

These ideas can be traced to the writings of the philosopher and political scientist Cesare Beccaria.⁴² In his work in *Dei Delitti e Delle Pene*⁴³, Beccaria appeals to the notions of rationality and humanity in the laws. In line with the latter, Beccaria also claimed that “an act of cruelty committed, for example, in Constantinople, may be punished at Paris for this exact reason, that he offends humanity should have enemies in all mankind.”⁴⁴ I take Professor Bassiouni’s point in concluding that Beccaria “did not propound universal criminal jurisdiction”⁴⁵ as it is understood today; however, the foundations for universal jurisdiction concerning crimes of grave nature can be said to find some explanation on Beccaria’s work.

On the other end of the same spectrum, Hugo Grotius in *The Law of War and Peace*⁴⁶ argued the idea that freedom of navigation was applicable universally and, as a consequence, any infringement upon this right would provoke universal punishment.⁴⁷ In Grotius conception, pirates were “enemies of human race.”⁴⁸ His theory of universal punishment is based on the nature and effect of the crime on all nations.⁴⁹

There thus seems to be three main points which provided a theoretical basis for the development of universal jurisdiction. First, the fact that pirates are “stateless” and thus no nation can have jurisdiction over them based on the nationality principle. Secondly, the idea that crimes of piracy happen on the high seas where no State has jurisdiction based on the territoriality principle. Under these two rationales, States are not acting in violation of each other’s sovereignty but rather for a common objective, a sort of “mutual self-interest” to combat a crime that potentially affects all nations. The third rationale for universal jurisdiction is based on the claim that some crimes are so heinous that they are perpetrated against the international community and not only individual States.⁵⁰ Under this rationale, in exercising universal jurisdiction, States are acting on behalf of the interests of the international community as a whole, for the pursuit of the ultimate goal of justice. This last rationale provided the basis for the expansion of universal jurisdiction from piracy to crimes of universal concern.

III. VICTIMS’ RIGHT TO REPARATION UNDER INTERNATIONAL LAW

Having explored the foundational basis for universal jurisdiction in its criminal dimension, I now briefly describe victims’ right to obtain reparation under international law,⁵¹ and more speci-

fically, under international human rights law and international criminal law. I claim that the right to reparation should not be limited to the realm of international human rights law and traditional mechanisms, but should also find application through the doctrine of universal jurisdiction, which was developed within a criminal context.⁵²

The right to reparation is a well-established principle of international law. Such right has been confirmed in a number of international instruments and jurisprudence of international and regional courts.⁵³ The Permanent Court of International Justice, in the often-quoted passage of the *Charzów Factory* Judgment stated that: “it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”⁵⁴ Similarly, in the general international law of State responsibility, breaches of international law engage the duty to make reparation.⁵⁵

In the field of international human rights law, the right of victims to seek and obtain effective reparation has been codified in human rights treaties and instruments.⁵⁶ It has also been firmly reiterated and expanded upon by international jurisprudence.⁵⁷

Already in 1985, the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*⁵⁸, whereby the right of victims to obtain reparation is established. The focus of this Declaration was on reparation to victims of domestic crimes.⁵⁹ Subsequently, another instrument was adopted by the United Nations General Assembly: the *Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law*.⁶⁰ The right of victims of gross violations of international human rights law or serious violations of international humanitarian law to obtain reparation is established in its Article 15, pursuant to which:

“In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.”

Other recent documents have also affirmed victims’ right to reparation. For example, the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* concluded that, on the basis of human rights law,

It is in this context, that we now review the theoretical underpinnings of the civil dimension of the doctrine of universal jurisdiction.

