) It is within the IDI's mandate to make *de lege ferenda* proposals. See Article 1(2) of the *statut* of the IDI: "[L'Association] a pour but de favoriser le progrès du droit international: *a*) En travaillant à formuler les principes généraux de la science de manière à répondre à la conscience juridique du monde civilisé; *b*) En donnant son concours à toute tentative sérieuse de codification graduelle et progressive du droit international...".

(25) In fact, more members voted against or abstained than voted in favour: the resolution was adopted by 13 votes in favour, 6 against, and 8 abstentions.

(26) General Comment No. 3, *Implementation of Article 14 by States Parties* (2012), CAT/C/GC/3, para. 22.

(27) *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* [2006] UKHL 26, p. 57 (Lord Hoffmann); *Bouzari v. Islamic Republic of Iran,* 2004 Carswell Ont 2681 (Canada); ECtHR, *Nait-Liman*, para. 118 (arguing that the Committee's approach has not been followed by the States parties to the Convention).

systemic interpretation of the Torture Convention, it appears that the drafters had not intended to give the civil regime of Article 14 extraterritorial application, since *a contrario* they had devised a detailed regime for the extraterritorial application of the *criminal* repression of torture, with which the Torture Convention is mainly concerned (28).

Bucher has now brought a new argument to the fore: the *erga omnes* character of the (human) right to reparation, and the attendant consequences for the exercise of (universal) civil jurisdiction, *i.e.*, jurisdiction meant to provide reparations. Relying *inter alia* on conventions on international humanitarian law (29), the Rome Statute of the International Criminal Court (30), the practice of the European and Inter-American Courts of Human Rights (31), 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 (32), and the case-law of the International Court of Justice (33), Bucher argues that there exists a right to reparation under international law (34), although its actual implementation as an individual right is to be articulated in the domestic legal order (35). According to Bucher, States have not designated the State that is specifically responsible to provide reparations, but there is an international duty of solidarity to prevent that victims of international crimes remain without protection in case the State responsible for the violations does not protect them (36). This duty of solidarity arguably finds its basis in States' *erga omnes* obligations, not only not to commit international crimes, but also to ensure reparation to victims (37). In terms of practical implementation of this duty, States would have to allocate responsibilities, which includes providing for subsidiary or last resort universal civil jurisdiction to prevent that

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(28) Article 5 of the United Nations Torture Convention.

(29) Article 3 of the Fourth Hague Convention of 1907 and Article 91 of the First Additional Protocol to the Four Geneva Conventions of 1977.

(30) Article 75 of the Rome Statute of the International Criminal Court.

(31) Article 41 ECHR; Article 63 of the Inter-American Convention on Human Rights.

(32) Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

(33) Notably ICJ, *Diallo*, Judgment of 19 June 2012, *I.C.J. Reports,* 2012, p. 324, para. 57.

(34) *IDI Report*, pp. 37-48.

(35) *Id.*, p. 49.

(36) *Id.*, p. 202.

(37) *Id.* Both obligations *erga omnes* would be of the same nature.

victims are deprived of reparation (38). Ultimately, to safeguard the right to reparation, there should be at least one competent jurisdiction — possibly a bystander State acting under the universality principle to avert a denial of justice (39). According to Bucher, private and procedural international law could make this practically possible (40). States' codes of civil procedure and private international law could, in this respect, be modelled on the IDI's formulation of subsidiary universal civil jurisdiction.

There is much to be commended regarding Bucher's argument. For one thing, there is little doubt that the right to reparation indeed rises to the level of a right under international law, and it is arguable that the obligation to safeguard this right is of an *erga omnes* character. For another, to prevent that such a right offers only illusory protection, it is essential that duty-bearers be identified, such as bystander States providing a subsidiary forum even absent a connection. It is noteworthy that Bucher's *erga omnes*-based reasoning was not as such contested within the IDI. Critical members only appeared to take issue with the consequences to be derived from the *erga omnes* character of the obligation to provide reparations, notably whether States should be *required* to exercise universal civil jurisdiction, or whether such jurisdiction could be exercised without any connection to the forum (41).

However, deriving an *obligation to exercise jurisdiction* from the *erga omnes* character of an obligation is not self-evident. After all, the doctrine of *erga omnes* obligations has been developed in the context of the *optional invocation of responsibility by non-injured States*. Thus, Article 48 (1) of the ILC Articles on State Responsibility (2001) provides that "[a]ny State other than an injured State is entitled to invoke the responsibility of another State ... if: (*a*) The obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (*b*) The obligation breached is owed to the international community as a whole" (42). Assuming that the obligation to offer reparation is an *erga omnes* obligation, this only means that bystander States are *entitled* —

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(38) BUCHER, *supra* note 16, pp. 75-76.

(39) *Id.*, p. 79.

(40) *Id.*, p. 81.

(41) Regarding the obligatory character see *IDI Report*, comments Gaja, p. 205; Meron, p. 215; Tomuschat, p. 217. Regarding the connection requirement see *IDI Report*, comments Salmon, pp. 208-209; Ranjeva, p. 214. Regarding both: Wolfrum, p. 216.

(42) ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (November 2001) Supplement No. 10 (A/56/10).

not obliged — to *invoke the responsibility* of the State which breached the norm. A State may invoke another State's responsibility via diplomatic channels, or even before an international court or tribunal in case it has jurisdiction (as happened before the International Court of Justice in *Belgium v. Senegal*) (43), but the doctrine of *erga omnes* does not autonomously give rise to a right, let alone to an obligation to unilaterally exercise universal jurisdiction. It seems that, at most, a bystander State could invoke the international responsibility of the State responsible for the substantive violation as well as its subsequent failure to provide reparation to the victim (44).

