

Universal Civil Jurisdiction

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Which Way Forward?

Edited by

Serena Forlati and Pietro Franzina

with the assistance of Mariangela La Manna



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The Role of the European Court of Human Rights in the Development of Rules on Universal Civil Jurisdiction

Naït-Liman v Switzerland in the Transition between the Chamber and the Grand Chamber

Serena Forlati

1 Introduction

The European Court of Human Rights (ECtHR) Grand Chamber's judgment in the case of *Naït-Liman v Switzerland*¹ confirmed the finding already made by the Court's Second Chamber, that Switzerland did not breach the European Convention on Human Rights in the instant case.² The facts underlying the application are known: the applicant, originally a national of Tunisia, was granted refugee status in Switzerland and eventually became a Swiss national. Mr Naït-Liman contended that Swiss judicial authorities infringed his right of access to a court under Article 6 ECHR by refusing to exercise

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- 1 App no 41357/07 (ECtHR, GC, 15 March 2018). On the judgment see C De Marziis, 'Diritto di accesso a un giudice e giurisdizione civile universale dinanzi alla Corte europea dei diritti umani' (2018) 12 DUDI 693; PD Mora, 'Universal Civil Jurisdiction and *Forum Necessitatis*: The Confusion of Public and Private International Law in *Naït-Liman v. Switzerland*' (2018) 65 Netherlands Intl L Rev 155; S Nkenkeu-kek, 'L'arrêt *Naït-Liman c. Suisse* ou l'occasion manquée par la Cour européenne des droits de l'homme de renforcer l'effectivité du droit des victimes d'obtenir réparation de violations graves des droits de l'homme' (2018) 29 Rev trim dr homme 985; R Pavoni, 'Giurisdizione civile universale per atti di tortura e diritto di accesso al giudice: la sentenza della grande camera della Corte europea dei diritti umani nel caso *Naït-Liman*' (2018) 101 RDI 888; D Rietiker, 'The case of *Naït-Liman v. Switzerland* Before the European Court of Human Rights: Where Are the Limits of the Global Fight Against Torture?', Harvard Intl LJ, 15 March 2019, available at <<https://harvardilj.org>> (last accessed 31 December 2019). Cf also D Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 EJIL 427–56, 450.
- 2 *Affaire Naït-Liman c Suisse* (ECtHR, 21 June 2016). On the Chamber judgment see BI Bonafè, 'La Corte europea dei diritti dell'uomo e la giurisdizione universale in materia civile' (2016) 99 RDI 1100; C Ryngaert, 'From Universal Civil Jurisdiction to Forum of Necessity: Reflections on the Judgment of the European Court of Human Rights in *Naït-Liman*' (2017) 100 RDI 782.

jurisdiction over the civil claim he had submitted against a high-ranking Tunisian State official and the Tunisian State as such. In the domestic proceedings, Mr Naït-Liman sought reparation for the acts of torture the former Minister, Mr AK, ordered against him while he was in detention. Swiss Courts declined to exercise jurisdiction, 'faute de lien de rattachement suffisant entre la cause et les faits d'une part, et la Suisse d'autre part'.³ The Second Chamber considered this refusal as compatible with Article 6, despite the fact that Swiss law does provide for *forum necessitatis* jurisdiction,⁴ a residual jurisdictional ground establishing the competence of the courts of the place with which the case presents a sufficient link whenever no other ground of jurisdiction exists under Swiss law and it would be unreasonable for the applicant to bring the case abroad.⁵ The ECtHR's Chamber deemed their interpretation of this provision not to be arbitrary, and posited that no obligation for States Parties to exercise universal civil jurisdiction exists under the ECHR, nor does it apply under either the UN Convention against Torture (CAT) or customary international law.⁶

That the Grand Chamber largely upheld the Chamber's findings did not come as a surprise, given the difficulty of identifying a 'European consensus' on the existence of an obligation to exercise universal civil jurisdiction for international crimes, at a time when even strenuous supporters of this principle acknowledge that it is not widely reflected in State practice.⁷ This is especially true as regards acceptance of the principle in its 'pure' form, namely

the exercise of civil jurisdiction by the courts of a state over conduct or events [...] that all states have an interest in preventing and punishing even though the parties involved are not affiliated in any way to the forum state, nor do the events take place on the territory of the forum state, and nor do the events implicate the interests of the forum state.⁸

3 *Naït-Liman* (n 2) para 18: 'as there is no sufficient link between the case and the alleged facts, on the one hand, and Switzerland, on the other' (translation by the author; the judgment is available only in French).

4 On the notion of universal civil jurisdiction and the treatment of its relationship to the *forum necessitatis* in the *Naït-Liman* case see Bonafè (n 2) 1106 ff.

5 Article 3 of the Swiss Law on Private International Law, of 18 December 1987; see *Naït-Liman* (GC) (n 1) para 24.

6 *ibid* paras 116, 120.

7 A Bucher, 'La compétence universelle civile' (2015) 372 *Recueil des Cours de l'Académie de Droit International* 21, 103 concedes that 'la compétence universelle en matière de crimes contre l'humanité ne trouve pas un accueil aussi permissif parmi les Etats et l'*opinio iuris*'.