2. Understanding the doctrine of universal civil jurisdiction

Universal civil jurisdiction, similarly to universal criminal jurisdiction, does not require any jurisdictional link between the forum and the wrongful act.⁷³ It has been defined “as the principle under which civil proceedings may be brought in a domestic court irrespective of the location of the unlawful conduct and irrespective of the nationality of the perpetrator or the victim, on the grounds that the unlawful conduct is a matter of international concern.”⁷⁴

In this context, the question that arises is whether such exercise of universal jurisdiction is permitted by international law. It has been rightly pointed out that a general international treaty allowing for universal civil jurisdiction is lacking.⁷⁵ It has also been affirmed that: “It would make sense to assume that the exercise of universal civil jurisdiction is permitted in respect of the same unlawful conduct as universal criminal jurisdiction and that similar conditions apply”⁷⁶ and that “[i]nternational law authorizes universal civil jurisdiction, in part because it operates as a less intrusive form of jurisdiction than universal criminal jurisdiction.”⁷⁷ In a similar vein, in a concurring opinion to the United States Supreme Court Decision in *Sosa v. Alvarez-Machain*, Justice Breyer stated that “universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well” and that the exercise of universal civil jurisdiction is no more threatening than that of universal criminal jurisdiction.⁷⁸

Be that as it may, it does not seem that the principle of universal civil jurisdiction is uniformly accepted under international law. Some States have expressed the view that, although international law recognizes universal criminal jurisdiction, it does not “recognize universal civil jurisdiction for any category of cases at all, unless the relevant states have consented to it in a treaty or it has been accepted in customary international law.”⁷⁹ It has also been pointed out that 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.”⁸⁰

In any event, at this early stage of the development of the doctrine under international

law, the examination of individual States’ practice is not of much help to defining the contours of universal civil jurisdiction. In the author’s view, the development of the doctrine should rely on principles of international law, such as the right of victims to receive reparation, which transcends the realm of international human rights law, and the theoretical foundation that supported the development of the doctrine of universal jurisdiction in its criminal dimension. It is in this perspective that attention is now turned to the further development of the civil dimension of universal jurisdiction on the basis of the *rationale* that underpins universal criminal jurisdiction.

3. Rationale for a civil dimension of universal jurisdiction

Universal jurisdiction has strengthened its foundation pursuant to the principle of combating impunity and providing accountability for serious violations of international law⁸¹ by allowing prosecution in any State of certain crimes – such as, for example, piracy, genocide, slave trade, war crimes, torture – that defy traditional boundaries of criminal justice and which shock the conscience of humankind.⁸² Hence, to include civil dimensions in universal jurisdiction may seem inappropriate.⁸³ Recent developments in different parts of the world, however, suggest that the civil and criminal dimensions of universal jurisdiction are the two sides of the same coin.

On the one hand, the series of civil litigation in the United States for crimes committed abroad under the auspices of the *Alien Tort Claims Act*⁸⁴ seems to lend support to the idea that universal jurisdiction could encompass a civil dimension as well. As expressed in one of the leading cases in the United States in this field, “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.”⁸⁵

Developments in other States also point to the conclusion that there is no reason to dissociate, on the doctrinal and practical levels, the two facets of the same concept. For example, in a case relating to reparations for crimes committed during the Second World War, the Italian Court of Cassation had to adjudicate the civil claim of an Italian citizen who was used as forced labourer in Germany during the war. While not relying entirely on the doctrine of universal jurisdiction, the Italian Court of Cassation expressed the view that even though it had highlighted events that took place in part in

conduct, the international community should, in addition to punishing the offender, also have victims' rights at heart. In its civil dimensions, universal jurisdiction can prove to be an effective tool to enforce the right of victims to receive reparation and contribute to the deterrence of future criminal conduct. Thus, the criminal and civil dimensions of universal jurisdiction should develop in synergy, one feeding the other, and both together

contributing for a holistic system of justice for offenders and victims. After all, the pursuit of justice goes beyond the punishment of the offender, be it through international criminal trials or the exercise of universal criminal jurisdiction, and delivering justice encompasses, *inter alia*, granting victims the right to obtain redress for the crimes they suffered and providing an avenue for them to obtain reparation.

pending before the International Court of Justice, see <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&code=&case=143&k=60>. Considering that the purpose of this article is to argue that the same rationale underpinning universal criminal jurisdiction – which is used as a means to bring individual offenders to justice – can also encompass a civil dimension, this article will not dwell upon questions of State immunity, or other connected questions, but will rather focus on the theoretical underpinnings of the doctrine.