Bucher may argue that it is unclear which State is exactly responsible for violations of the right to reparation, as international law has arguably not identified specific duty-bearers in this respect. Therefore, in his view, the *entire international community* is collectively responsible to guarantee this right, including by ensuring that at least one of its members offers a forum that can provide reparation. It remains to be established whether a *primary* international law rule that provides for a collective *obligation* (*i.e.*, an obligation incumbent on a plurality of States) to give reparation, truly exists. Invoking the doctrine of *erga omnes* obligations is of no avail in this respect, as the doctrine only operates at the level of *secondary* rules of international law, which deal with the consequences of violations of primary norms. Put differently, by virtue of the doctrine of *erga omnes* obligations, States do not have a collective obligation to respect an international law norm. They only have the right to invoke the responsibility of another State that has violated the norm when these States have an interest in norm-compliance ("obligations owed to" a group of States or the international community).

However, even if Bucher has misconstrued the doctrine of *erga omnes* obligations, the gist of his argument could still be rescued if proof was adduced of there being a non-individualized, collective obligation to provide reparations. In this respect, it is true that the

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(43) International Court of Justice, *Questions relating to the obligation to prosecute or extradite* (Merits), *I.C.J. Reports*, 2012, p. 422.

(44) Bucher's position is eventually somewhat reminiscent of earlier arguments that derived the legality of universal criminal jurisdiction from the *jus cogens* character of the prohibition of the relevant offences. These arguments have had little traction, as substantive proscriptions based on peremptory norms have not been considered to be automatically accompanied by the availability of procedural remedies. *E.g.*, regarding the law of jurisdictional immunities, the ICJ has held that the *jus cogens* character of an international norm has no bearing on the exercise of jurisdiction or the availability of State immunity from jurisdiction. See ICJ, *Jurisdictional Immunities of the State Germany v. Italy* (Merits), *I.C.J. Reports*, 2012, p. 99.

United Nations Basic Principles on the Right to a Remedy and Reparation indeed fail to identify the States on whose shoulders the obligation to provide reparation would rest, and instead limit themselves to generic references to "States". However, it stands to reason that States that have themselves committed the violation, or on whose territory the violations have been committed (*e.g.*, by non-State actors) are the *primary* responsible for reparation, if only because they are most closely connected to the violation and in the best position to redress it. Bucher himself has argued that the aforementioned Article 14 of the United Nations Torture Convention — which enshrines the right to reparation for torture victims — does not give rise to collective obligations, including the obligation to exercise universal civil jurisdiction. While he is of the view that the scope of Article 14 is larger than just territorial, and thus that the responsible State is not only the territorial State, he still considers the circle of duty-bearers to be restricted, citing the State responsible for the act of torture, the State where the acts have been prepared, and the State on whose territory the torturers have sought refuge (45). Accordingly, I fail to see why Bucher resists a collective obligation with respect to reparation for torture, *nota bene* one of the few offenses for which the right to a remedy is explicitly provided, while arguing in favor of such obligations with respect to international crimes in general. The only explanation appears to be that he did not consider torture as such to be an international crime (46). Eventually, however, the IDI decided to include "torture" in the international crimes mentioned in the preamble to the resolution (47).

However that may be, there is no evidence that the international obligation to ensure reparation for international crimes is a collective one, and would on that basis give rise to subsidiary obligations for bystander States to provide a forum to the victims in case a more

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(45) BUCHER, *supra* note 16, p. 48.

(46) Cf. *IDI Report*, p. 212 ("Although the Rapporteur mentioned that torture was included in the Statute of the International Criminal Court as a crime against humanity, not as a separate crime, Mr Ronzitti felt the Resolution should include torture.").

(47) This also begs the question why the collective obligation to provide reparations is limited to international crimes and does not extend to other human rights violations. In fact, an earlier version of the resolution advanced the broader concept of "offenses against human dignity" rather than "international crimes". Apparently, precisely because the former concept was more encompassing than the latter — and could thus give rise to State obligations regarding a much larger pool of violations — and also because it was not clear what various domestic law systems would consider as offenses to human dignity, the drafters eventually settled for "international crimes". *IDI Report*, comments Higgins, pp. 211-212; Meron, p. 214; Wolfrum, p. 216; Tomka, p. 217.

connected forum fails to assume its responsibility (48). Realistically speaking, one also has difficulties imagining that States would agree to an international obligation that requires that they open their courts for disputes which have no connection whatsoever with them (49). As regards the exercise of universal criminal jurisdiction, it is recalled that States have *not* accepted such an obligation. In a number of treaties States have *only* accepted obligatory universal jurisdiction insofar as the presumed offender *cannot be extradited* and is *present* in the forum State (50).

4. That there is no international *obligation* to exercise universal civil jurisdiction does obviously not imply that there is no international *authorization* to exercise such jurisdiction. Sufficient State practice and *opinio juris* may indeed evidence the existence of a *permissive* norm on universal civil jurisdiction, meaning that international law *allows* States to exercise universal civil jurisdiction, short of compelling them to do so.

Scholars who have previously engaged with universal civil jurisdiction have largely focused on this question of authorization (51), typically from a *customary international law* perspective in the absence of relevant treaty rules. These scholars would then rely on the presence or absence of sufficient (positive) State practice, the presence or absence of protest (negative State practice), the jurisdictional leeway left by the Permanent Court of International Justice in the *Lotus* case (52), or the existence of an authorization to exercise universal criminal jurisdiction over the same offenses (53), in order to assert or to reject a customary

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(48) Collective obligations may only arise in the rather exceptional situation that multiple States have been responsible for the substantive rights violations (*e.g.*, two States jointly torture a person), subsequent to which a joint/shared duty to provide reparations may arise. See Article 47 ILC Articles on State Responsibility. See on the principles of shared responsibility: NOLLKAEMPER, PLAKOKEFALOS, *The Practice of Shared Responsibility in International Law*, Cambridge, 2017. Such a collective obligation may obviously also arise under primary international law norms, but so far there is no evidence that such a specific obligation to ensure reparations exists under international law.

