

An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct

Jurisdictional dilemma raised/created by the use of the extraterritorial techniques

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1. Introduction

The background to this article is the well-documented difficulty of bringing human rights standards to bear on corporate misconduct in so-called 'host' countries¹ where, for various reasons, such standards are not upheld locally. Two key extraterritorial techniques, namely civil litigation in the company's 'home' state and 'long arm' regulation from the home state are important alternative methods of implementing human rights standards, but they engender controversy both in terms of their legality under public international law and because there are a number of objections to their use that go beyond their technical legality. The purpose of this article is to evaluate the techniques using the framework of the jurisdictional dilemma that intersects for both.

The extraterritorial application of law in any field can be a breach of the public international law principle of non-intervention² and, whether or not this is the case, can have serious political implications. In terms of political effects, first it can be viewed as an attempt by the regulating state to impose its policies upon the target state. This can lead to allegations of imperialism and neocolonialism, particularly when the target state is a former dependency that was subjected to imperial/colonial power. Second, the target state's exclusive territorial sovereignty may be infringed by the extraterritorial law. This can lead to conflict and state protest, for example through the use of diplomatic protests; non-recognition of laws; blocking legislation or even retaliatory measures, which can be deployed when states consider that another state's jurisdictional claim has gone too far.

There are different degrees of extraterritoriality, however. The United Nations Guiding Principles on Business and Human Rights (UNGPs) distinguish direct extraterritorial jurisdiction from domestic measures

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1 The term 'home state' in relation to a multinational group of companies is typically used to denote the state in which the parent company is domiciled. In the globalised economy, parent companies are not tied to a certain 'home state' but may relocate with ease. From a commercial rather than a legal perspective, therefore, the home state is the place where the group is headquartered or where the relevant decision about actions in the host state was made. The term 'host state' refers to any state other than the home state in which that group operates or invests, or which is a significant source of goods or services for the group or its constituent companies.

2 The principle of non-intervention forbids all states from intervening directly or indirectly in the internal or external affairs of other states: *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Reports, p. 14.

with extraterritorial implications.³ As was noted by the architect of the UNGPs, John Ruggie, the latter are not ‘equally controversial or as likely to trigger objections and resistance’ as the former.⁴ The two extraterritorial techniques under consideration here can entail both direct extraterritorial jurisdiction and domestic measures with extraterritorial implications. They create a dilemma that can be stated as follows. In order for the home state to regulate or adjudicate extraterritorially, there is necessarily some degree of incursion into the domestic affairs of the host state, and this may be viewed as an impermissible infringement of host state exclusive jurisdiction and/or as being imperialist⁵/neocolonialist. But the alternative, to limit regulation and adjudication to events and actors wholly within the territorial state, may create a regulatory and adjudicatory vacuum where corporate misconduct is transnational, spanning home and host state, and/or where the host state is unwilling or unable to regulate or adjudicate over the locally incorporated subsidiary or other affiliate company.

A dilemma is a situation in which a difficult choice has to be made between two alternatives. A moral dilemma is a situation in which

(...) an agent regards herself as having moral reasons to do each of two actions, but doing both actions is not possible. Ethicists have called situations like these *moral dilemmas*. The crucial features of a moral dilemma are these: the agent is required to do each of two (or more) actions; the agent can do each of the actions; but the agent cannot do both (or all) of the actions.⁶

The difficult choice examined in this article is that presented both to home state judges in the tort cases under consideration when deciding whether or not to accept jurisdiction over the case⁷ and to home state lawmakers debating whether to adopt the extraterritorial regulatory mechanisms.⁸ It is assumed that in making the choice between these two actions, they take account of the host state’s perspective.

When faced with a dilemma, one has to balance the gains and losses of each alternative or ‘pole’ of the dilemma in order to navigate one’s way through it. Given that impunity for business-related human rights abuse that takes place in host states is commonplace, there are arguably strong reasons in favour of using the extraterritorial techniques. In practice, however, judges frequently do not accept jurisdiction over extraterritorial cases⁹ and lawmakers have rejected draft laws designed to regulate the conduct of

3 UN Guiding Principles on Business and Human Rights (UNGPs), UN Doc A/HRC/17/31 (2011), Commentary to UNGP 2: ‘Examples include requirements on “parent” companies to report on the global operations of the entire enterprise.’

4 J.G. Ruggie, ‘Keynote Presentation at EU Presidency Conference on the “Protect, Respect and Remedy” Framework Stockholm, November 10-11, 2009’, p. 5, <<https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-presentation-Stockholm-10-Nov-2009.pdf>> (last visited 2 February 2018).