8 AG Jain, 'Universal Civil Jurisdiction in International Law' (2015) 55 *Indian J Intl L* 209, 211.

Even formulations endorsing ‘attenuated’ forms of universal civil jurisdiction, such as the one included in the Institut de droit international’s resolution on the topic,⁹ set out State obligations in this regard only in hortatory terms.

It is also noteworthy that the applicant’s lawyers, while relying on the Institut’s resolution in their pleadings, stressed that the principle of universal civil jurisdiction as such was *not* at stake in the instant case; rather, they argued that Switzerland should be identified as the country that would provide the ‘appropriate forum’ for Mr Naït-Liman’s claim.¹⁰ As this defence strategy in itself makes clear, it could hardly be expected that the referral procedure would lead the Grand Chamber to construe an obligation to exercise universal civil jurisdiction under Article 6 ECHR.

Whether States are *entitled* to exercise universal civil jurisdiction is a more open question, on which the Grand Chamber gives an affirmative answer;¹¹ however, the ECtHR is usually reluctant to interfere with domestic courts’ interpretation of their own legislation. It is therefore also not surprising, although possibly disappointing, that the Grand Chamber did not disavow the Federal Court’s findings in this regard and impose a broad reading of Article 3 of the Swiss Federal Statute on Private International Law, absent an international obligation to do so.

Nonetheless, the Grand Chamber’s judgment did not simply restate the main findings of the Chamber on the principle of universal civil jurisdiction. Firstly, and as is typical of referral proceedings, it took into specific account some issues that had been raised by the Joint Dissenting Opinion appended to the Chamber’s judgment by Judges Karakaş, Vučinić and Kūris, as regards the possibility for Switzerland to exercise criminal jurisdiction over Mr AK. The dissenting Judges highlighted that the five days between Mr Naït-Liman’s complaint and the assessment by the Public Prosecutor that Mr AK had left

9 Institut de Droit international, Tallinn Session, ‘Universal Civil Jurisdiction with regard to Reparation for International Crimes’ (2015) *Annuaire* 265, Article 2, according to which States *should* exercise jurisdiction over claims for reparation by victims of international crimes only if a number of conditions are met (notably, if no other State with stronger connection to the case exists or if such a State would not provide for an effective remedy).

10 See *Naït-Liman* (GC) (n 1), especially para 141, and more clearly the pleadings at the hearing of 14 June 2017. The webcast is available at <www.echr.coe.int/Pages/home.aspx?p=hearings&w=5135707_14062017&language=lang&c=&py=2017> (last accessed 31 December 2019).

11 See further below, Section 3. Cf L Roorda, C Ryngaert, ‘Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters’, above in this volume. See also DF Donovan and A Roberts, ‘The Emerging Recognition of Universal Civil Jurisdiction’ (2006) 100 *AJIL* 142, 143; Rietiker (n 1). For a different view, see however Jain (n 8) 237.

Switzerland should be scrutinized carefully,¹² suggesting that the inaction of the Swiss authorities might imply a violation of the ECHR. Indeed, a systemic reading of the ECHR¹³ in light of the commitments set forth by the United Nations Convention against Torture (UNCAT)¹⁴ might imply that the lack of prompt action by the Swiss authorities actually deprived Mr Naït-Liman of a venue that could provide him with access to a Court as regards his civil claim. Had the suspect been apprehended in Switzerland, the latter State would arguably be under an obligation to exercise criminal jurisdiction against him under the ECHR;¹⁵ in turn, this would have allowed Mr Naït-Liman to bring a civil suit in the framework of a criminal procedure against Mr AK,¹⁶ without any

12 Dissenting Opinion, para 12: 'Le requérant a déposé le 14 février 2001, auprès du procureur général du canton de Genève, une plainte pénale contre son tortionnaire présumé. Or ce n'est que le 19 février 2001 que le procureur général s'est prononcé sur cette plainte, en refusant de la prendre en compte, au motif que la personne mise en cause par le requérant avait alors quitté le territoire suisse. Le Gouvernement n'a fourni aucune information concernant la raison et la date de ce départ. Étant donné que la personne suspectée d'avoir commis les actes de torture se trouvait hospitalisée en Suisse le jour du dépôt de plainte, il convient de porter une attention particulière sur les cinq jours d'inaction des autorités'. See also para 14, highlighting that functional immunity from *criminal* jurisdiction could not be invoked in cases of torture.

13 Cf *Naït-Liman* (n 2) para 105. Cf *Demir and Baykara v Turkey* App no 34503/04 (ECtHR, GC, 12 November 2008) para 76.

14 Article 5 (2) CAT binds States Parties to establish jurisdiction 'in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him'. Moreover, according to Article 7(1), the State where an alleged perpetrator is found 'shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution'.