(49) See also *IDI Report*, comment Tomuschat, p. 217 ("Même si l'Institut a pour but de favoriser le progrès du droit international, il ne peut aller trop loin au risque que son travail devienne utopique et inutilisable").

(50) It is thus even questionable whether such an *aut dedere aut judicare* clause is an instantiation of "universal jurisdiction".

(51) Also BONAFÈ, *supra* note 3, p. 1115.

(52) *The Case of the SS Lotus* (Merits), *P.C.I.J.*, *Publications*, Series A, No. 70.

(53) See for a comparison of universal criminal and civil jurisdiction: BONAFÈ, *supra* note 3, pp. 1115-1117.

norm on universal civil jurisdiction (54). I myself have earlier defended the lawfulness of universal civil jurisdiction based on *Lotus* (55), although I admit that there is no consensus on the contemporary applicability of *Lotus* (56).

Moreover, in the absence of any contemporary positive State practice on universal civil jurisdiction, it may be difficult to prove the existence of a permissive norm. This applies with even more force after, in *Kiobel* (2013) (57), the United States Supreme Court read down the *Alien Tort Statute*, the only domestic statute that on its face provided for universal civil jurisdiction. Admittedly, the United States Supreme Court, unlike various *amici curiae* in the case, remained silent on the question of the lawfulness of universal civil jurisdiction and interpreted the Alien Tort Statute only in light of the presumption of extraterritoriality. Thus, even if the Alien Tort Statute offers a cause of action for substantive violations of international law, because the Supreme Court considered the determination of the geographical reach of the Alien Tort Statute as a function of United States statutory construction rather than of the international law rules of jurisdiction, *Kiobel* is not necessarily very relevant for universal civil jurisdiction purposes. Still, the effect of this judgment, which requires that claims "touch and concern" the United States for jurisdiction to be established (58), can only be to severely restrict the viability of so-called "foreign-cubed" cases, *i.e.*, cases brought by a foreign plaintiff against a foreign defendant regarding conduct abroad. In the wake of *Kiobel*, courts have indeed narrowly interpreted the "touch and concern" standard, or even simply dismissed cases on the ground that they concerned foreign conduct, even

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(54) In favour: Donovan, Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, *American Journal of Int. Law*, vol. 100, 2006, p. 142, and Kohl, *Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute*, *Int. and Comparative Law Quarterly*, vol. 63, 2014, p. 665 ff. Against (more recently in fact): Mora, *The Legality of Civil Jurisdiction over Torture under the Universal Principle*, *German Yearbook of Int. Law*, vol. 52, 2009, p. 367 ff.; Id., *The Alien Tort Statute after Kiobel: The Possibility for Unlawful Assertions of Universal Civil Jurisdiction Still Remains*, *Int. and Comparative Law Quarterly*, vol. 63, 2014, p. 699 ff.; Jain, *Universal Civil Jurisdiction in International Law*, *Indian Journal of Int. Law*, vol. 55, 2015, pp. 209 ff.

(55) Ryngaert, *Universal Tort Jurisdiction over Gross Human Rights Violations*, *Netherlands Yearbook of Int. Law*, vol. 38, 2007, p. 3 ff.

(56) See, however, for an interesting re-interpretation of *Lotus* that speaks to its abiding relevance: Hertogen, *Letting Lotus Bloom*, *European Journal of Int. Law*, vol. 26, 2015, p. 901 ff.

(57) *Kiobel v. Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013).

(58) *Ibid.*

if the defendant was a US corporation (59). The quasi-disappearance of what in fact amounted to the sole assertions of universal civil jurisdiction does not bode well for the establishment of a permissive universal civil jurisdiction norm.

This leaves us with a number of "verbal acts" of States supporting the permissibility of the exercise of universal civil jurisdiction, as they notably come to light in the *Kiobel* litigation. The International Law Association (ILA) has earlier held that "verbal acts, and not only physical acts, of States count as State practice" (60), which could be taken into account for purposes of the formation of customary norms. However, the ILA added that "[s]ome statements may nevertheless be more usefully regarded as expressions of opinion than as formal acts of State practice" (61). This may apply in particular to expressions on universal civil jurisdiction, where such views are not matched by those States' conferral of universal civil jurisdiction on their own courts. Moreover, States' statements on universal civil jurisdiction are hardly in unison, whereas State practice which is uniform, extensive and representative in character is required (62). In fact, in response to litigation relating to the *Alien Tort Statute*, only one State — Argentina — has unreservedly spoken out in favour of universal civil jurisdiction (63). Two other States have withdrawn their earlier opposition against the exercise of universal civil jurisdiction, although it is unclear whether this withdrawal was necessarily predicated on a conviction that jurisdiction was lawful. Other States have only accepted universal civil jurisdiction subject to certain conditions, such as the limitation of universal civil jurisdiction to offenses amenable to universal criminal jurisdiction, or

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(59) *E.g.*, Mujica v. AirScan Inc., 771 F.3d 580 (9th Cir. 2014); Cardona v. Chiquita Brands Int'l Inc., 760 F.3d 1185 (1 1th Cir. 2014); Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014). But see Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304 (D. Mass. 2013) (court proceeding to the merits on the ground that a US citizen acted with the purpose of aiding and abetting the persecution of sexual minorities in Uganda). See for a discussion of post-*Kiobel* case-law: ALTMAN, *Extraterritorial Application of the Alien Tort Statute after Kiobel*, *University of Miami Business Law Review*, vol. 24, 2015-2016, p. 111 ff. Note that neither the Supreme Court nor the lower courts post-*Kiobel* held that an expansive reading of the Alien Tort Statute would violate the international norms on jurisdiction.

