CHAPTER 4

Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters

Lucas Roorda and Cedric Ryngaert

1 Introduction

In Naït-Liman, the Grand Chamber of the European Court of Human Rights (ECtHR) implied that public international law is relevant when determining the permissibility of the exercise of adjudicatory jurisdiction in civil matters, as well as when determining the scope of the margin of appreciation enjoyed by forum States when deciding whether to open up their courts to tort claims with weak ties to the forum. This elicits the question whether, as a general matter, public international law governs the exercise of jurisdiction in civil matters, ie in disputes between private persons, typically concerning torts.

Jurisdiction in civil matters is normally governed by private international law. Jurisdictional grounds in private international law do not fully coincide with the classic jurisdictional heads in public international law. In fact, they are far more diverse. Arguably, this is so because jurisdiction in private

---

1 Naït-Liman v Switzerland App no 51357/07 (ECtHR, GC, 15 March 2018) para 127: ‘[A]s a subsidiary consideration, the Grand Chamber accepts that a State cannot ignore the potential diplomatic difficulties entailed by recognition of civil jurisdiction in the conditions proposed by the applicant.’

2 ibid paras 176–181 discerning ‘two concepts of international law that are relevant for the present case: the forum of necessity and universal jurisdiction’, examining ‘whether the Swiss authorities were legally bound to open their courts to the applicant, by virtue either of universal civil jurisdiction for torture, or of the forum of necessity’, the conclusions of which ‘will serve to determine the scope of the margin of appreciation enjoyed by those authorities in this case’.

3 eg the multiple jurisdictional principles that are codified in Regulation (EU) 1215/2012 of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) [2012] OJ L 351/1. Note that this Regulation is not exhaustive of the possible grounds of jurisdiction under private international law. The Regulation notably does not list forum of necessity, ie the jurisdictional ground at issue in Naït-Liman.
international law – the rules of which, for that matter, are largely although not exclusively laid down in domestic law – serves a purpose that is different from the purpose of jurisdiction in public international law. Both are concerned with the allocation of regulatory authority, but the purpose of the latter is mainly to prevent one State from encroaching on the sovereignty of another (ie interfering in its internal affairs), while the purposes of the former are to provide predictability to the variegated legal relationships between private persons, do justice to their legitimate interests, and offer due process. In light of these different goals, jurisdiction in respectively private and public international law may seem to be worlds apart. States may perhaps enter into treaties governed by international law to approximate or harmonize jurisdictional principles in private international law, but the public international law form used for such approximation or harmonization may not change the fundamental private international law character of the jurisdictional principles laid down in the treaties.

As jurisdiction in private international law mostly engages private interests rather than State interests, it could be argued that public international law, which (only) accommodates State interests, does not and cannot constrain or otherwise impact private international law-based adjudicatory jurisdiction. The latter position appears to be taken by the drafters of the recent Fourth Restatement of US Foreign Relations Law, which is likely to be influential, also outside the United States (as discussed in Section 3). In this contribution, we argue that the Restatement’s drafters are misguided. The exercise of adjudicatory jurisdiction amounts to a projection of State regulatory power, and is accordingly in principle, although not necessarily in practice, subject to sovereignty-based public international law constraints (Section 4). We go on to illustrate our general position with the specific case of tort litigation regarding human rights abuses committed by transnational corporations (Section 5). Such litigation straddles the public/private divide par excellence and engages both private and public (international law) concerns, making it a fascinating field to examine the applicability of public international law constraints on the exercise of adjudicatory jurisdiction. In view of the thrust of this volume, however, we start with a more detailed discussion of what triggered our inquiry in the first place: the position taken on the matter by the European Court of Human Rights in Naït-Liman (Section 2). Section 6 concludes.

---

4 See eg the various Hague conventions on private international law, available at <www.hcch.net/en/instruments/conventions> (last accessed 31 December 2019).
The Position of the European Court of Human Rights in *Naït-Liman*

In *Naït-Liman*, the Grand Chamber of the European Court of Human Rights implied that public international law informs the assessment of the legality of the exercise of adjudicatory jurisdiction in civil law matters. The Grand Chamber considered that, in substance, the applicant’s arguments regarding the private international law jurisdictional ground of forum of necessity ‘come very close’ to the public international law approach of universal jurisdiction.\(^5\) Therefore, it went on to review Swiss private international law and practice regarding forum of necessity in light of public international law. In particular, the Grand Chamber considered it ‘appropriate to examine whether Switzerland was bound to recognise universal civil jurisdiction for acts of torture by virtue of an international custom, or of treaty law’.\(^6\) These are formal sources of (public) international law which, as the Grand Chamber reminded, are set out in Article 38 of the Statute of the International Court of Justice.\(^7\) Eventually, the Grand Chamber concluded that neither customary nor treaty (public international) law obliged ‘the Swiss authorities to open their courts to the applicant pursuant to universal civil jurisdiction for acts of torture’.\(^8\) It also concluded that there is no ‘international custom rule enshrining the concept of forum of necessity’,\(^9\) or an ‘international treaty obligation obliging the States to provide for a forum of necessity’.\(^10\)

Regardless of the specificities of *Naït-Liman*, the important takeaway of the Grand Chamber’s reasoning is that public international law *is* relevant to private international law jurisdiction in two ways: (1) public international law can impose *obligations* on States to establish adjudicatory jurisdiction (‘open up their courts’) in private law (tort) cases, and (2) public international law can *constrain* the exercise of adjudicatory jurisdiction. The first issue was the centre of *Naït-Liman*, and pertained to whether Article 14 of the UN Convention against Torture, or parallel customary international law, obliges States to exercise universal civil jurisdiction over torture, ie the wrongful act at issue

\(^{5}\) *Naït-Liman* (GC) (n 1) para 176. The Court appears to narrow the applicant’s argument regarding restricted forum of necessity (based on a nexus to the forum State) to an argument regarding unrestricted forum of necessity (not based on a nexus to the forum State). Only the unrestricted form of forum of necessity comes very close to universal jurisdiction.