14. In recent years, many authors, governments and non-governmental organizations have expressed growing concern about human rights violations that happen within borders and across frontiers. The concern seems to be focusing around the idea of a need to end impunity and to achieve justice. Especially in an era where ‘never again’ is not a mirror image of reality when it comes to genocide and crimes against humanity, great efforts have been deployed to make the case for expanding national jurisdiction to prosecute serious human rights offenses. In the Annex to the question of the Impunity of Perpetrators of Human Rights Violations (civil and political), revised final report prepared by Mr. Joinet, impunity is “the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to make reparation to their victims.” Set of principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.
15. In the past decade, a great number of scholarly literature and human rights defenders dedicated attention to the topic of universal jurisdiction. Some of the prominent efforts to describe the theory and practice of universal jurisdiction in modern international law: Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, adapted version of dissertation defended at Utrecht University on 27 October 2004, Oxford University Press (2005); Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under international Law*, University of Pennsylvania Press (2003); Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford University Press (2003) (in this study, the author not only addresses a comprehensive analysis of universal jurisdiction in international law but also provides an insightful account for the approach of national legal systems to universal jurisdiction). Amongst the non-governmental efforts to promote universal jurisdiction for human rights atrocities, some studies have proved insightful in the description and analysis of the principle: Amnesty International, *Universal Jurisdiction: The duty of states to enact and implement legislation* (September 2001), AI Index: IOR 53/002/2001 and Amnesty International, *Universal Jurisdiction: 14 Principles on Effective Exercise of Universal Jurisdiction* (1999); International Council on Human Rights Policy, *Hard Cases: Bringing Human rights violators to Justice Abroad- A Guide to Universal Jurisdiction* (International Council on Human Rights Policy, 1999); Redress, *Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for war crimes, Crimes against Humanity, Torture and Genocide* (1999); International Law Association, *Final report on the exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Committee on International Human Rights Law and Practice, London Conference (2000).
16. Universal jurisdiction was the subject of various studies in the beginning of the past century: see e.g. WE Beckett, *Criminal Jurisdiction over Foreigners*, 8 *British Yearbook of International Law* 108 (1927). Universal jurisdiction has been used in history as a means to prosecute piracy and slave trade.
17. See e.g., Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction* (2001). Scholarly collective initiatives have also created materials concerning universal jurisdiction: cf. TMC Asser Institute for International Law, *Universal Jurisdiction in Theory and Practice*; Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction*.
18. See Donald Donovan and Anthea Roberts, *supra*, note 13, p. 142.
19. *Ibid.*, pp. 142-143.
20. This principle stands for the proposition that acts committed within the limits of a State are subject to the laws of that State. The most interesting point to underscore about the territoriality principle relates to acts that have not been committed entirely in the territory of a certain State. The conduct of States varies with