(60) Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, *Final Report of the Committee*, p. 14.

(61) *Id.*, p. 15.

(62) *Id.*, p. 20.

(63) Brief for the Government of Argentine Republic as *Amicus Curiae* in Support of Petitioners, in *Kiobel v. Royal Dutch Petroleum Co*, No. 10-1491, 2012 WL (2012) 2165334 (USA).

the requirement of exhaustion of domestic remedies (64). Yet others have rejected it out of hand on the ground that absent a connection with the forum jurisdiction interferes in the internal affairs of other States (65). Given this State of affairs, the conclusion is almost inescapable that, as of yet, there is no permissive customary international law norm on universal civil jurisdiction (66), even if in *Nait-Liman* the ECtHR has not excluded the existence of such a norm (67).

5. That there is no permissive, let alone obligatory norm on universal civil jurisdiction does not mean that domestic courts cannot, or should not, exercise civil jurisdiction when some connection with the forum can be established. Foreign States' reactions to *Alien Tort Statute* litigation only evidence their opposition to the exercise of jurisdiction without *any* connection to the forum. In fact, quite a number of State instruments, including the Swiss code at issue in *Nait-Liman*, allow for the exercise of civil jurisdiction in order to avert a denial of justice, provided that a connection with the forum is

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(64) *E.g.*, Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, pp. 14-16, in *Kiobel v. Royal Dutch Petroleum Co*, No. 10-1491, 2012 WL 2165345 (2012). The interpretative technique of "the greater includes the lesser", pursuant to which the lawfulness of universal *criminal* jurisdiction under customary law (or treaty law for that matter) renders its civil variation lawful too has been criticized on the ground that the different remedial purposes of civil as opposed to criminal jurisdiction make it difficult to consider civil jurisdiction to be subordinate to criminal jurisdiction. Cf. JAIN, *supra* note 54, pp. 219-221.

(65) *E.g.*, Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of Neither Party, pp. 11-17, in *Kiobel v. Royal Dutch Petroleum Co*, No 10-1491, 2012 WL 2312825 (2012) (USA).

(66) See also KOHL, *supra* note 54, p. 680 ("In the light of these ambiguities and the relatively onerous requirements for the establishment of a rule of customary international law, one may conclude that at this stage there is insufficient evidence of an international consensus that the jurisdictional rules of public international law extend to civil proceedings"). In the remainder of her article, however, Kohl goes on to make a substantive (normative) argument in favour of universal civil jurisdiction. The thrust of her argument is that domestic courts, when exercising universal civil jurisdiction, are simply enforcing substantive norms of international (human rights) law that all States agree on. Thus, they could not reasonably oppose the assertion of jurisdiction by a third State acting as a neutral agent of the international community. Jain also gives a detailed overview of foreign States' protest on international law grounds against expansive assertions of *Alien Tort Statute* jurisdiction, discussing not only the *amicus curiae* briefs in *Kiobel* but any brief ever filed by a foreign State in an *Alien Tort Statute* case. Cf. JAIN, *supra* note 54, pp. 214-217.

(67) BONAFÈ, *supra* note 3, p. 1121. Obviously, even if one considers universal jurisdiction to be authorized by international law, one can still entertain doubts as to the desirability of such jurisdiction, which does not appear to be the ideal instrument to offer a remedy for the sort of collective damage resulting from international crimes. Cf. BONAFÈ, *supra* note 3, p. 1114.

present (68). Such jurisdiction under private international law is denoted as jurisdiction based on forum of necessity. This is not specifically geared to protect human rights extraterritorially, but nothing precludes reliance on them in a human rights context. Indeed, (a limited number of) human rights claims have been brought under jurisdiction based on forum of necessity, such as in the Netherlands and Canada, a few of them successfully (69).

Whether or not a State provides for forum of necessity appears to be a matter of State discretion and of (domestic) private international law. Admittedly, the author of a 2007 European Commission report on residual jurisdiction went as far as characterizing jurisdiction based on forum of necessity as a "general principle of international law" (70). However, as jurisdiction based on forum of necessity is not very widespread, this is probably exaggerated. It is also not clear what the exact normative force of such a principle would be: is it a principle that *allows* States to exercise jurisdiction based on forum of necessity, or one that even *compels* them to do so? Given the discrepancies in domestic law and practice as to the requirement of connection and the interpretation of "denial of justice", it is moreover uncertain whether the principle would have any definite content, apart from the general requirement of connection and the need to avert a denial of justice.

In an earlier publication, we signalled a worrying tendency on the part of (some) courts to interpret jurisdiction based on forum of necessity restrictively, by requiring particularly strong connections and by readily accepting the availability of alternative fora (71). The end-result then is often a rejection of jurisdiction. The Swiss Federal Tribunal's decision in *Nait-Liman* is a fine example thereof. While such practices do not necessarily amount to a violation of international law — as there is no requirement to exercise jurisdiction based on forum of necessity — it is undeniable that they limit the opportunities for victims to obtain redress. Especially when the underlying violation amounts to

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(68) See for an overview: Roorda, Ryngaert, *Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction*, *Rabels Zeitschrift fuer auslaendisches und int. Privatrecht*, vol. 80. 2016, p. 783 ff.

(69) Jurisdiction based on forum of necessity was accepted in the Canadian case of *Bouzari v. Bahremani* [2013] ONSC 6337 and in the Dutch case of *El-Hojouj v. Unnamed Libyan Officials* (2012) 400882/HA ZA 11-2252 (ECLI:NL:RBSGR:2012:BV9748). It was rejected by the Canadian Superior Court in *Canadian Association Against Impunity (CAAI) v. Anvil Mining Ltd* (2011) 500-06-000530-101.

(70) Nuyts, *Study on Residual Jurisdiction: General Report* (3 September 2007), available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf accessed 5 April 2017.