5 For example, Ugo Mattei and Jeffrey Lena argue that Alien Tort Statute litigation of so-called ‘Holocaust claims’ including those against corporations imposes American substantive and procedural standards as well as its legal culture on foreign parties and foreign conduct: U. Mattei & J. Lena, ‘US Jurisdiction Over Conflicts Arising Outside of the United States: Some Hegemonic Implications’, (2001) 24 *Hastings Int’l & Comp L Rev*, pp. 381-400. See also A. Parrish, ‘Reclaiming International Law from Extraterritoriality’, (2009) 93 *Minn L Rev*, pp. 866-867. Witnesses before the Australian Parliamentary Joint Statutory Committee on Corporations and Securities described the draft Corporate Code of Conduct Bill (Cth) (Australia) as ‘a blatant act of imperialism’ and ‘basically a form of cultural imperialism’. Another witness said that the provisions in the Bill were clearly ‘implying that local standards are either inferior, inadequate or somehow inappropriate.’ Parliamentary Joint Statutory Committee on Corporations and Securities, Parliament of the Commonwealth of Australia, ‘Report on the Corporate Code of Conduct Bill 2000’ (2001), paras. 3.53-3.59. For discussion of the Bill, see for example S. Deva, ‘Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should “Bell the Cat”?’, (2004) 5 *Melbourne Journal of International Law*, no. 1, pp. 37-65; J. Zerk, *Multinationals and Corporate Social Responsibility* (2006), p. 166.

6 The *Stanford Encyclopaedia of Philosophy*, <<https://plato.stanford.edu/entries/moral-dilemmas/>> (last visited 1 February 2018).

7 They would be applying the relevant domestic civil procedure law, which is shaped by private international law, in making this decision.

8 These difficult choices may also be debated at the international policy-making level, for example in the debates on the proposed business and human rights treaty.

9 *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell Plc.*, [2017] EWHC 89 (Technology and Construction Court, England and Wales), *Association Canadienne Contre L’impunité v Anvil Mining Ltd*, [2012] QCCA 117 (Canada), *In re Union Carbide Corp Gas Plant Disaster at Bhopal*, 634 F Supp 842 (SDNY 1986) (US).

corporate nationals and their affiliates extraterritorially.¹⁰ This can be explained in part at least by the perceived undesirability of extending adjudication and regulation extraterritorially. Does the protection of the host state's exclusive jurisdiction merit this? There is no broad-brush answer, but rather there are nuances related to which technique is being used, which right is being protected and the roles of both home and host states in the abuse that this article explores.

The international policy background is as follows. The UNGPs address the permissive question of whether states may adopt extraterritorial measures to regulate corporate behaviour overseas of businesses domiciled in their territory and/or jurisdiction.¹¹ More recently, the Office of the UN High Commissioner for Human Rights has produced guidance to improve accountability and access to remedy for victims of business-related human rights abuses,¹² which draws out the challenges particular to cross-border cases and the importance of international co-operation, and makes policy recommendations to states in this regard.¹³ Neither of these works addresses the legal and political ramifications for host states of home states adopting such extraterritorial measures, however, which is the contribution made by this article. The subject is highly topical in light of the current treaty negotiations at the UN Human Rights Council on a binding instrument on business and human rights.

The first substantive section (Section 2) introduces the two extraterritorial techniques. The article continues (in Section 3) by addressing the broad question of the impact on host state sovereignty of globalisation and global business structures. This is followed by a discussion (in Section 4) of whether state sovereignty is ceded in respect of norms of international human rights law and (in Subsections 4.1 and 4.2) of the legality and, beyond this, the propriety of the home state's incursion and the posited host state objection to this. Section 5 suggests ways in which the objections underlying the dilemma may be confronted in order to minimise the dilemma.

2. The two key extraterritorial techniques to bring human rights standards to bear on corporate misconduct

Civil litigation, primarily in this instance through cases in tort law, provides remedies to victims in the form of compensation for physical injury and property damage caused by the defendant company's negligence or foresight.¹⁴ Sometimes more importantly to the claimants, it provides for the formal, public, legal accountability of the defendant. Tort law can also be viewed as a mechanism for behavioural regulation, using financial penalties to dissuade private actors from acting in a socially undesirable fashion. Thus although civil litigation does not generally use human rights language, it arguably implements human rights standards, by providing a cause of action against companies for harming private interests including those denominated as human rights under public international law and thereby regulating corporate behaviour.

10 See, for example, Corporate Code of Conduct Bill 2000, *supra* note 5. A less stringent draft law, Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries* (Canada), would have made Canadian mining companies ineligible for certain forms of public support if they were found to have breached human rights standards defined to include those from the IFC Performance Standards and the Voluntary Principles on Security and Human Rights. For a discussion of the Bill, see S.L. Seck, 'Canadian Mining Internationally and the UN Guiding Principles for Business and Human Rights', (2011) 49 *Canadian Yearbook of International Law*, pp. 66-75 and R. Janda, 'Note: An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries (Bill C-300): Anatomy of a Failed Initiative', (2010) 6 *McGill International Journal of Sustainable Development Law and Policy*, no. 2, pp. 97-107.