\(^{6}\) ibid.

\(^{7}\) ibid para 182.

\(^{8}\) ibid para 198.

\(^{9}\) ibid para 201.

\(^{10}\) ibid para 202.
in Naït-Liman.\textsuperscript{11} This issue has been addressed at length in literature and in practice.\textsuperscript{12}

The second question – whether public international law constrains rather than mandates the exercise of adjudicatory jurisdiction in civil matters – is only obliquely referenced in Naït-Liman. Only ‘as a subsidiary consideration’, the Grand Chamber accepted ‘that a State cannot ignore the potential diplomatic difficulties entailed by recognition of civil jurisdiction in the conditions proposed by the applicant’.\textsuperscript{13} Here, the Grand Chamber seems to refer to foreign State protests which the exercise of adjudicatory jurisdiction in civil matters by the forum State could engender. Such protests play an important role in determining, under public international law, the lawfulness of jurisdictional assertions by States.\textsuperscript{14} At the very least, this consideration speaks to foreign State interests that are possibly engaged by the forum State’s exercise of adjudicatory jurisdiction, and which may amount to unlawful interference in the internal affairs of foreign States. This risk of interference is also cited in the Court’s first instance judgment in Naït-Liman, in which it held that ‘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’.\textsuperscript{15} This risk may obviously render the exercise of civil jurisdiction subject to public international law constraints – although, as argued below, in practice, foreign States rarely protest.

Ultimately, however, the ECHR did not have to see through the argument of public international law constraints, as the question before the Court was not whether Switzerland had jurisdictionally overreached, but rather whether it had underreached, ie whether its failure to exercise adjudicatory jurisdiction in the case fell short of potential international obligations to exercise such jurisdiction (it did not). Moreover, in any event, the Court, as a human rights court,

\textsuperscript{11} The Grand Chamber in Naït-Liman answers the question in the negative (there is no such obligation), relying on treaty interpretation. See Naït-Liman (GC) (n 1) paras 182–198.


\textsuperscript{13} Naït-Liman (GC) (n 1) para 127.

\textsuperscript{14} cf M Akehurst ‘Jurisdiction in International Law’ (1972) 46 British Ybk Intl L 145, 176.

\textsuperscript{15} Naït-Liman v Switzerland App no 51357/07 (ECHR, 21 June 2016) para. 107. This judgment is only available in French.
hearing violations of human rights law rather than of public international law, will therefore only indirectly review jurisdictional action or inaction of States in light of public international law-based jurisdictional constraints.\textsuperscript{16}

3 \textbf{The Fourth Restatement of US Foreign Relations Law: the Contested Absence of Public International Law Constraints}

For reasons related to its competency as a human rights court, rather than a court with jurisdiction over violations of public international law, the ECtHR may so far not have fully engaged yet with potential public international law constraints on the exercise of adjudicatory jurisdiction. However, this does not detract from the principled epistemic relevance of the existence of such constraints in the context of the relationship between private and public international law.

The discussion on the existence of such constraints has recently received a boost as a result of the adoption of the Fourth Restatement of US Foreign Relations Law by the American Law Institute.\textsuperscript{17} The Fourth Restatement

\textsuperscript{16} Thus, in \textit{Naït-Liman}, the applicant invoked Article 6 \textit{ECHR}, although backed up by jurisdictional arguments drawn from public international law. See for an ECtHR review of allegations of State jurisdictional overreach in light of the \textit{ECHR}: \textit{Jorgic v Germany App no 74613/01 (ECtHR, 12 July 2007)}. In this case, the applicant, Jorgic, a Bosnian Serb who had been convicted for genocide by German courts acting under the universality principle, complained with the ECtHR that his conviction was in violation of the right to liberty, the right to be heard by a tribunal established by law, and/or the legality principle which prohibits punishment without law, laid down in Articles 5–7 \textit{ECHR}. Public international law constraints were however considered to inform the determination of whether the State has violated these provisions. Thus, Jorgic alleged that German courts' wide interpretation of that crime had no basis in German or public international law. When reviewing the conviction in light of the \textit{ECHR}, the Court noted that the German courts’ interpretation of the rules of public international law was not arbitrary, and that the application could reasonably have foreseen that he risked being charged with and convicted of genocide for the acts he had committed in light of the fact that several authorities had interpreted the offence of genocide in a wider way.

Note, however, that the Court’s practice in jurisdictional immunity cases shows a ready willingness of the Court to engage with the public international law regime of jurisdictional immunity. See Ph Webb, ‘A Moving Target: the Approach of the Strasbourg Court to Immunity’ and R Pavoni, ‘The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?’, both in A van Aaken, I Motoc (eds), \textit{The European Convention of Human Rights and General International Law (OUP 2018)} 251 and 264 respectively.