(71) Roorda, Ryngaert, *supra* note 68.

a violation of a substantive international law norm, such as a human rights norm, and even more so when the norm has a *jus cogens* character, it is advisable for courts not to interpret the requirements of connection and denial of justice too restrictively.

In this respect, in 2012, the ILA has adopted some useful Guidelines on best practices regarding transnational litigation with respect to "civil claims against corporations, individuals and other non-State actors arising out of or brought to redress conduct constituting a human rights violation, in view of the nature of the norm allegedly violated or the gross or systematic nature of the breach alleged" (72). One of its Guidelines (2.3) pertains specifically to the exercise of jurisdiction based on forum of necessity (73):

> "(1) The courts of any State with a sufficient connection to the dispute shall have jurisdiction in order to avert a denial of justice.
>
> (2) A denial of justice in the sense of paragraph 2.3(1) occurs if the court concludes upon hearing all interested parties, and after taking account of reliable public sources of information, that:
>
> (*a*) no other court is available; or
>
> (*b*) the claimant cannot reasonably be expected to seize another court.
>
> (3) A sufficient connection in the sense of paragraph 2.3(1) consists in particular in:
>
> (*a*) the presence of the claimant;
>
> (*b*) the nationality of the claimant or the defendant;
>
> (*c*) the presence of assets of the defendant;
>
> (*d*) some activity of the defendant;
>
> (*e*) a civil claim based on an act giving rise to criminal proceedings in the court seized of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings".

This Guideline invites some comments. The ILA Committee is, in principle, favourably disposed towards forum of necessity as a tech-

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(72) Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations as Adopted by the International Law Association at Its 75th Conference held in Sofia, August 2012, Article 1(1).

(73) The other jurisdictional grounds are the defendant's domicile (guideline 2.1) and connected claims (guideline 2.2), pursuant to which "[t]he courts of the State where one of a number of defendants is domiciled shall have jurisdiction over all of the defendants in respect of closely connected claims". The ILA also discusses *forum non conveniens* (guideline 2.5).

nique to further the effectiveness of civil actions for human rights violations, and even encourages "States that do not have such a rule to import it into their system" (74). Thus, the Committee formulates jurisdiction based on forum of necessity in rather mandatory terms: "The courts of any State ... *shall* have jurisdiction" (Article 2.3(1)). However, echoing the concerns of some members of the Committee that "States would use the forum of necessity too lightly", the Committee still considers jurisdiction based on forum of necessity to be exceptional, and more particularly subject to a "sufficient connection" requirement (75). The Committee then gives a non-exhaustive (76) list of what qualifies as "sufficient connection". *Prima facie*, this requirement seems to imply that not *any* connection will pass muster. In fact however, for the ILA, the connection need not be a very strong one to qualify as sufficient. Moreover, not all of the listed connections need to be available at the same time. Instead, it appears to suffice that at least one link with the forum is present.

While such a liberal approach is possibly not entirely appropriate for ordinary civil claims, it may lend itself particularly to civil claims based on human rights violations, given the fundamental values of human dignity at stake in such cases. By factoring the substance of the claim into the jurisdictional analysis, the ILA is in fact moving closer to a model of universal civil jurisdiction. Indeed, the operation of universal civil jurisdiction, just like that of its counterpart universal criminal jurisdiction, is not dependent on the availability of a neutral nexus (notably territory or personality), but on the *gravity of the offense.* While, to be true, the ILA still requires a *connection* to the forum, due to the broad construction of what may constitute a connection, the analysis concerning forum of necessity gravitates away from the connection requirement toward averting a denial of justice and providing accountability — the cosmopolitan goal of any assertion of universal jurisdiction.

For instance, the mere territorial presence of the victim-claimant suffices for jurisdiction to be exercised, without it being required that the claimant has a legal status or permanent residence in the forum. This requirement is not synonymous with the territorial presence requirement currently conditioning the exercise of universal *criminal* jurisdiction in most States, as for criminal jurisdiction purposes

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(74) ILA Committee, *Sofia Report 2012*, p. 32.
(75) *Ibid.*, p. 32.
(76) *Ibid.*, p. 33.

"presence" refers to the defendant, not to the victim (77). Also, it suffices that *some* assets of the defendant are present in the forum State (para. 2.3(3)(*c*)), even when these are not sufficient for enforcement purposes (78). Furthermore — and this is particularly relevant for remedies against multinational corporations — "some activity of the defendant" in the forum State suffices (para. 2.3(3)(*d*)). In this respect, the ILA Committee explicitly rejected the (United States personal jurisdiction) requirement of "conducting business" in the forum State (79). Also, the Committee appears to consider the availability of criminal jurisdiction over the relevant act to constitute a sufficient nexus with the State (para. 2.2.3(*e*)). This is an apparent reference to the mechanism of civil party petition, which allows a civil claim to piggyback on a criminal case brought under the universality principle or another principle of extraterritorial jurisdiction (80).

The Committee considers multiple connections with the forum State as sufficient, and uses a low threshold to determine "sufficiency". It remains, however, that under the Guidelines, a denial of justice could still occur, namely when "no other court is available" or "the claimant cannot reasonably be expected to seize another court" (para. 2.3 (2)), but there is no connection with the forum. Arguably, in order to manage expectations for victims, offenders and States, to prevent claimants from forum-shopping, and to prevent States from having to offer an entirely unconnected forum, it does not appear as unreasonable for States to require *some connection* to the forum. After all, States also have had to backpedal on their assertions of "connectionless"

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(77) *E.g.*, Netherlands, International Crimes Act (2003), Germany, German Code of Crimes against International Law (2002) and Spain, Organic Law 6/1985.

(78) ILA Committee, *Sofia Report 2012*, p. 33.