15 According to the case law of the ECtHR concerning positive obligations, if entitlements and obligations relating to the exercise of criminal jurisdiction exist in this regard under multilateral instruments showing the existence of a European consensus, they also apply under the ECHR: see *Jorgic v Germany* App no 74613/01 (ECtHR, 12 July 2007) para 70 where the Court considered that the German authorities 'had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide', on the basis of a contextual interpretation of Article VI of the Genocide Convention as confirmed by implementing practice, since 'the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing)'. Moreover, the Court ruled out the existence of an obligation to exercise universal jurisdiction as regards human trafficking by reading Article 4 ECHR in light of the UNTOC Trafficking Protocol: see *J and Others v Austria* App no 58216/12 (ECtHR, 17 January 2016) para 114. By the same token, should an instrument relevant to the Convention's interpretation set out an obligation to exercise universal criminal (or, indeed, civil) jurisdiction, such obligation would seem to apply also under the ECHR.

16 The Chamber itself acknowledges this element when recalling that Mr Naït-Liman 's'est effectivement constitué partie civile par rapport à sa plainte pénale du 14 février 2001; par

reference to the principle of universal civil jurisdiction or to the *forum necessitatis* as such. While not specifically mentioning the Dissenting Opinion, the Grand Chamber judgment clarified some issues of fact showing that Switzerland had not been negligent in the exercise of its *criminal* jurisdiction – and had thus not arbitrarily deprived Mr Naït-Liman of an opportunity to seek redress against Mr AK in the framework of criminal proceedings, as is provided for by most European domestic legal systems.¹⁷

While this is certainly a welcome step, another aspect of the Grand Chamber judgment will be in focus here: notably, the more adequate consideration it gave, as compared to the Chamber judgment, to the role that international courts and tribunals have in favouring, but at times also in chilling, the development of new international legal rules. In this perspective, specifically the ECtHR Chamber's assessment of the legality of the aim pursued by the Swiss authorities when refusing to rely on *forum necessitatis* deserved to be reappraised out of consideration for this component of the international judicial function.

It may be useful to recall briefly how the role of international judicial bodies as regards the development of international law is currently seen, before reflecting on the Grand Chamber's findings in this regard and on whether they are in line with the role of the ECtHR as an International Human Rights Court.

2 The Systemic Role of International Judicial Institutions

The role of international courts in the interpretation, elucidation and development of international law is well known: while international judgments bind only the parties to the decided case¹⁸ – and other judicial pronouncements such as advisory opinions are not formally binding at all – judicial interpretation of international legal rules has a significant impact on the development of the international legal system. Such influence (which some characterise, in terms of either criticism or praise, as 'judicial law-making') is only in part grounded on the idea that judgments are 'subsidiary means of interpretation' of international custom under Article 38(1)(d) ICJ

contre, la plainte fut classée après qu'AK eut quitté la Suisse': *Naït-Liman* (n 2) para 119 (see also para 14).

17 *Naït-Liman* (GC) (n 1) para 100.

18 Article 59 ICJ Statute; Article 46(1) ECHR.

Statute.¹⁹ As noted by the Special Rapporteur on the identification of international custom, Michael Wood,

The decisions of international courts and tribunals cannot be said to be conclusive for the identification of rules of customary international law. Their weight varies depending on the quality of the reasoning, the composition of the court or tribunal, and the size of the majority by which they were adopted. In addition, it needs to be borne in mind that customary international law may have developed since the date of the particular decision. Nevertheless, judicial pronouncements, especially of the International Court of Justice and of specialist tribunals, [...] are often seen as authoritative. [...] Examples of reliance upon judicial decisions for the identification of rules of customary international law are legion.²⁰

The structure of the international society greatly enhances this component of the judicial function, since the impartial assessment of the existence and content of legal rules has particular importance in a legal order still lacking a formal 'legislative body' with general competence. International judgments, whose systemic effects are grounded on the binding character of the rules they apply, confirm the existence of such rules and elucidate their content;²¹ nonetheless, this clarification effort often implies a creative element, which is crucial for the stabilisation and development of legal regimes.²² Specifically, the drafters of the Statute of the Permanent Court of International Justice (PCIJ) considered that the new Court would contribute to the development of international law through its case law.²³ This function was later taken up by the ICJ, whose status as the principal judicial organ of the United Nations actually emphasises it. An apt example in this regard is the consideration given

19 ILC, 'Third report on identification of customary international law by Michael Wood, Special Rapporteur' (27 March 2016) UN Doc A/CN.4/682, 43–44, paras 60–61 (footnotes omitted).

20 *ibid.*

21 L Condorelli, 'L'autorité des décisions des juridictions internationales permanentes', in SFDI, *La juridiction internationale permanente – Colloque de Lyon* (Pedone, 1987) 277, 307.

22 A von Bogdandy, I Ventzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2012) 15. Criticisms such as the one of AM Weisburd, *Failings of the International Court of Justice* (OUP 2016) take the influence of ICJ case law as a premise for analysis, rather than denying it.