controversially posits that public international law does not constrain the exercise of adjudicatory jurisdiction. The reporters’ notes provide that ‘[w]ith the exception of various forms of immunity, however, modern customary international law generally does not impose limits on jurisdiction to adjudicate’. The co-reporters for the jurisdictional sections of the Restatement have explained this rule in a separate post, in which they argue that ‘[s]tates often limit their jurisdiction to a greater extent than international law requires’ but ‘unless such limits result from a sense of international legal obligation, they reflect international comity rather than customary international law’. They go on to state that ‘[m]any states exercise personal jurisdiction on bases that other states consider exorbitant’, but that ‘states have not, however, protested such exercises of personal jurisdiction as violations of customary international law’, and instead ‘have simply refused to recognize and enforce the judgments rendered in such cases’. While admitting that ‘states generally do not exercise personal jurisdiction without a basis for doing so that is widely recognized by other states’, they point out that ‘the fact that many states maintain the right to exercise jurisdiction on other bases, and the fact that other states do not protest such exercises as violations of customary international law, forecloses the conclusion that the limits generally observed are followed out of a sense of legal obligation’. This position is echoed by Paul Mora, who, reflecting on the ECtHR’s judgment in Naït-Liman, argues that the Court confused separate principles of both public and private international law when dealing with universal civil jurisdiction and forum of necessity. According to him, ‘public international law rules on prescriptive jurisdiction do not in practice regulate the jurisdiction of municipal courts in civil and commercial matters under the conflict of laws’. On this view, there may well be extraneous limitations to the exercise of adjudicatory jurisdiction in civil matters, but these do not flow from public international

---

18 ibid Section 422, reporters’ note 1.
20 ibid.
21 ibid. As an element ex autoritate they add they ‘had the benefit of counsel from a wide range of advisers (including foreign advisers) with deep experience in customary international law and of vigorous debates on many issues’.
law but rather from non-binding comity, reasonableness or due process considerations.\textsuperscript{23}

These positions constitute a departure from the influential Third Restatement of US Foreign Relations Law, which did appear to posit public international law constraints on the exercise of adjudicatory jurisdiction. The Third Restatement stated that ‘[t]he exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement’.\textsuperscript{24} More specifically, it considered the exercise of ‘tag’ jurisdiction based on the service of process to a person with only a transitory presence in the jurisdiction, as ‘not generally acceptable under international law’.\textsuperscript{25} Relying on the Third Restatement, Austen Parrish thus rejected the approach of the Fourth Restatement; he cited international practice as well as US judicial decisions which arguably evidence the existence of public international law constraints on the exercise of adjudicatory jurisdiction (in the US also called ‘judicial’ or ‘personal’ jurisdiction), as a matter of binding law rather than mere comity.\textsuperscript{26} Alex Mills, one of the pre-eminent specialists on the relationship between public and private international law, took the resembling view that it ‘is a matter of great regret that the forthcoming Restatement (Fourth) (…) appears to have departed from the approach previously recognised under US law, and suggests that customary international law does not constrain the exercise of adjudicative jurisdiction at all’.\textsuperscript{27} Mills pointed out in this respect that

\begin{itemize}
\item \textsuperscript{23} Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction § 302 comment d: ‘Both general and specific jurisdiction are subject to the reasonableness requirements of the Due Process Clauses. Because the contacts required for general jurisdiction tend to satisfy these requirements, however, reasonableness typically functions as an independent check on personal jurisdiction only in specific jurisdiction cases’. See from a US perspective on the moderating influence of domestic doctrines, such as reasonableness, venue transfer, and forum non conveniens, on the expanded reach of the US national-contacts test: W Dodge and S Dodson, ‘Personal Jurisdiction and Aliens’ (2018) 116 Michigan L Rev 1295.
\item \textsuperscript{24} American Law Institute, Restatement of the Law Third – The Foreign Relations Law of the United States (American Law Institute 1987) Section 421, reporters’ note 1.
\item \textsuperscript{25} ibid Section 421, comment e.
\end{itemize}
while 'the range of connecting factors on which States rely in the context of private law disputes is broader than those commonly recognised in criminal law', States do not assert jurisdiction in the absence of any connection to the dispute,28 thus implying that the requirement of 'connection' is a constraint under public international law.

Others are more agnostic as to whether the Fourth Restatement’s approach is valid or not. This is exemplified by Ralph Michaels, who, commenting on the Restatement, argued that the question of public international law limits to adjudicatory jurisdiction 'remains open' and calling for 'more work (...) to be done before we find consensus on this question',29 although going by the text of his reaction he was leaning towards the position that public international law constraints do exist.30 By the same token, French and Ruiz Abou-Nigm recently admitted that most commentators may apply the draft Convention on Jurisdiction with Respect to Crime31 equally to the scope of a State’s civil jurisdiction, but added that they do so ‘almost without much thought’.32 It does not help that two of the main theorists of jurisdiction contradict each other on the issue: Mann implied that any assertion of jurisdiction, including civil jurisdiction, is limited by rules of international law,33 whereas Akehurst harboured strong doubts in this respect.34 Ultimately, however, Mann and Akehurst did not engage in-depth with the issue.

4 The (Potential) Existence of Public International Law Constraints

In our view, the position of the American Law Institute as laid down in the Fourth Restatement is misguided. Instead, the correct position should be that

---

28 ibid (n 29).
30 Notably, in the sentence preceding his agnostic conclusion, Michaels (n 29) writes: ‘the fact that every existing jurisdictional provision appears to rest on some kind of connection to the forum, however detached, might be more plausibly interpreted as evidence for a state practice and opinio iuris in favor of some kind of genuine link’.
33 FA Mann, ‘The Doctrine of Jurisdiction in International Law’ (1964) 111 Recueil des Cours de l’Académie de Droit International 14, esp. 17, 73–81.
34 Akehurst (n 14) 177, 182.
the exercise of adjudicatory jurisdiction in civil matters is potentially normatively limited by public international law, even if in practice those limits are rarely engaged. This is so for the following reasons. The point of departure is that adjudicatory jurisdiction is exercised by a State actor (in this case: a court), just like jurisdiction in criminal or regulatory matters. Thus, it amounts to a projection of regulatory authority in the transnational domain.35 Put differently, it is an exercise of State prescriptive jurisdiction and thus subject to the rules of jurisdiction under public international law.