(79) For purposes of establishing United States personal jurisdiction, this requirement has lately been interpreted quite restrictively by the United States Supreme Court as meaning that the business should be essentially at home in the United States (see *Daimler AG v. Bauman* 571 US _ (2014) and *Goodyear Dunlop Tires Operations, SA v. Brown* 564 US 915 (2011)). The Committee appears to consider this construction to be too restrictive, at least as far as the exercise of forum of necessity-based jurisdiction is concerned. It is of note that, technically speaking, forum of necessity does not exist under United States laws of civil procedure.

(80) In this situation, the victim is obviously dependent on the willingness of the prosecutor to pursue the case. This is not self-evident. In *Nait-Liman*, in 2001, the victim had filed a criminal complaint with the prosecutor-general of the Canton of Geneva against the presumed offender as the latter was hospitalized in Switzerland. The prosecutor-general did not act upon this complaint, however, as the presumed offender had in the meantime left Swiss territory and could not be questioned by the police. Cf. ECtHR, *Nait-Liman*, paras. 13-14.

universal criminal jurisdiction *in absentia*, especially because of foreign pressure (81).

What is of greater concern in the ILA Guidelines is the apparent contradiction between on the one hand the liberal, exemplary overview of what may constitute a sufficient connection (para. 2.3(3)), and on the other the stated principle that only courts of States "with a sufficient connection *to the dispute*" (para. 2.3(1)) shall have jurisdiction (82).The latter definition of connection may disqualify almost all the listed specific connections, as these do not pertain to the dispute as such, but rather to the involved *persons*, their activities, and assets (83). Still, in all likelihood, the intended systemic coherence of the pertinent paragraph counsels against such an interpretation.

6. In the previous section, the (relatively liberal) guidelines governing the exercise of jurisdiction based on forum of necessity suggested by the ILA were laid out. This section goes on to apply them to *Nait-Liman*. In this respect, one should bear in mind that the Guidelines are what they are: guidelines or best practices, and self-evidently not binding norms (84). In fact, actual State practice is decidedly more restrictive than the Guidelines. Still, the Guidelines constitute an adequate normative vantage point from where to criticize the Swiss Federal Tribunal for espousing an unduly narrow reading of jurisdiction based on forum of necessity where human rights are at stake. However, given the absence of widespread practice concerning forum

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(81) In the context of universal criminal jurisdiction, *in absentia* refers to the absence of the presumed offender. However, as Guilfoyle notes, in practice universal jurisdiction *in absentia* virtually does not exist (GUILFOYLE, *International Criminal Law*, Oxford, 2016, p. 40) and States have enacted reforms to curb exercises of universal jurisdiction *in absentia* (SHAW, *International Law*, 7th ed., Cambridge, 2014, pp. 488-489).

(82) Emphasis added.

(83) *IDI Report*, pp. 94-95.

(84) Even if members of the ILA are recognized experts in international law, it is obvious that the ILA is not a law-making agency. Its resolutions are not a source of international law in the sense of Article 38 of the Statute of the International Court of Justice. This is of course not to say that the work of the ILA lacks any influence. As the ILA itself points out, "[t]he ILA's resolutions and the reports of its committees and study groups inform and influence the development of international law". See *http://www.ila-hq.org*, last accessed 25 June 2017. There is a considerable literature on the normative impact of best practices, guidelines, codes of conduct, etc., sometimes denoted as "soft law". See on soft law, *e.g.*, D'ASPREMONT, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, *European Journal of Int. Law*, vol. 19, 2008, p. 1075 ff.; ABBOTT, SNIDAL, *Hard and Soft Law in International Governance*, *International Organization*, vol. 54, 2000, p. 421 ff.

of necessity, criticism of the ECtHR's review of Swiss practice in light of Article 6 ECHR should necessarily be more guarded.

Starting from Swiss law on jurisdiction based on forum of necessity and its interpretation by the Swiss Federal Tribunal, it is striking that the relevant Swiss provision — on which the ILA Guidelines were apparently partly modelled (85) — refers to a *sufficient connection to the dispute* ("la cause" in French) (86), a requirement which I considered problematic in the previous section in that it severely limits the relevant connections triggering jurisdiction based on forum of necessity. Regarding the facts in *Nait-Liman*, the Swiss Federal Tribunal construed, not illogically, the term "dispute" as referring to the *actual acts of torture*, which were entirely extraterritorial, thus foreclosing the exercise of jurisdiction based on forum of necessity (87).

In this interpretation, the later presence or even residence of the claimant ("un fait postérieur à la cause") is of no moment: it is the offense, its perpetrator(s) or its victim(s) which at the moment of the commission of the act needed to be connected to the forum (under the territoriality or personality) principle. The ECtHR in *Nait-Liman* did not consider this interpretation to be unreasonable or arbitrary (88). Pursuant to the ILA Guidelines, however, which espouse a broad reading of the connection requirement, necessity-based jurisdiction would normally obtain in the *Nait-Liman* case, if only because the claimant was present on Swiss soil (para. 2.3.3(*a*)). What is more, the claimant not only "happened to be" present in Switzerland, he was also a Swiss resident, Switzerland had recognized him in 1995 as a refugee, and moreover, he had obtained Swiss nationality via naturalization on

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(85) Swiss practice is cited, in a dispersed manner, in the ILA report, *supra*, on pp. 15-19 (although noting at p. 18 that the Swiss provision "appears to impose something above a *de minimis* standard").

(86) Article 3, loi fédérale sur le droit international privé du 18 décembre 1987 (LDIP; RS 291) ("Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes").

