CHAPTER 4

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

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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,[1] 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.[2] 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.[3] 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*.

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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,[4] 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).

2 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*.[11] This issue has been addressed at length in literature and in practice.[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'.[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.[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'.[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 ECtHR 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,

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.

12 See UN Committee against Torture, 'General Comment no 3' (13 December 2012) UN Doc CAT/C/GC/3 taking the view that Article 14 of the Convention against Torture does ground such an obligation. See for scholarly discussions PD Mora, 'The Legality of Civil Jurisdiction over Torture under the Universal Principle (2010) 52 German Ybk Intl L 367; K Parlett, 'Universal Civil Jurisdiction for Torture' (2007) 4 Eur Human Rights L Rev 385; CK Hall, 'The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad' (2007) 18 EJIL 921.

13 *Naït-Liman* (GC) (n 1) para 127.

14 cf M Akehurst 'Jurisdiction in International Law' (1972) 46 British Ybk Intl L 145, 176.

15 *Naït-Liman v Switzerland* App no 51357/07 (ECtHR, 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.[16]

3 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.[17] The Fourth Restatement

16 Thus, in *Naït-Liman*, the applicant invoked Article 6 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 ECHR: *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 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 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), *The European Convention of Human Rights and General International Law* (OUP 2018) 251 and 264 respectively.

17 American Law Institute, *Restatement of the Law Fourth – The Foreign Relations Law of the United States* (American Law Institute 2018).

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'.[18] 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'.[19] 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'.[20] 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'.[21] 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'.[22] 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.

19 W Dodge, A Roberts and P Stephan, 'Jurisdiction to Adjudicate Under Customary International Law', *Opinio Juris*, 11 September 2018, available at <http://opiniojuris.org/2018/09/11/33646/> (last accessed 31 December 2019).

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'.

22 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 165.

law but rather from non-binding comity, reasonableness or due process considerations.[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'.[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'.[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.[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'.[27] Mills pointed out in this respect that

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 1205.

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.

25 ibid Section 421, comment e.

26 A Parrish, 'Judicial Jurisdiction: The Transnational Difference' (2019) 59 Virginia J Intl L; see also Id, 'Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law', *Opinio Juris*, 6 September 2018 available at <http://opiniojuris.org/2018/09/06/remaking-international-law-personal-jurisdiction-and-the-fourth-restatement-of-the-foreign-relations-law/> (last accessed 31 December 2019).

27 A Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction', in S Allen, D Costelloe, M Fitzmaurice, P Gragl, E Guntrip (eds), *Oxford Handbook on Jurisdiction in International Law* (OUP 2019) 330.

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 Crime[31] 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).

29 R Michaels, 'Is Adjudicatory Jurisdiction a Category of Public International Law?',*Opinio Juris*, 20 September 2018 < http://opiniojuris.org/2018/09/20/is-adjudicatory-jurisdiction-a-category-of-public-international-law/> (last accessed 31December 2019).

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'.

31 Draft Convention on Jurisdiction with Respect to Crime (1935) 29 AJIL 439.

32 D French and V Ruiz Abou-Nigm, 'Jurisdiction: Betwixt Unilateralism and Global Coordination', in V Ruiz Abou-Nigm, K McCall-Smith, D French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart 2018) 84.

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] ICJ 1, the only application in which the ICJ 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.[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.[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 *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).[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').[41]

Against the background of *Naït-Liman*, assertions of *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 *in practice* not exercised.[42] Even assertions of jurisdiction under the US Alien Tort Statute (ATS),[43] sometimes cited as an example of a universal civil jurisdiction statute,[44] are based

38 J Hill, 'The Exercise of Jurisdiction in Private International Law', in P Capps, M Evans, S Konstadinidis (eds), *Asserting Jurisdiction: International and European Perspectives* (Hart 2003).

39 See C Staker, 'Jurisdiction', in M Evans (ed), *International Law* (5th edn, OUP 2018) 312–313; Mills, 'Rethinking Jurisdiction' (n 37) 195.

40 *Burnham v Superior Court*, 495 US 604 (1990).

41 See Mills, 'Rethinking Jurisdiction' (n 37) 234.

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.

43 28 USC § 1350.

44 eg G Nolte, 'Universal Jurisdiction in the Area of Private Law: the Alien Tort Claims Act', in C Tomuschat and J Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Nijhoff 2006) 373; PD Mora, 'The Alien Tort Statute after "*Kiobel*": the Possibility for Unlawful Assertions of Universal Civil

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.[45] 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,[46] or even be 'essentially at home' in the US.[47] 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, ie 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.[48] 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

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Jurisdiction Still Remains' (2014) 63 ICLQ 699; J Ku, '*Kiobel* and the Surprising Death of Universal Jurisdiction under the Alien Tort Statute' (2013) 107 AJIL 835; G Barrie, 'Moving towards Universal Jurisdiction?: United States Courts and the Alien Tort Statute' (2010) 35 South African Ybk Intl L 180.

45 *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013); *Jesner v Arab Bank*, PLC, no 16-499, 584 US ___ (2018).

46 *International Shoe Co v Washington*, 326 US 310 (1945).

47 *Goodyear Dunlop Tires Operations SA v Brown*, 564 US 915 (2011).

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.[49] 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.[50] 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.[51] 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

49 A Mills, *Party Autonomy in Private International Law* (CUP 2018).

50 See in particular J Bomhoff, 'The Reach of Rights: "The Foreign" and "The Private" in Conflict-of-Laws, State-Action, and Fundamental-Rights Cases with Foreign Elements' (2008) 71 L Contemporary P 39; H Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 Transnl L Theory 347.

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.

53 See on multinational corporations' reliance on the host State's territorial sovereignty as a public international law argument against the exercise of adjudicatory jurisdiction in civil matters, from a critical geography: P Liste, 'Transnational Human Rights Litigation and Territorialised Knowledge: *Kiobel* and the "Politics of Space"' (2014) 5 Transnl L Theory 1; Id, 'Geographical Knowledge at Work: Human Rights Litigation and Transnational Territoriality' (2016) 22 Eur J Intl Rel 217.

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.