At the end of the day, public international law is blind to the domestic characterization of an exercise of State authority as penal, regulatory, or private. What matters is whether the assertion risks trampling on another State’s sovereignty, by interfering in its own regulatory environment, and thus violating the principle of sovereign equality.36 It is recalled in this respect that private tort claims may have a strong regulatory connotation. Tortious conduct can amount to criminal conduct, and it depends on the legal system whether certain conduct is classified as either or both. Criminal prosecution and tort litigation both present an ex post perspective on conduct, but contribute to ex ante norm setting as well. Moreover, even when torts do not coincide with norms of criminal law, the substantive legal basis can often be found in norms of public law, eg environmental regulations, health and safety standards in the workplace or rules of labour law. If States are concerned with the effects of foreign authority over their subjects,37 it may not matter whether that authority

35 See also the arguments made by Belgium in Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v Switzerland) (Application Instituting Proceedings) General List No 145 [2010] 1CJ 1, the only application in which the 1CJ was requested to pronounce itself on the legality under public international law of private international law jurisdiction. See notably Application, 13 submitting that Switzerland’s failure to recognize and give effect to a judgment of a Belgian court and to halt proceedings before Swiss courts was ‘a breach of the rules of general international law governing the exercise by States of their authority, in particular in judicial matters, according to which State authority of any kind must be exercised reasonably’.

36 See also A Mills, ‘Connecting Public and Private International Law’ in Ruiz Abou-Nigm, K McCall-Smith, D French (eds), Linkages and Boundaries (n 32) 13, stating: ‘Rules of private law are exercises of “public” governmental authority as much as rules of criminal law, and they are ultimately sanctioned through coercive judicial and executive powers. (…) the distinction between public and private law has long been criticized as a legal artifice, and in any case does not appear materially relevant to the question of whether state regulatory power is implicated.’

37 In that respect, one may be reminded that the practice of courts can contribute to the development of State practice for the purposes of customary international law. See A Mills, ‘Rethinking Jurisdiction in International Law’ (2014) 81 British Ybk Intl L 187, 230.
is exercised through private or public law instruments.\textsuperscript{38} What also matters is that at one point, courts, whether acting in criminal or civil matters, may order the arrest of an individual, execution of a verdict or seizure of assets, thereby becoming in any event bound by the public international law limits on enforcement jurisdiction.\textsuperscript{39}

The fact that foreign States do not usually protest the exercise of adjudicatory jurisdiction does not mean that they do not consider public international law to be irrelevant to such jurisdiction. Rather, it may suggest that adjudicatory jurisdiction as it is currently exercised is largely \textit{in keeping with} public international law, in particular on the ground that such assertions are based on a sufficiently strong connection with the forum State.

Only exceptionally may the exercise of adjudicatory jurisdiction be in tension with public international law constraints and possibly lead to international protest. States have notably protested what they consider exorbitant assertions of jurisdiction, such as tag jurisdiction (personal jurisdiction based on the temporary presence of the defendant).\textsuperscript{40} Also, rules have been adopted that allow States to refuse recognition of civil judgments rendered on exorbitant jurisdictional bases (although formally this does not amount to ‘protest’).\textsuperscript{41}

Against the background of \textit{Naït-Liman}, assertions of \textit{universal civil jurisdiction}, ie jurisdiction without any connection to the forum, may be cited as potentially problematic from a public international law perspective. However, it remains that pure universal civil jurisdiction is \textit{in practice} not exercised.\textsuperscript{42} Even assertions of jurisdiction under the US Alien Tort Statute (\textit{ATS}),\textsuperscript{43} sometimes cited as an example of a universal civil jurisdiction statute,\textsuperscript{44} are based

\begin{thebibliography}{9}
\bibitem{40} \textit{Burnham v Superior Court}, 495 US 604 (1990).
\bibitem{41} See Mills, ‘Rethinking Jurisdiction’ (n 37) 234.
\bibitem{42} This may in itself already give rise to the conclusion that such jurisdiction is unlawful under public international law given the absence of relevant positive State practice. Cf AG Jain, ‘Universal Civil Jurisdiction in International Law’ (2016) 55 Indian J Intl L 209. See for an argument in favour of legality C Ryngaert, ‘Universal Tort Jurisdiction over Gross Human Rights Violations’ (2007) 38 Netherlands Ybk Intl L 3.
\bibitem{43} 28 USC § 1350.
on a connection with the US. This is surely the case after the US Supreme Court’s judgment in *Kiobel*, which required that the claim ‘touch and concern the United States’, and its later judgment in *Jesner*, which precluded the ATS from applying to foreign corporations.\(^4^5\) Moreover, any assertion of subject-matter jurisdiction – such as under the ATS – in the US still needs to satisfy ordinary requirements of personal jurisdiction. In practice, these requirements mean that a party needs to have minimum contacts with the US,\(^4^6\) or even be ‘essentially at home’ in the US.\(^4^7\) Additionally, even if States were to exercise universal civil jurisdiction in the absence of substantial contacts with the forum, it could still be argued that the exercise of universal civil jurisdiction is *only unlawful* in case it is exercised over acts that are not amenable to universal *criminal* jurisdiction, i.e., acts that do not rise to the level of international crimes or gross human rights violations. Arguably, the commission of such acts provides in itself a connection to every single State. This approach was taken by the European Commission in its *amicus curiae* brief in *Kiobel* as well as Justice Breyer’s Concurring Opinion in that case.\(^4^8\) The Commission thus recognized the potential existence of public international law constraints on the exercise of adjudicatory jurisdiction – even when the possibility of actual enforcement of such jurisdiction was only remote – while nevertheless pointing to limited authorization under public international law.