- international institutions in prosecuting egregious crimes.
39. Anne H Geraghty, *Universal Jurisdiction and Drug Trafficking: a tool for fighting one of the World's Most Pervasive Problems*, 16 *Florida Journal of International Law* 371 (2004), p. 372.
 40. C. Bassiouni, *supra* note 25, p. 42.
 41. *Ibid.*, pp. 41-44.
 42. *Ibid.*, pp. 42-43.
 43. See a discussion in Bassiouni, *ibid.*, p. 40.
 44. (1974), translation available at: http://www.constitution.org/cb/crim_pun.htm.
 45. Cesare Beccaria, *supra* note 44.
 46. C. Bassiouni, *supra* note 25, p. 43.
 47. Translated by FW Kelsey, (1925).
 48. *Ibid.*
 49. *Ibid.*
 50. See C. Bassiouni, *supra* note 25, claiming that Grotius' theory is the basis for universal jurisdiction for international crimes.
 51. See M. Itsouhou Mbadinga, *Le recours à la compétence universelle pour la répression des crimes internationaux: étude de quelques cas*, 81 *Revue de droit international et de sciences diplomatiques et politiques* (2003), pp. 286-287.
 52. A thorough review of the right to reparation for victims of international crimes and gross human rights violations is outside the scope of the present article. See e.g., Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 *Human Rights Law Review* 2 (2006), pp. 203-279; Diana Shelton, *supra* note 4; Gabriela Echeverria, *Codifying the Rights of Victims in International Law: Remedies and Reparation*, In: *Redressing injustices through mass claims processes: innovative responses to unique challenges*, Oxford University Press (2006), pp. 279-297; Heidi Rombouts, et al., *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, In: *Out of the ashes: reparation for victims of gross and systematic human rights violations*, Intersentia (2005), pp. 345-503.
 53. The question of whether or not victims can invoke their right to reparation vis-à-vis a State for violations of international humanitarian law is outside the scope of the present article. See in this regard, arguments in the Case concerning Case concerning Jurisdictional Immunities of the State before the International Court of Justice, *supra* note 14.
 54. This article studies the question of reparation from the perspective of the victims' right to obtain reparation and not the State or the offender's duty to provide reparation.
 55. *Factory at Chorzów, Jurisdiction, Judgment N° 8, 1927, P.C.I.J., Series A, n° 17, p. 29.*
 56. See generally, C. Gray, *Judicial Remedies in International Law*, Oxford University Press (1987).
 57. See generally, e.g. *Universal Declaration of Human Rights* (Art. 8); the *International Covenant on Civil and Political Rights* (art. 2(3), 9(5) and 14(6)); the *International Convention on the Elimination of All Forms of Racial Discrimination* (art. 6); the *Convention of the Rights of the Child* (art. 39); the *Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment* (art. 14); the *European Convention on Human Rights* (art. 5(5), 13 and 41); the *Inter-American Convention on Human Rights* (art. 25, 68 and 63(1)); the *African Charter of Human and Peoples' Rights* (art. 21(2)).
 58. See e.g., *Velásquez Rodríguez Case*, *Inter-American Court of Human Rights*, Serial C, No 4 (1989), par. 174. See also *Papamichalopoulos v. Greece*, E.C.H.R. Serial A, No 330-B (1995), p. 36. See e.g. *Rodriquez v. Uruguay* (322/88), CCPR/C/51/D/322/1988 (1994); 2 IHRR 12 (1995); *Blancov v. Nicaragua* (328/88), CCPR/C/51/D/328/1988 (1994); 2 IHRR 123 (1995); and *Bautista de Arellana v. Columbia* (563/93), CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996).
 59. GA Res. 40/34, 29 Nov 1985.
 60. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 *Human Rights Law Review* 2, pp. 203-279.
 61. GA Res. A/RES/60/147, 16 Dec 2005.
 62. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, para. 598.
 63. See e.g. L. Zegveld, *Victims' Reparations Claims and International Criminal Courts, Incompatible Values?*, 8 *Journal of International Criminal Justice* (2010) pp. 79-111, where the author claims that the incorporation of reparation in international criminal law is in part a reaction to concerns of how victims' rights were treated in the ad hoc international crimi-

US Alien Tort Claims Act, In: International Criminal Law, Brill (3rd ed., Vol. III, 2008).

91. See in this regard, the proceedings in the Case concerning Jurisdictional Immunities of the

State, supra note 14, which were pending before the International Court of Justice at the time of the writing of this article.

92. D. Donovan, supra note 13, p. 161.