(87) "Or, en l'espèce, le demandeur se plaint d'actes de torture qui auraient été commis en Tunisie, par des tunisiens domiciliés en Tunisie, à l'encontre d'un tunisien résidant en Italie. L'ensemble des caractéristiques de la cause ramène en Tunisie, sauf la résidence en Italie à ce moment-là. Les faits de la cause ne présentent donc aucun lien avec la Suisse, si bien que la question de savoir si le lien avec ce pays est suffisant ou non ne se pose pas. Dans ces circonstances, il n'est pas possible d'admettre la compétence des tribunaux helvétiques, sauf à violer le texte clair de l'art[icle] 3 LDIP .... Que le demandeur ait ensuite choisi de venir en Suisse ne peut rien y changer, car il s'agit d'un fait postérieur à la cause, et qui n'en fait du reste pas partie" (Tribunal fédéral suisse, judgement of 22 May 2007, para. 3.5).

(88) ECtHR, *Nait-Liman*, para. 112.

21 May 2007, *i.e.*, the day *before* the Federal Tribunal's judgment, even if a local council only confirmed the naturalization on 25 May 2007 (89). Accordingly, also the (admittedly after-the-fact) nationality connection was met (para. 2.3.3(*b*)).

Nevertheless, it is to be conceded that the connecting factors suggested by the ILA only apply by way of example, States are not required to apply all of them, and — as the list is not exhaustive — may apply *other* factors. According to the ILA Committee, indeed, "courts should have a margin of appreciation, taking into consideration all the facts of the case at hand" (90). It is precisely at the domestic courts' discretion to determine *ad hoc* what counts as a sufficient link that paves the way for such restrictive interpretations as in *Nait-Liman* (91). Even when it is not seriously in dispute that the victim cannot access the courts in his country of origin (92), nor elsewhere, the requirement of a sufficient link with the bystander State (the forum) may serve effectively to deny justice to the victim. It is nonetheless arguable that Swiss courts have exceeded their "margin of appreciation" by requiring connections that insufficiently factor in the global public order-disturbing effects of human rights violations, and in fact disregarding the reasonably strong connections which the plaintiff had with Switzerland.

What this means for the ECtHR's review of Swiss practice is an altogether different question, however. Indeed, the "margin of appreciation" employed by the ILA does not coincide with the margin of appreciation used by the ECtHR with respect to the exercise of its review powers. Especially where there is no requirement under international law to exercise universal civil jurisdiction, where even the mere

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(89) Given the presence of these links, a number of ECtHR dissenting judges failed to understand why forum of necessity jurisdiction could not apply. See *Nait-Liman*, dissenting opinion of judges Karakas, Vucinic and Kuris, para. 9 ("Le lieu de résidence, le statut de réfugié, la procédure de naturalisation avec l'avis favorable de 2006 et l'autorisation du 21 mai 2007, combinés à la présence de la personne suspectée d'avoir commis les actes de torture en cause sur le territoire suisse, c'est-à-dire sous la juridiction de l'État concerné, permettaient d'établir un lien suffisamment fort pour appliquer l'article 3 de la loi fédérale sur le droit international privé et examiner le fond de la plainte du requérant").

(90) ILA Committee, *Sofia Report 2012*, p. 33.

(91) On States' discretion see also Bonafè, *supra* note 3, p. 1118.

(92) Cf. ECtHR, *Nait-Liman*, para. 15 ("Le 22 juillet 2003, le requérant allègue qu'il [demanda] à un avocat tunisien de le représenter dans le but d'introduire une action civile en dommages-intérêts contre [A.K.] et la République de Tunisie. Le 28 juillet 2003, l'avocat [informa] [le requérant] que ce type d'action n'avait jamais abouti et lui conseilla de ne pas déposer une telle requête. Le dépôt d'une telle action civile était prétendument impossible en Tunisie").

optional exercise of universal civil jurisdiction appears to be problematic under customary international law, where jurisdiction based on forum of necessity is hardly widespread, and where States typically give narrow interpretations jurisdiction based on forum of necessity, the ECtHR would be hard-pressed to censure Contracting Parties regarding their interpretation of forum of necessity. It is then not surprising that in *Nait-Liman* the ECtHR did not deem the Swiss court's rejection of jurisdiction to be an arbitrary restriction of Article 6 ECHR.

True, the ECtHR may too readily have accepted the Swiss Government's argument that the exercise of jurisdiction in the case would indeed amount to universal civil jurisdiction (93). Going by the criteria offered by the ILA, the exercise of jurisdiction over Nait-Liman would still fall within the ambit of jurisdiction based on forum of necessity as the victim's territorial presence and later acquired nationality may serve as sufficient connecting factors. As jurisdiction based on forum of necessity has not raised the kind of foreign relations concerns and protests which universal civil jurisdiction did, the Court may have been too supine in accepting at face value that the exercise of civil jurisdiction on the basis of the purportedly "tenuous" nexus of residence and later nationality would amount to interference in other States' internal affairs. The Grand Chamber of the ECtHR may want to reconsider the part of the judgment that, mistakenly in my view, appears to consider the exercise of jurisdiction over Nait-Liman to be an instance of universal civil jurisdiction.

But even if the Grand Chamber were to consider such jurisdiction to be an example of the — so far — less controversial jurisdiction based on forum of necessity, it is hardly certain, however, that it will, or should consider Switzerland's failure to offer a forum to run afoul of Article 6 ECHR. The Court could obviously argue that the risk of foreign displeasure increases as the strength of the connection with the forum decreases, on the ground that in the latter case jurisdiction based on forum of necessity edges closer to universal civil jurisdiction. Moreover, it appears to be incongruous to take issue with how Switzerland precisely *exercises* its jurisdiction based on forum of necessity: by just *providing* for a forum of necessity, Switzerland is already doing

(93) ECtHR, *Nait-Liman*, para. 107 ("[La Cour] partage l'avis du Gouvernement selon lequel une compétence universelle, au sens civil, risquerait de créer des difficultés pratiques considérables pour les tribunaux, notamment à cause de l'administration des preuves et l'exécution de telles décisions judiciaires. La Cour n'exclut pas non plus que l'acceptation d'une compétence universelle puisse provoquer des immiscions indésirables d'un pays dans les affaires internes d'un autre").