Ultimately, when taking the relative absence of foreign protest and the requirement of substantial connection into account, one is inclined to conclude that most assertions of adjudicatory jurisdiction are currently compatible with public international law. After all, public international law only draws the outer boundaries of jurisdictional permissibility. However, this does not gainsay the possibility that, in the future, States may perhaps change their opinion on the legality of particular instances of adjudicatory jurisdiction by abstaining from


\(^{48}\) *Kiobel v Royal Dutch Petroleum* n 45 (*Amicus curiae* brief of the European Commission on behalf of the European Union in Support of Neither Party) (13 June 2012) available at <www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_neither_amcu_eu_authcheckdam.pdf> (last accessed 31 December 2019); *Kiobel v Royal Dutch Petroleum* (n 45), concurring opinion Breyer J.
exercising such jurisdiction or by protesting jurisdictional assertions by other States. When doing so, they may contribute to clarifying prohibitive norms of customary international law.

All of this is not to say that the rules of jurisdiction in public and private international law function in the same way, or that assertions of jurisdiction under either discipline are assessed similarly by foreign States. The respective purposes of these fields of law are too different to argue that. Moreover, the principle of party autonomy, though not unlimited, allows for deviation of jurisdictional principles that is not possible in public international law. The contrary position however, namely that jurisdiction in private international law operating completely separately from the limits set by public international law, is unconvincing. Assertions of jurisdiction in private international law do interact with doctrines of territorial sovereignty as recognized under public international law.

In fact, some authors argue that after having started from common roots and being conceptually separated by competing currents of globalization and nationalization, public and private international law are converging once more. A re-internationalization of private international law may be taking place, as an international framework with a more systemic perspective is emerging that represents not just fairness to parties, but public interests and interests of the international community as well. This has consequences for jurisdiction under private international law. The recognition of a systemic, public international law perspective submits the practice of courts in private international law to not just territorial and personal limits informed by private party interests, but also to the balancing of State policies and State interests.

5 Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction over Business and Human Rights Tort Claims

In the specific part of this contribution, we illustrate the abovementioned general considerations regarding the absence or existence of public international

51 See Mills, ‘Rethinking Jurisdiction’ (n 37) 211–212. See on global coordination also French and Ruiz Abou-Nigm, ‘Jurisdiction’ (n 32).
law constraints on the exercise of adjudicatory jurisdiction in civil (tort) matters by engaging with the exercise of adjudicatory (home State) jurisdiction over multinational corporations implicated in extraterritorial human rights abuses. Our choice to focus on this manifestation of adjudicatory jurisdiction should be seen against the backdrop of the global governance dimension of transnational corporate regulation. It is in particular informed by the nature of tort claims as private claims pitting individuals against (multinational) corporations involved in overseas abuses of public international (human rights) law.\(^{52}\) Such claims stand at the intersection of the public and the private, and can be productively engaged with when donning a jurisdictional lens that is coloured by both private and public international law.

These cases demonstrate that the exercise of such jurisdiction may raise sovereignty concerns and may thus be constrained by public international law. Indeed, host States, and in practice more often by multinational corporations on behalf of the host State,\(^{53}\) have raised sovereignty concerns against the exercise of jurisdiction by civil courts in third States. Moreover, concerns over host State sovereignty are an important argument for home States not to lower barriers for such cases to be adjudicated in their courts.\(^{54}\) Those objections may not be justified, however: we submit that the argument of non-intervention is not convincing given the historical and economic reality of host State sovereignty as well as the actual practice of host States. Nevertheless, this discussion needs to be engaged in, even in relation to what is strictly speaking ‘purely’ private litigation.

Technically speaking, claims filed by individuals against corporations are governed by private international law rules of adjudicatory jurisdiction,

\(^{52}\) Note that, as is discussed below, not all of these cases are expressly classified as ‘human rights’ cases due to the fact that human rights law is often not actionable in civil suits against other private actors. Nevertheless, each of these cases has clear implications for human rights, which is why they are often labelled as ‘human rights’ cases against multinational corporations.


\(^{54}\) Even while they are requested to do so in international instruments; see for instance Operational Principle 26 of the UN Guiding Principles on Business and Human Rights, 21 March 2011, UN Doc A/HRC/17/31 or in Council of Europe Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States (2016) on Business and Human Rights.
which are different per legal system and may or may not correspond to jurisdictional principles of public international law. One such rule is the domicile principle, the basis for home State jurisdiction in the European Union.\footnote{See the general provision of jurisdiction in EU Regulation No \textit{1215/2012} (n 3), Article 4(1): ‘\textit{P}ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State’.}

This is a principle that is not a classic ground of public international law jurisdiction, even if it could be traced back to the nationality and territoriality principles.\footnote{\textit{Cf} Mills, ‘Private interests’ \textit{(n 27)} 17: ‘regulating a party based on their domicile or residence is not a matter of regulating the person (based on nationality) or the events (based on territoriality), but rather based on the territorial connections of the person, fusing traditional conceptions of state authority in international law’.} In conjunction with national rules on joining cases, it has been used as a jurisdictional ‘anchor’ to litigate against both EU-based parent companies of multinational corporations, and their foreign-based subsidiaries.\footnote{See, for a more detailed discussion of how this is done in the EU, L Roorda, ‘Adjudicate This! – Foreign Direct Liability and Civil Jurisdiction in Europe’, in A Bonfanti (ed), \textit{Business and Human Rights in Europe. International Law Challenges} (Routledge 2018) 195.}