23 See PCIJ, Advisory Committee of Jurists, verbatim record of the first meeting, Annex No 2, *Procès Verbaux of the Meetings of the Committee* (van Langenhuyzen Brothers 1920) 8. Cf R Kolb, *The International Court of Justice* (Hart Publishing 2014) 1139.

to the *Jurisdictional Immunities* case by the ECtHR: in *Jones* the Grand Chamber maintained that ‘the recent judgment of the International Court of Justice in *Germany v Italy* [...] must be considered by this Court as authoritative as regards the content of customary international law’ with reference to the absence of a ‘*jus cogens* exception to State immunity’.²⁴ In reaching a similar conclusion as regards immunities of State officials, the Grand Chamber also emphasised that ‘the applicants have not pointed to any decision of the ICJ or international arbitral tribunals which has stated this principle’.²⁵

The ICJ’s view on the matter was set out in the *Nuclear Weapons* advisory opinion: rather than acknowledging any law-making role, the Court considers that ‘its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable’ to the case; it ‘states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend’.²⁶

While the position of the ICJ is somehow special, other international courts and tribunals share the same function of ‘noting the general trend’ in the evolution of international law, thereby fostering the development of specific treaty regimes and/or of the international legal order as such. The relevance of this component of the international judicial function varies depending on several elements, including the content of the applicable legal rules,²⁷ the permanent and multilateral nature of the relevant jurisdiction and the ‘acceptability’ of specific decisions to the group of States that are part of a given judicial system.²⁸ There is little doubt, however, that it plays a prominent role in the

24 *Jones v The United Kingdom* Apps nos 34356/06 and 40528/06 (ECtHR, 14 January 2014) para 189.

25 *ibid* para 208.

26 *Legality of the Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 236, para 18.

27 Thus, for instance, according to Judge Wolfrum ‘international courts and tribunals in respect of maritime delimitation exercise a “law-making function”, a function which is anticipated and legitimized by articles 74 and 83 of the [UNCLOS]’; see ITLOS, *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* (14 March 2012, Decl Wolfrum) ITLOS Reports 2012 136,137. Beyond this specific context, the use of vague or flexible notions also leaves the interpreter broader discretion in the interpretation of the relevant rules: see J Salmon, ‘Le concept de raisonnable en droit international public’, in *Mélanges offerts à Paul Reuter – Le droit international: unité et diversité* (Pedone, 1981) 447, 450; R Sapienza, ‘Sul margine d’apprrezzamento statale nel sistema della Convenzione europea dei diritti dell’uomo’ (1991) 74 RDI 571.

28 G Gaja, ‘The Protection of General Interests in the International Community – General Course on International Law’ (2011) 364 *Recueil des Cours de l’Académie de Droit International* 9, 44.

context of the ECHR, where the case law of the ECtHR is crucial to the development of the Convention system. In an early case, the ECtHR opined that its judgments

in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.²⁹

This stance has entailed practical consequences in later case law – for instance in cases where the ECtHR decided to pursue the examination of a case notwithstanding the death of the applicant and the absence of close relatives,³⁰ or although the respondent State had acknowledged a breach and issued an unilateral engagement to pay compensation.³¹ It also underlies developments such as those relating to the pilot judgment procedure, with the ECtHR indicating general measures to ‘assist States’ in addressing systemic failures to respect the Convention,³² and more recently even deciding (with an unprecedented move from the procedural point of view) that all pending and future cases connected to a pilot judgment that had not been executed would be struck out of the list and ‘transferred’ to the Committee of Ministers.³³ This systemic role does not concern only the addressees of specific judgments: if, on the one hand, the Strasbourg Court requires States parties to take into account judgments *against other States parties* in order to modify their domestic legal systems accordingly,³⁴ on the other hand States Parties accept this approach, with legislative or judicial authorities often deciding that ECtHR case law should be followed at domestic level irrespective of whether it formally binds the State. Thus, a survey commissioned by the Parliamentary Assembly confirms that Contracting States of the ECHR

29 *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) para 154.

30 *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003) para 26, where the Court stated: ‘Although the primary purpose of the Convention system is to provide individual relief, its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States’.

31 *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 17 January 2010) paras 198 ff.

32 *Broniowski v Poland* App no 31443/96 (ECtHR, 22 June 2004) para 194.

33 *Burmych and others v Ukraine* App no 46852/13 and others (ECtHR, Grand Chamber, 12 October 2017).

34 *Modinos v Cyprus* App no 15070/89 (ECtHR, 24 May 1993).

have been prepared to meet their Convention obligations by scrutinising the Court's case law and, if necessary, adjusting their legal systems following the finding of a violation in a case against another State, thereby amplifying the effect of the Court's case law across Europe by taking into account the interpretative authority (*res interpretata*) of the Strasbourg Court's judgments.³⁵

Also in the ECHR context, this systemic effect is one of the reasons explaining the prominent importance of elements such as coherence and predictability in the Court's case law, which was emphasised for instance in *Jones*:

While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases.³⁶

Finally, ECtHR case law also performs an 'inter-systemic role', notably *vis-à-vis* other international judicial and quasi-judicial bodies: not only regional human rights courts and UN treaty-based bodies, or the Court of Justice of the European Union, but also the ICJ has referred to ECtHR precedents in its own case law. In the *Diallo* case, when discussing the amount of compensation due by the Republic of Guinea, the ICJ expressly acknowledged taking into account

the practice in other international courts, tribunals and commissions (such as the International Tribunal for the Law of the Sea, the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission), which have applied general principles governing compensation when fixing its amount, including in respect of injury resulting from unlawful detention and expulsion.³⁷

35 Council of Europe Parliamentary Assembly, 'Impact of the European Convention on Human Rights in States Parties: selected examples', Overview prepared by the Legal Affairs and Human Rights Department, AS/Jur/Inf (2016) 04, 8 January 2016, 2.