11 UNGPs, *supra* note 3, Principle 2.

12 Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse', Report of the United Nations High Commissioner for Human Rights, A/HRC/32/19 (16 June 2016). The language of 'extraterritoriality' is not used by in the report because, it is understood, of the controversy it creates.

13 The second phase of the Accountability and Remedy project is looking at state-based non-judicial mechanisms, including whether these have functions or mandates in relation to extraterritorial business entities or activities, see OHCHR, Accountability and Remedy Project Part II: State-based non-judicial mechanisms, 'State-based non-judicial mechanisms for accountability and remedy for business-related human rights abuses: Supporting actors or lead players?', Discussion paper prepared for the 6th UN Annual Forum on Business and Human Rights, Geneva, 27-29 November 2017, p. 16. See also, Fundamental Rights Agency, 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level' (April 2017).

14 O. Salas-Fouksmann, 'Corporate Liability of Energy/Natural Resources Companies at National Law for Breach of International Human Rights Norms', (2013) 2 *UCL Journal of Law and Jurisprudence*, no. 1, p. 204. Claims under the Alien Tort Statute (ATS) in the United States are another example of civil litigation, although their number has dwindled significantly since the Supreme Court decision in *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 in particular, but also its decision in *Daimler AG v Bauman*, 134 S Ct 751.

Despite this regulatory outcome, it is not an instrument of regulatory policy *per se*, but rather it is the decision of the court (or the negotiated settlement) in individual cases. The phenomenon of civil litigation in this context has happened as a result of lawyers attempting inventive litigation strategies to try to get a remedy for their clients. Thus, at the executive level, it has not come about as a result of the weighing up of the objectives of this type of litigation against the policy concerns implicit in these extraterritorial matters being the subject of litigation.¹⁵ Examples of cases include *Lubbe v Cape*,¹⁶ in which the company operated an asbestos factory in South Africa to low standards of health and safety, allegedly resulting in workers and people in the local communities becoming sick through exposure to asbestos dust and *Choc v Hudbay Minerals*,¹⁷ in which the victims are claiming direct negligence in tort by the company for its subsidiary's actions in Guatemala, which resulted in human rights abuses including a shooting, a killing and gang rapes against members of the Q'eqchi' Mayan Community.

The regulatory mechanisms referred to in this article are legislative provisions that prescribe conduct for corporations using penalties or disincentives for non-compliance and/or incentives for compliance.¹⁸ Some also contain injunctive mechanisms whereby the prescription of certain behaviour can be enforced. Specific home state regulation of corporate misconduct impacting on human rights abroad is relatively rare, however. Examples include a law requiring companies to conduct human rights due diligence¹⁹ and human rights reporting requirements that form part of company law²⁰ and securities regulation.²¹

Of the two extraterritorial mechanisms under consideration, regulatory mechanisms engender less controversy than civil litigation.²² This is because those mechanisms that have been enacted into law are modest in their extraterritorial requirements, mandating no more than that corporate nationals²³ of a certain size or that are listed on a national stock exchange report for example on their efforts to ensure that slavery and human trafficking do not occur in their overseas operations²⁴ or on their use of certain metals mined in the Democratic Republic of Congo and neighbouring countries.²⁵ The rules require reporting from foreign entities of activities that take place outside the home state territory, but enforcement takes place in the home state. Draft regulations that made greater demands on companies, requiring them to refrain from abusing human rights in their overseas operations (including through subsidiaries, associates etc),

15 In the United Kingdom, following the House of Lords decision in the extraterritorial case of *Connelly v RTZ Corporation*, [1998] AC 854, the Lord Chancellor's department, in a restricted consultation letter, argued that increased litigation against corporate nationals in the English courts could influence corporate decisions to move their headquarters to a different jurisdiction. Legislation was proposed to reverse the effect of the judgment, but was ultimately rejected. See H. Ward, 'Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options', (2001) 24 *Hasting International and Comparative Law Review*, no. 3, p. 466 and R. Meeran, 'Tort Litigation Against Multinationals for Violation of Human Rights: An Overview of the Position Outside the United States', (2011) 3 *City U. Hong Kong Law Review*, p. 29. The US Government did not instigate the modern usage of the ATS, this evolved due to innovative legal strategies adopted by claimant lawyers. Certain administrations have expressed their disapproval of this contemporary usage, for instance the Bush administration, see E. Schrage, 'Judging Corporate Accountability in the Global Economy', (2003) 42 *Columbia Journal of Transnational Law*, p. 156.

16 *Lubbe v Cape Plc.*, [2000] 1 WLR 1545 (House of Lords, England and Wales).