While private international law rules govern adjudicatory jurisdiction in business and human rights cases, they may nevertheless raise acute public international law concerns to the extent that they adversely affect the regulatory space of host States. Host States are the States in which the corporation invested, and which for some reason may not be able or willing to regulate the corporation’s activities on the basis of the territoriality principle, ie the bedrock principle of the sovereignty-based public international law of jurisdiction. In particular, the host State may wish to maintain low regulatory standards or weak enforcement practices in order to attract foreign direct investment. Host States may have concerns that the sovereign economic policy which they wish to implement on their territory is displaced when foreign States, such as the home State of the corporation (ie the State where the corporation is domiciled), open up their courts to overseas tort claims. Such sovereignty concerns may render adjudicatory jurisdiction amenable to public international law constraints.

On closer inspection, when unpacking what sovereignty means for host States, the concern that the exercise of adjudicatory jurisdiction by home States violates the public international law principle of non-intervention is far less convincing. A critical look at territorial sovereignty reveals that the concept is not a goal in and of itself. The territorially defined State is the organizational structure built to effectuate its sovereignty, and is, accordingly, only
a means to an end, an ordering mechanism to ensure the self-governance of peoples. Thus, the main question is whether a particular exercise of adjudicatory jurisdiction by home States over multinationals corporations operating on host State territory respects, strengthens or harms the sovereignty of the host State, as protected by public international law.

It is important to realize in this respect that ‘sovereignty’ may mean something different for the developing States that are typically investment host States, than it does for most Western States. The conception of Western statehood and territorial sovereignty were coinciding developments: the concepts arose out of each other. Subsequent limits imposed on the territorial sovereignty of Western States were a product of their own sovereign choices, whether it was accession to human rights treaties or participation in global free trade regimes. This is not the case for most developing States, however: their statehood arose out of decolonization in the 20th century. At that time, many limits imposed on territorial sovereignty were already in place, shaped by Western States and former colonizers intent on promoting ‘globalization’, ‘modernization’, and ‘development’, without meaningful participation of these newly independent States. For many developing States, ‘sovereignty’ is not, and has never been the full and original sovereignty as enjoyed by Western States, only voluntarily limited for their own purposes and through their consent. It is, as Sara Seck describes it, an ‘impoverished sovereignty’ that from the outset has denied Third World States full legal and economic governance, including governance aimed at protecting human rights. Even as we write, limited policy space is afforded to host States to regulate economic affairs on their territory, as trade and investment treaties may prioritize the rights of foreign investors above the interests and rights of local communities. The World Bank all but enforces privatization of public services in

the interests of development, and thereby the relinquishing of State control over institutions that can be vital for the realization of the public good and human rights. In addition, even if they are legally and practically capable, host States may be unwilling to address corporate human rights abuses and to prioritize their citizens’ interests over those of foreign corporations, whether out of genuine economic concerns and the desire to preserve a favorable investment climate as noted above, or because the States themselves have been the primary violators of local rights. This means that the contemporary shape of sovereignty of host States mostly detracts from, rather than enhances their capacity to regulate corporate conduct, and to protect local communities against the harmful impact of multinational corporations. While sovereignty should guard the legal space of host States to protect and realize the rights of its citizens, it is functionally limited by existing doctrines and institutions of international law. Those same doctrines and institutions empower transnational corporations with respect to the States that they operate in, and disempower local communities compared to both the State and transnational corporate actors.

Some scholars have consequently argued that for the full realization of political and economic self-determination, the intervention of other States such as home States is called for. Such intervention could take the form of the exercise of adjudicatory jurisdiction in civil matters, enabling the filing transnational tort claims. This approach essentially breaks down the ‘bundle of rights’ conception of sovereignty and argues that some of those rights could be protected by other States if the territorial State cannot exercise its responsibility as a fiduciary of its population. The exercise of adjudicatory jurisdiction by home States should then be viewed not as a threat to the sovereignty of the host State, as protected by public international law, but rather as a reinforcement of it, an additional tool to promote the self-governance of local communities. Thus, Jennifer Zerk has argued for a regulatory agenda on transnational corporations and human rights with a more flexible approach to adjudicatory jurisdiction, as the protection of human rights can be both in the home and

64 See Anghie (n 60) 245–246; Rajagopal (n 61) 11.
host State’s interest. These ideas are echoed by De Schutter, Kirshner, and Augenstein if host States cannot provide remedies and hold transnational corporations accountable for their impact on the human rights of local communities, host State measures such as the exercise of adjudicatory jurisdiction, which do vindicate those rights, should not be regarded as a threat to host State sovereignty but rather as supportive of it. In a system where control over transnational corporate actors is fragmented across territories, the actions of multiple States, including home States exercising ‘extraterritorial’ adjudicatory jurisdiction, may be necessary to rein in harmful corporate conduct.