36 *Jones* (n 24) para 194.

37 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Compensation, Judgment) (2012) ICJ Rep 324 (eg 337, para 33, and 339–40, para 40). See also *Armed Activities in the Territory of the Congo (Congo v Uganda)* (Reparations, Order) Declaration of Judge Cançado Trindade, para 13, inviting the Parties and the ICJ

Neither the systemic nor the inter-systemic role of international case law is one-sided. In other words, 'progressive' case law can certainly foster an evolutive interpretation of treaties and the development of customary international law; but at the same time more conservative stances can also 'chill' or 'freeze' the process of consolidation of rules, which may be emerging but have not yet fully crystallized into customary law. This criticism was raised, notably, as regards the ICJ judgment in *Germany v Italy*³⁸ – a case worth mentioning because also the *Nait-Liman* case involves jurisdictional immunities of States and State organs, although this aspect was not addressed by the Court.³⁹ Therefore, international courts are arguably expected to exercise particular care whenever they decide cases involving areas where traditional international legal rules may be undergoing transformation due to the emergence of 'new' values or social needs: specifically in such cases, a well construed and thorough reasoning is crucial to the perceived legitimacy of their judgments, regardless of whether they affirm the existence of new rules or adopt a more conservative stance. This would seem to be even more important in a case that concerns the interrelationship between the ECtHR and universal civil jurisdiction as acceptance of the latter – were it to be in general terms or in the attenuated form suggested by the Institut de droit international – would favour the implementation of the individual right to obtain reparation for serious violations of human rights. It would also enhance the right of access to a judge, which according to the ECtHR is one of the basic components of the right to a fair trial and must be guaranteed 'in a manner that is practical and effective'.⁴⁰ Arguably, it is in this perspective that the difference between the Chamber's and the Grand Chamber's approach to the case becomes apparent.

itself to study the case law of 'other contemporary international tribunals' on the issue of reparations.

- 38 See F Salerno, 'Gli effetti della sentenza internazionale nell'ordinamento italiano' (2012) 6 DUDI 350, 353, arguing that the ICJ judgment 'petrified' the existing legal framework on immunities.
- 39 *Nait-Liman* (n 2) para 20. On the 'chilling' effect of the ECtHR *Al-Adsani* judgment see A Saccucci, 'The Case of *Nait-Liman* Before the European Court of Human Rights: a *Forum non Conveniens* for Asserting the Right of Access to a Court in Relation to Civil Claims for Torture Committed Abroad?', above in this volume.
- 40 *Jones* (n 24) para 187, also stressing the great relevance of the right to a fair trial in a democratic society. Cf also *Golder v United Kingdom* (ECtHR, 21 February 1975) Series A no 18, para 35.

3 On the Importance of Reasoning

Indeed, the reasoning of the ECtHR's Grand Chamber shows better consideration for the Court's systemic role, as compared to the Chamber, when appreciating the lawfulness of the aims pursued by Switzerland in limiting Mr Naït-Liman's right of access to a Court. The Grand Chamber was not persuaded that an obligation to exercise universal civil jurisdiction can be construed under Article 6 ECHR, nor could it circumvent the issue altogether – as the International Court of Justice often does by relying on its own freedom to choose the grounds on which its decisions are based.⁴¹ Yet, it sought to mitigate its 'conservative' approach.

Notably, the Chamber had taken a clear-cut stance *against* the existence of an obligation to exercise universal jurisdiction, considering that 'the practice of states, as expression of an *opinio juris* (Article 38 para 1 b) of the ICJ Statute)' in favour of such a rule was 'clearly missing'.⁴² The Grand Chamber adopted a more nuanced position when it posited that

those States which recognise universal civil jurisdiction – operating autonomously in respect of acts of torture – are currently the exception. Although the States' practice is evolving, the prevalence of universal civil jurisdiction is not yet sufficient to indicate the emergence, far less the consolidation, of an international custom which would have obliged the Swiss courts to find that they had jurisdiction to examine the applicant's action.⁴³

41 The International Court of Justice has on occasion avoided taking a stance on controversial issues with potentially broad 'systemic' implications. Arguably, this may happen in situations when it considers that State practice and *opinio iuris* have not evolved yet into a new legal rule that would better meet 'new' needs expressed by the international society and values protected by international law. For a critical appraisal see ICJ, *Obligation to extradite or to prosecute (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 402, Declaration of Judge Abraham, paras (3–4).

42 The Chamber stated that no treaty obligation would bind Switzerland to exercise jurisdiction on Mr Naït-Liman's case, and that Swiss authorities 'n'en étaient pas non plus obligées en vertu du droit coutumier, étant donné que la pratique des États, comme expression d'une *opinio juris* (article 38 § 1 b) du Statut de la CIJ en faveur de l'existence d'une compétence universelle civile, [fait] clairement défaut', see *Naït-Liman* (n 2) para 120.

43 *ibid* para 187. In the next paragraph, the Grand Chamber continues as follows: 'The Court considers that, as it currently stands, international treaty law also fails to recognise universal civil jurisdiction for acts of torture, obliging the States to make available, where no other connection with the forum is present, civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State' (*ibid* para 188).