more in terms of offering access to justice for victims, than most other ECHR Contracting Parties, which do not even have jurisdiction based on forum of necessity on their statutory books. This explains why the ECtHR has been reluctant to second-guess the Swiss Federal Tribunal's assessment, and has only been willing to review such assessments insofar as they are arbitrary or manifestly unreasonable (94). As the restrictive interpretation of the connection requirement by Swiss courts was well-known, and as other Contracting Parties use even more restrictive jurisdictional provisions, it is difficult to advance that these thresholds have been met. That Switzerland has not taken into account the nature of the underlying substantive violation — torture in the case — is surely regrettable, but as there is no evidence that other States exercising jurisdiction based on forum of necessity factor in the gravity of the offense, this will be of little consequence. Moreover, as the ECtHR and the International Court of Justice have repeatedly stated, the *jus cogens* nature of the alleged substantive violation has no bearing on the availability of jurisdiction (95).

It appears then that, as far as providing a forum for extraterritorial harm is concerned, the State disposes of an almost unlimited "margin of appreciation", which is not reviewable by the Court. Arguably, this may only change when more Contracting Parties enshrine jurisdiction based on forum of necessity in their codes of civil procedure and actually start exercising it, heeding the call of the ILA. This will undercut the argument that jurisdiction based on forum of necessity is just a marginal phenomenon and may allow the ECtHR to draw certain limits as to what is, and what is not, an acceptable exercise of that jurisdiction. At the end of the day, it is difficult for the ECtHR to exercise effective judicial supervision over States domestic procedural conduct if relevant practices in Contracting Parties remain so disparate. If the Court were to find a Contracting Party in violation of Article 6 ECHR for espousing a conservative reading of jurisdiction based on forum of necessity, where no consensus on the appropriateness or desirability of such a jurisdiction exists, it would arguably legislate from the bench and overstep its judicial role.

7. It is doubtful that universal civil jurisdiction is authorized, let

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(94) ECtHR, *Nait-Liman*, para. 109.

(95) ECtHR, *Nait-Liman*, para. 121. *Cudak v. Lithuania*, App No. 15869/02 (ECtHR, 23 March 2010); *Al-Adsani v. United Kingdon*, App No. 35763/97 (ECtHR, 21 November 2001) para. 56; *Jones and Others v. United Kingdom*, App no 34356/06 and 40528/06 (ECtHR, 14 January 2014); ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits), *I.C.J. Reports*, 2012, p. 99.

alone required by public international law. However, victims of human rights violations could pin their hopes on the private international law doctrine of jurisdiction based on forum of necessity, which, in some States at least, empowers the forum State's courts to exercise civil jurisdiction over cases with a strong foreign dimension, provided that some connection to the forum State can be established. Unfortunately, where jurisdiction based on forum of necessity is on domestic statutory books, it may be interpreted so restrictively that foreign-cubed cases stand little chance of success. Swiss practice, exemplified by the *Nait-Liman* case, bears testimony to this. In line with earlier work carried out by the ILA, it is suggested that, especially as far as claims regarding human rights violations are concerned, the connection requirement should be loosened, and that a variety of relatively minor connections to the forum ought to trigger jurisdiction. It is uncertain, however, whether the connection requirement should be abandoned altogether — *i.e.*, the suggestion of the IDI — as jurisdiction based on forum of necessity would then morph into the controversial universal civil jurisdiction.

The ECtHR deciding *Nait-Liman* may have been in a bind. It surely noticed the impact of the restrictive interpretation of jurisdiction based on forum of necessity by Swiss courts on the alleged victim's opportunities to have his day in court. But then, the Court is not there to impose, via Article 6 ECHR, a liberal interpretation of a specific jurisdictional technique on a Contracting Party, where the majority of Contracting Parties do not even use such a technique. Since State practice with regard to the forum of necessity, especially concerning foreign human rights injuries, remains limited, the ECtHR would be hard-pressed to hold a Contracting Party to be in violation of Article 6 ECHR for failing to construe jurisdiction based on forum of necessity broadly. If it were to do so, it would arguably overreach and lose legitimacy.

CEDRIC RYNGAERT

Abstract. — It is doubtful that universal civil jurisdiction is authorized, let alone required by public international law. However, victims of human rights violations could pin their hopes on the private international law doctrine of forum of necessity, which, in some States at least, empowers the forum State's courts to exercise civil jurisdiction over cases with a strong foreign dimension, provided that some connection to the forum can be established and the victim faces a denial of justice elsewhere. Unfortunately, where jurisdiction based on forum of necessity is on domestic statutory books, it may be interpreted so restrictively that foreign-cubed cases stand little chance of success. Swiss practice, exemplified by the *Nait-Liman* case, bears testimony to this.

In line with earlier work carried out by the International Law Association, it is suggested that, especially as far as claims regarding human rights violations are concerned, the connection requirement should be loosened, and that a variety of relatively minor connections to the forum ought to trigger a forum of necessity

The European Court of Human Rights deciding *Nait-Liman* may have been in a bind. It surely noticed the impact of the restrictive Swiss courts' interpretation of jurisdiction based on forum of necessity on the alleged victim's opportunities to have his day in court. But then, the Court is not there to impose, via Article 6 of the European Convention on Human Rights (ECHR), a liberal interpretation of a specific jurisdictional technique on a Contracting Party, where the majority of Contracting Parties do not even use such a technique. As long as the practice of States concerning forum of necessity, especially regarding foreign human rights injuries, remains limited and restrictive, for the European Court to hold a Contracting Party to be in violation of Article 6 ECHR for failing to construe forum of necessity broadly would amount to jurisdictional overreach.