Obviously, there is a certain risk that home State adjudicatory jurisdiction serves other purposes than supporting host States and their local communities, or that such measures go beyond what is needed to protect human rights. The exercise of adjudicatory jurisdiction may perpetuate the impoverished nature of host State sovereignty and repeat historical patterns of domination. Thus, home States may respond to this risk by rejecting the exercise of adjudicatory jurisdiction on the ground that the twin public international law principles of sovereignty and non-intervention bar them from hearing civil claims that originate abroad. In reality, however, using the language of host State sovereignty to justify the non-exercise of adjudicatory jurisdiction may tend to obscure the export of home State interests in protecting ‘their’ corporate actors, to the detriment of host States and local communities that are affected by corporate activities. For example, whenever States have in fact objected to the exercise of adjudicatory jurisdiction over foreign corporations under the Alien Tort Statute can be read this way: the majority of these were raised by the home States rather than host States of these corporations, ostensibly calling on US courts to respect the

69 See Augenstein (n 65) 370–372.
71 Home States can and do rely on the language of sovereignty and jurisdictional limits to refrain from taking meaningful action to address the conduct of transnational corporations. See B Chimni, ‘An Outline of a Marxist Course on Public International Law’ (2004) 17 IJIL 20.
sovereignty of *host States* by refusing to exercise jurisdiction over these cases.72 No such protests have yet been raised in European cases, probably because these were litigated in the home States themselves. This may, however, also explain the reluctance of these European home States to improve access to their domestic courts, bar international obligations to do so.

In practice, by supporting the jurisdictional *status quo* these States cared more about protecting corporations against liability in a foreign court, than about protecting the sovereign interests of host States.73 Thus, one can understand why a scholar like BS Chimni, who is in general highly critical of unilateral regulatory measures, is so harsh on the refusal of Western courts to exercise adjudicatory jurisdiction in civil matters regarding abuses committed by transnational corporations.74 Chimni laments the existence of a ‘jurisdictional field’ that ‘embeds a set of jurisdictional competences that simultaneously allows the advanced capitalist states to exercise extraterritorial jurisdiction and to use the territorial foundations of the law to shield the [transnational capitalist class] and imperial state functionaries from advocates of transnational justice’. Here, Chimni refers to a practice of home states extensively using extraterritorial jurisdiction in favor of trade liberalization, while denying ‘justice jurisdiction’, ie the adjudication of claims against transnational corporations that benefit from that liberalization.75

What this implies is that while sovereignty and non-intervention are of fundamental importance to the regulation and adjudication of the foreign practices of multinational corporations, one cannot rely on ‘sovereignty’ as a blanket argument *against* home State adjudicatory jurisdiction. As Chilenye Nwapi argues, it may be positively disingenuous of home States to field the argument

72 As exemplified by the *amicus briefs* sent by the UK and Dutch governments in support of Royal Dutch Shell in *Kiobel*. See *Kiobel* (n 45), Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *amicus curiae* in support of the respondents, available at <sblog.s3.amazonaws.com/wp-content/uploads/2012/02/4587212_1_UK-Netherlands-amicus-brief-ISO-respondents-filed-2-3-12-2.pdf> (last accessed 31 December 2019).

73 Augenstein (n 65) 14. See also U Kohl, ‘Corporate Human Rights Accountability: the Objections of Western Governments to the Alien Tort Statute’ (2014) 63 ICLQ 684.

74 Chimni (n 71) 10 criticizes both environmental protection measures and universal criminal jurisdiction as veiled means to maintain Western capitalist hegemony over developing Third World States. At the same time, he also criticizes US courts refusing jurisdiction in the *Bhopal* litigation for reasons of *forum non conveniens*. See also U Baxi, ‘Mass Torts, Multinational Enterprise Liability and Private International Law’ (1999) 276 Recueil des Cours de l’Académie de Droit International 312; H Zhenjie, ‘Forum Non Conveniens: An Unjustified Doctrine’ (2001) 48 Netherlands Intl L Rev 159.

75 See also Seck, ‘Transnational Business’ (n 70) 164–202.
of host State sovereignty and ‘ook away from the egregious and unethical conduct of their corporations operating in the third world’. Instead, home States should exercise adjudicatory jurisdiction in ways that support rather than detract from the rights of host State peoples, and accordingly protect against the abuses committed by corporate actors. If sovereignty is indeed conditional on rights-based governance, home State adjudicatory jurisdiction could in fact strengthen rather than infringe home State sovereignty. Especially home States which, via their historic and economic links with corporations, contribute, and have contributed to the impoverished sovereignty of host States, should take seriously their responsibility to exercise adjudicatory jurisdiction in respect of extraterritorial human rights harm caused by such corporations.

If one accepts that public international law does not as such bar the exercise of adjudicatory jurisdiction in business and human rights tort claims, it remains that a critical assessment should be made as to whether, in practice, the exercise of such jurisdiction does not protect domestic home State interests more than it does the human rights of local communities abroad. The language of human rights can obfuscate true motives here. Seck notes in this respect that several scholars writing in the tradition of Third World Approaches to International Law (TWAIL) are suspicious of human rights language as it has repeatedly been used to discipline host States without improving the situation of local communities. Human rights concerns have been used to condition foreign aid, or justify protectionist measures that benefit home States much more than they do host States. Moreover, human rights arguments have often focused on promoting liberal democracy according to the Western liberal model, rather than socio-economic equality and locally controlled development. Relying on human rights in the context of adjudicatory jurisdiction in civil matters thus requires showing that the human rights

76 See Chambers (n 70) 27–28, citing Ch Nwapi, Litigating Extraterritorial Corporate Crimes in Canadian Courts (2012), Thesis University of British Columbia (Vancouver) 54.

77 Examples of such corporations are Shell with respect to the United Kingdom and the Netherlands, Anglo American in the United Kingdom, and Comilog’s parent company Eramet in France. Note that these companies got the initial concessions in British and French colonies respectively, under colonial rule. A more general discussion of home State involvement with transnational corporations, see J Braithwaite, P Drahos, Global Business Regulation (CUP 2000) 629.

78 See Seck, ‘Home State Responsibility’ (n 62) 20–22, citing Anghie (n 60) 224–236.

79 See Chambers (n 70) 32–33.

80 This problem has recently gained general attention after the publication of Samuel Moyn’s treatise on how the human rights movement has failed to address rising inequality. See S Moyn, Not Enough: Human Rights in an Unequal World (Harvard UP 2018).
argument indeed benefits and empowers the rights-holders. This, however, is an argument that builds on sovereignty just as much as any argument against home State adjudication.