The Grand Chamber couples this cautious assessment of the current status of State practice with a specific emphasis on the the possibility that the international legal system may evolve, thus limiting or cancelling the ‘wide margin of appreciation’ that States Parties enjoy on such issues at the moment:

given the dynamic nature of this area, the Court does not rule out the possibility of developments in the future. Accordingly, and although it concludes that there has been no violation of Article 6 § 1 in the present case, the Court invites the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture, while assessing carefully any claim of this nature so as to identify, where appropriate, the elements which would oblige their courts to assume jurisdiction to examine it.⁴⁴

It may be interesting to note that the Grand Chamber’s judgment did not simply follow the approach adopted in *Jones v United Kingdom* as regards immunities of States and State officials:⁴⁵ it also expressly commended States who, absent an international obligation to do so, nonetheless strive to ‘make access to a court as effective as possible for those seeking compensation for acts of torture’.⁴⁶

4 On Whether Limitations to the Exercise of Civil Jurisdiction Pursue Legitimate ‘Lawful Aims’: the Exercise of Civil Jurisdiction as a Form of Unlawful Interference in Other States’ Domestic Affairs?

Another element of some relevance in the Grand Chamber’s review of the Chamber’s approach concerns the appraisal of the legality of the aims pursued by Switzerland in limiting Mr Naït-Liman’s right of access to a Court.

The Grand Chamber upheld the Chamber’s stance that the aims broadly related to preserving the effectiveness of the Swiss judicial system were in

44 *ibid* para 220.

45 While on that occasion the ECtHR Chamber concluded that no human rights exception existed as regards jurisdictional immunities of State officials, it also specified that the law and the practice of States on that particular issue could change and that, ‘in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States’, see *Jones* (n 24) para 215.

46 *Naït-Liman* (GC) (n 1) para 218.

keeping with Article 6 of the Convention.⁴⁷ This aspect of the Grand Chamber's approach is not particularly convincing, insofar as it blurs the distinction between criminal and civil jurisdiction. Indeed, problems with collecting evidence may arise in the context of proceedings that are not 'close' to the events they relate to. The impact of such difficulties is very significant in criminal proceedings, where it risks seriously hampering their outcome.⁴⁸ In civil proceedings, however, it is in principle for the applicant to prove that the claim to reparation is well founded in fact and in law, on the basis of domestic rules governing the burden of proof; an applicant who submits insufficient evidence to the seised court bears the risk of losing the case on the merits, without thereby undermining the credibility and legitimacy of the domestic jurisdiction involved. The same distinction seems of relevance as regards possible difficulties in the execution of any judgment. In this specific regard, moreover, it may well be that future developments, notably in Tunisia, could lead to opportunities of implementation that could not be foreseen when the Swiss courts dismissed the applicant's claim. Last but not least, in relation to the risk of forum shopping and of high numbers of similar cases flooding the Swiss judicial system, it would not seem that practical concerns of this nature should as such easily prevail over the right of access to a Court where, as in Mr Naït-Liman's case, the right to reparation for international crimes is at stake, and some close connections to the forum exist at the time when the claim is submitted, if not at the time when the acts of torture allegedly took place. Admittedly, this element relates not so much to the legality of the aim pursued by Swiss authorities but

47 *ibid* paras 123–126: 'Firstly, there can be little doubt that an action such as the applicant's, alleging that he had been tortured in Tunisia in 1992, would pose considerable problems for the Swiss courts in terms of gathering and assessing the evidence. [...] In addition, the enforcement of a judgment giving effect to such an action would entail practical difficulties [...]. In this connection, one might wonder, from the perspective of the effective right of access to a court, whether a judgment delivered in such circumstances could effectively be enforced [...]. Further, it seems legitimate for a State to wish to discourage forum shopping, in particular in a context in which the resources allocated to domestic courts are being restricted. [...] Moreover, the Court considers justified the fear expressed by the Government to the effect that accepting an action such as the applicant's, where the connection with Switzerland at the relevant time was relatively tenuous, would be likely to attract similar complaints from other victims in the same situation with regard to Switzerland, and thus to result in an excessive workload for the domestic courts. It follows that a reasonable restriction on admissible complaints is likely to ensure the effectiveness of the justice system'. Compare *Naït-Liman* (n 2) paras 106 ff.

48 Cf D Hovell, 'The "Mistrial" of Kumar Lama: Problematising Universal Jurisdiction', *EJILTalk!*, 6 April 2017, available at <www.ejiltalk.org/the-mistrial-of-kumar-lama-problematising-universal-jurisdiction/> (last accessed 31 December 2019).

rather to the proportionality of the limitation – an aspect dealt with elsewhere in this volume.⁴⁹

Be that as it may, what matters for the purposes of this contribution is rather the Grand Chamber's treatment of another argument raised by the Chamber – a treatment which ultimately did not change the outcome of the case, but arguably also reflects its consideration for the systemic impact of its judgments in the framework of referral proceedings under Article 43 ECHR. The Chamber envisaged the risk that the exercise of civil jurisdiction in cases such as *Nait-Liman* would imply 'undesirable interference with another State's internal affairs'.⁵⁰ That this line of argument could be accepted by an international human rights court seems at odds with the premise on which the whole international system of protection of human rights is presently based: namely, that inducing other States to comply with the relevant obligations (including the obligation to ensure reparation in case of serious violations) is *not* per se undesirable, nor incompatible with the customary international law principle of non-intervention in domestic affairs – all the more so in the relations between countries which are both parties to the UN Convention against Torture.

Indeed, the possibility of infringing the principle of non-intervention through the exercise of a State Party's adjudicative jurisdiction was discussed in the *Jorgic* case, where the ECtHR did not uphold the applicant's argument to this effect. Of course, the situation in *Nait-Liman* should be distinguished from *Jorgic* as Switzerland, according to the stance taken by its highest Courts, had *not* established a ground of jurisdiction in the circumstances, whereas Germany had. It is however noteworthy that, in *Jorgic*, the Court held that it was not arbitrary for States Parties to apply the principle of universal (criminal) jurisdiction, although the Convention against Genocide sets out an obligation to exercise such jurisdiction only for the State on whose territory the crime was perpetrated. The ECtHR reached this conclusion also because,

pursuant to Article I of the Genocide Convention, the Contracting Parties were under an *erga omnes* obligation to prevent and punish genocide, the prohibition of which forms part of the *ius cogens*. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish

49 See again the contribution of Saccucci (n 39).

50 '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*': *Nait-Liman* (n 2) para 107 (emphasis added).

extraterritoriality in this respect must be considered as reasonable (and indeed convincing).⁵¹

Arguably, the same line of reasoning should be adopted as regards civil liability for acts of torture, which are also a violation of peremptory *erga omnes* obligations, even in a context where civil claims are not linked to a criminal prosecution. On the contrary, the Chamber's approach in *Nait-Liman* may imply the conclusion that Switzerland would not be entitled to exercise adjudicative jurisdiction in the case – once again, this would entail a potentially 'chilling' effect on the development of rules on the exercise of jurisdiction that would enhance opportunities for victims of torture to obtain reparation.

Also in this perspective, the Grand Chamber's judgment in *Nait-Liman* is more in keeping with the Court's role as guardian of international human rights obligations than the Chamber's. The Grand Chamber simply accepted, 'lastly, and as a subsidiary consideration, [...] that a State cannot ignore the potential *diplomatic difficulties* entailed by recognition of civil jurisdiction in the conditions proposed by the applicant'.⁵² As diplomatic difficulties are a risk that States are perfectly entitled to face under international law, the Grand Chamber judgment should be understood as confirming that the exercise of universal civil jurisdiction over claims related to torture, albeit not yet imposed under Article 6 ECHR,⁵³ is at least a *faculté* – a choice that falls, for the time being, within the margin of appreciation of the States parties. Therefore, the difference between the approach of the Chamber and that of the Grand Chamber is not simply a matter of nuances, although it ultimately did not change the outcome of the case.⁵⁴

5 Conclusions: the Function of International Tribunals and the Limits of 'Judicial Creativity'

International courts such as the ECtHR can't choose the cases they will have to decide, nor the timing of their submission. Moreover, it is not the ECtHR's task to make 'moral open-ended judgments' nor to adopt a 'natural-law approach'⁵⁵ in deciding difficult cases, as Judge Dedov opines in his Dissenting Opinion.⁵⁶

51 *Jorgic* (n 15) para 68.

52 *Nait-Liman* (GC) (n 1) para 127.

53 See Bonafè (n 2) 1103.

54 For a different appraisal see Roorda, Ryngaert (n 11) and the pessimistic considerations of De Marziis (n 1).

55 Dissenting Opinion of Judge Dedov, 68.

56 *ibid* 74.

The *Nait-Liman* case reached the Grand Chamber at a stage where it did not deem it possible to assert the existence of a clear-cut obligation under the Convention to exercise universal civil jurisdiction in respect of torture, nor specifically for Swiss authorities to exercise civil jurisdiction in the instant case.

This stance cannot be read simply in terms of 'judicial policy', as a form of acceptance of the emphasis currently put by Contracting States on the margin of appreciation as a 'value' underlying the Convention system.⁵⁷ It is in line with previous case law concerning the exercise of 'extraterritorial' jurisdiction over international and transnational crimes⁵⁸ and reflects the lack of a clear trend in State practice in this regard. But regardless of whether one considers the operative part of the judgment to be perfectly correct, or would rather advocate a 'creative' approach leading to a more satisfactory solution for the applicant (possibly on the basis of the principle of effective protection of human rights which underlies the Convention,⁵⁹ rather than on natural justice as suggested by Judge Dedov), it remains true that international jurisdictions should be particularly careful in cases where relevant international legal rules may be undergoing a process of change. This applies especially for permanent, multilateral institutions like the ECtHR, since the systemic impact of their case law may 'chill' or 'freeze' such developments. Although the ECtHR cannot 'legislate', thus overstepping the limits of its judicial function, arguably its role as an International Human Rights institution is that of fostering, rather than hindering, the 'reappraisal under international law of the relative importance of fundamental human rights and state sovereignty' that lies at the basis of the modern idea of universal civil jurisdiction.⁶⁰

While the Chamber failed to meet this expectation in the *Nait-Liman* case, the Grand Chamber's judgment displayed better consideration for the systemic and inter-systemic role of the ECtHR in this regard. On the one hand, it explained why the Chamber could not have settled the case by construing an obligation for Switzerland to exercise its criminal jurisdiction against Mr

57 cf in particular Article 1 of Protocol no 15, envisaging the addition of a new recital to the ECHR Preamble to the effect that 'the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'. The Protocol is not yet in force but is the expression of a political climate where the Court's perceived judicial activism has given rise to serious criticism by some Governments and domestic courts.