When assessing the appropriateness of exercising adjudicatory jurisdiction, not only the conduct of the home State but also that of the host State should factor in the equation. If the host State itself fails to live up to its human rights obligations to protect and remedy against harmful actions of transnational corporations, the sovereignty objection to foreign States exercising adjudicatory jurisdiction with respect to those actions carries less strength. This is even more so when the host State itself is the primary human rights violator: it would be difficult to argue that this very State is in the best position to regulate and adjudicate the conduct of a transnational corporation that operated as its accomplice.

Viewed from these perspectives, there is a good case to be made for the compatibility with host State sovereignty of adjudicatory jurisdiction as exercised by third States, such as home States. Provided that such jurisdiction has a legal basis in domestic private law, home States actually exercising it are unlikely to step beyond the limits of jurisdiction under public international law. This is in line with our aforementioned general position that, in practice, public international law does not tend to constrain the exercise of adjudicatory jurisdiction in civil matters. Home State adjudicatory jurisdiction may at times even be preferable to host State jurisdiction, although it may go too far to state that there is an obligation under current public international law to provide access to court for foreign plaintiffs in respect of extraterritorial human rights harm.\(^{81}\)

At the end of the day, one should also acknowledge that the mere offering of an adjudicative forum for the settlement of disputes is less intrusive than the application of the substantive domestic law of the forum. In public law (criminal and regulatory) law, the exercise of adjudicatory jurisdiction will coincide with the exercise of prescriptive jurisdiction, as the court will apply (‘prescribe’) its own law to settle the dispute. Indeed, States do not normally apply foreign public laws.\(^{82}\) In private international law, however, a forum’s exercise of adjudicatory jurisdiction need not go hand in hand with the exercise of prescriptive jurisdiction.\(^{83}\) Per rules of private international law applicable

---


82 The Antelope, 23 US (10 Wheat) 66 (1825) 123.

83 See also Mills, ‘Private Interests’ (n 27) 14 stating: ‘In private law disputes, issues of “jurisdiction” (in the international law sense) must therefore involve a careful distinction
to torts, the applicable law is, in principle, the law of the State where the harm occurred.

This exercise of prescriptive jurisdiction would then be covered by the territoriality principle, the fundamental permissive principle of public international law jurisdiction. In the context of business and human rights tort claims, this means that a forum (home) State exercising adjudicatory jurisdiction over transnational business and human rights claims will in principle go on to apply the (territorial) law of the host State. Such a method respects the host State’s competence to regulate its domestic affairs in accordance with the principle of territorial sovereignty. It does not superimpose a home State assessment of what should be the appropriate level of substantive regulation in the host State. Accordingly, home State adjudication is less susceptible to host State protests than the imposition of new norms through administrative regulation would be. Nevertheless, it should be signaled that the application of host State law can be problematic from the perspective of the victim, in case host State law affords substantially less protection than home State law.

In conclusion, it can be stated that raising the argument of host State sovereignty against the exercise of adjudicatory jurisdiction by home State adjudication is at best a ‘flat’ argument, which ignores both the historical and economic realities confronting host State sovereignty. At worst, it is a hypocrisy that enables one infringement of a host State’s domestic affairs by ostensibly protecting against another.84

6 Concluding Observations

In this contribution, we have argued that the legality of assertions of adjudicatory jurisdiction under private international law is potentially contingent on public international law, but that in practice public international law hardly poses constraints on such assertions. Foreign State protests against a forum State’s exercise of adjudicatory jurisdiction are few and far between. Our finding that, practically speaking, private international law-based adjudicatory

---

jurisdiction is not constrained by public international law, shifts the debate to another question: the question of whether the exercise of adjudicatory jurisdiction may be mandatory. This question was central in *Naït-Liman*. If it is true indeed that public international law permits almost any assertion of adjudicatory jurisdiction, does it perhaps, in some circumstances at least, require that particular forms of adjudicatory jurisdiction are codified in domestic private international law codes, and require that such jurisdiction is also actually exercised in given cases? In this respect, it could be argued that in tort cases that involve human rights abuses, the right to a remedy, which is laid down in public international (human rights) law, should guide the exercise of adjudicatory jurisdiction. This would mean that private international law rules should be designed and applied in such a way that they contribute to public, global objectives, such as offering an adequate legal remedy to victims of violations of internationally recognized human rights. This is in keeping with recent scholarship which highlights the global governance potential and global regulatory effects of technical rules of private international law.

**Bibliography**

Akehurst M, 'Jurisdiction in International Law' (1972) 46 British Ybk of Intl L 145.


---

85 See on the shift in the law of jurisdiction of jurisdiction from a ‘ceiling’ (constraints) to a ‘floor’ (minimum obligations) also Mills, ‘Rethinking Jurisdiction’ (n 37).


87 H Muir Watt, D Fernandez Arroyo (eds), *Private International Law and Global Governance* (OUP 2015); Mills ‘Connecting Public and Private’ (n 36) 27 submitting that ‘private international law might be applied to achieve equivalent public, systemic objectives, at the international level, closely aligned to those of public international law’. 


Criddle E and Fox-Decent E, Fiduciaries of Humanity: How International Law Constitutes Authority (OUP 2016).


Kohl U, ‘Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute’ (2014) 63 ICLQ 684.


Shelton D, Remedies in International Human Rights Law (OUP 1999).


Zerk J, Multinationals and Corporate Social Responsibility (CUP 2006).