58 See notably the *Jorgic* case discussed above.

59 Cf De Marziis (n 1) 8.

60 Donovan, Roberts (n 11) 143.

AK – which, in turn, might have allowed Mr Naït-Liman to submit his civil claims in the framework of criminal proceedings, avoiding any decision on universal civil jurisdiction as such. On the other hand, it toned down some of the Chamber's most worrying assertions as to the legality of the aims pursued by the Swiss authorities in limiting the right of access to a court. Its findings confirm that the exercise of 'extraterritorial' civil jurisdiction over acts of torture – and, one may reasonably deduct, over international crimes in general – is not only a *faculté* in present-day international law, but also expressly encouraged within the ECHR system. By considering that such a choice still falls under the Contracting Parties' margin of appreciation, the Court put the 'ball' back into their hands – and more broadly into the hands of States, which may enhance opportunities for victims of torture to seek reparation by allowing for the exercise of universal civil jurisdiction despite the risk of 'diplomatic difficulties'. Albeit without construing an obligation to exercise universal civil jurisdiction over acts of torture under the Convention, the Grand Chamber thus re-positioned the Court's case law in the line of its previous jurisprudence and, arguably, of the present state of general international law on the issue. Thus, the transition between the Chamber and the Grand Chamber in *Naït-Liman* implied a significant – and, it is submitted, welcome – shift in the Court's approach to the case, which highlights the importance of the referral mechanism and, more generally, of the Grand Chamber's role as a 'constitutional' guardian of the Convention system and of its place in the broader context of the international legal order.

Bibliography

- Bonafè BI, 'La Corte europea dei diritti dell'uomo e la giurisdizione universale in materia civile' (2016) 99 RDI 1100.
- Bucher A, 'La compétence universelle civile' (2015) 372 Recueil des Cours de l'Académie de Droit International 21.
- Condorelli L, 'L'autorité des décisions des juridictions internationales permanentes', in SFDI, *La juridiction internationale permanente – Colloque de Lyon* (Pedone, 1987) 277.
- De Marziis C, 'Diritto di accesso a un giudice e giurisdizione civile universale dinanzi alla Corte europea dei diritti umani' (2018) 12 DUDI 693.
- Donovan FD and Roberts A, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 AJIL 142.
- Gaja G, 'The Protection of General Interests in the International Community – General Course on International Law' (2011) 364 Recueil des Cours de l'Académie de Droit International 9.

- Hovell D, 'The "Mistrial" of Kumar Lama: Problematizing Universal Jurisdiction', *EJIL-Talk!*, 6 April 2017, available at <www.ejiltalk.org>.
- Hovell D, 'The Authority of Universal Jurisdiction', (2018) 29 *EJIL* 427–56.
- Jain AG, 'Universal Civil Jurisdiction in International Law' (2015) 55 *Indian J Intl L* 209.
- Kolb R, *The International Court of Justice* (Hart Publishing 2014).
- Mora PD, 'Universal Civil Jurisdiction and Forum Necessitatis: The Confusion of Public and Private International Law in *Nait-Liman v. Switzerland*' (2018) 65 *Netherlands Intl L Rev* 155.
- Nkenkeu-kek S, 'L'arrêt *Nait-Liman c. Suisse* ou l'occasion manquée par la Cour européenne des droits de l'homme de renforcer l'effectivité du droit des victimes d'obtenir réparation de violations graves des droits de l'homme' (2018) 29 *Rev trim dr homme* 985.
- Pavoni R, 'Giurisdizione civile universale per atti di tortura e diritto di accesso al giudice: la sentenza della grande camera della Corte europea dei diritti umani nel caso *Nait-Liman*' (2018) 101 *RDI* 888.
- Rietiker D, 'The Case of *Nait-Liman v. Switzerland* Before the European Court of Human Rights: Where Are the Limits of the Global Fight Against Torture?', *Harvard Intl LJ*, 15 March 2019, available at <<https://harvardilj.org>>.
- Ryngaert C, 'From Universal Civil Jurisdiction to Forum of Necessity: Reflections on the Judgment of the European Court of Human Rights in *Nait-Liman*' (2017) 100 *RDI* 782.
- Salmon J, 'Le concept de raisonnable en droit international public', in *Le droit international, unité et diversité : mélanges offerts à Paul Reuter* (Pedone, 1981) 447.
- Salerno F, 'Gli effetti della sentenza internazionale nell'ordinamento italiano' (2012) 6 *DUDI* 350.
- Sapienza R, 'Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo' (1991) 74 *RDI* 571.
- von Bogdandy A and Ventzke I, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2012).
- Weisburd AM, *Failings of the International Court of Justice* (OUP 2016).