17 *Choc v Hudbay Minerals*, [2013] ONSC 998 (Ontario Superior Court of Justice, Canada). See also *Garcia v Tahoe Resources Inc.*, [2017] BCCA 39 and *Araya v Nevsun Resources Ltd.*, [2017] BCCA 401 (both cases from the Court of Appeal for British Columbia, Canada).

18 Chilenye Nwapi, *Litigating Extraterritorial Corporate Crimes in Canadian Courts* (2012), Thesis University of British Columbia (Vancouver), p. 22 uses this definition of a regulatory mechanism. Government policies such as the Canadian Government's 'Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad' (November 2014) are beyond the scope of this article.

19 New French legislation on Duty of Vigilance for parent companies *LOI n° 2017-399 du 27 mars 2017*, Art. L. 225-102-4.-1.

20 See, for example, Section 414(c)(7) of the Companies Act 2006 (UK).

21 See, for example, the Hong Kong Stock Exchange, Main Board Listing Rules, Chapter 18.05, (6)(a), which require mining companies to report on 'project risks arising from environmental, social, and health and safety issues' prior to listing.

22 This view is not shared by all. Craig Scott, for instance, says that regulation is more intrusive than adjudication – even though enforcement may take place on home state territory, it is still seeking to alter behaviour taking place in another country: C. Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms', in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001) p. 54.

23 Under customary international law, the nationality of a corporation will normally be determined by its place of incorporation. Domestic law practice diverges, but as a general rule the granting of nationality to companies tends to be based on domicile, which in turn is determined by the place of incorporation or by the 'real seat' of the company (the place from which day-to-day decision-making is made).

24 See, for example, Section 54(12) of the Modern Slavery Act 2015 (UK).

25 Section 1502 of the Dodd-Frank Wall Street and Consumer Protection Act 2010 (Dodd-Frank Act). There are strong indications that this regulatory mechanism will be repealed by the Trump administration.

have not been enacted into law.²⁶ In contrast, the civil litigation considered in this article involves direct adjudication over actions that take place in the host state. These cases have a connection to the home state, typically the domicile of the parent company, but the claimants are host state nationals and the harmful events have taken place in the host state.²⁷ There are usually allegations against the host state subsidiary or associate company, making it a co-defendant alongside the home state parent company. The fact that these allegations form the factual basis of extraterritorial civil litigation means that it is unlikely that host state courts will adjudicate over the particular wrongdoing.²⁸ But the application of private international law rules may lead to host state law being applied in the home state court. The article will return to the differences between litigation and regulation in this context below. First, there will be a discussion of the challenges to the notion of state sovereignty based on globalisation and the powerfulness of transnational business.

3. The validity of the ‘sovereignty’ objection in a globalised world

Criticism of extraterritoriality in the business and human rights context frequently makes reference to extraterritorial jurisdiction as an infringement of host state sovereignty.²⁹ This seems to cover both legal and ideological infringements. Thus, in the literature,³⁰ and in one of the cases,³¹ the charge of infringing sovereignty is made interchangeably with that of imperialism. Some commentators question the validity of these objections, however, asking the extent to which sovereignty is sacrosanct in a globalised world.³² Authors such as Claudio Grossman and Daniel Bradlow chart the twin developments of the growth in activities whose causes or effects transcend national boundaries and the increasing number of actors on the international level.³³ They argue that ‘whatever the international legal status of states might be, the sovereign has less power, measured in terms of control over human, natural, financial and other resources, than those corporations that it is supposedly regulating.’³⁴ Michael Osborne picks up this point:

[t]he very meaning of ‘sovereignty’ [has] evolved from the venerable Westphalian understanding to a broader conception of popular sovereignty – albeit still mediated, in the ordinary course, through a nation-state.³⁵

A conclusion on whether sovereignty has been lost, reconstituted, is in need of reinterpretation or a mix of all three is not needed here.³⁶ For the purposes of this article, it is clear that the transboundary nature of global business coupled with the relative lack of power of many host states when compared to that of

26 See, for example, Australian and Canadian Bills, *supra* notes 5 and 10. The Australian draft law would have provided for direct regulatory jurisdiction over actions that took place in host states.

27 There may however be allegations of wrongful behaviour in the home state, for instance decisions made at headquarters that result in harm occurring in the host state.

28 This may have been unlikely in any event. There may of course be parallel litigation in the home and host states, potentially brought by different claimants regarding the same harmful events. This is rarely seen in practice however – the gold miners’ silicosis litigation against Anglo American South Africa Ltd is an example. UK law firm Leigh Day and Co. worked with the South African Legal Resources Centre and South African advocates to bring claims in both South Africa and the UK, see Meeran, *supra* note 15, p. 39. This concern is of course not confined to business and human rights cases. The provisions in the Recast Brussels Regulation (Regulation (EU) No. 1215/2012) that allow foreign plaintiffs to sue in the courts of the European Union Member State in which the defendant is domiciled gives jurisdictional footing to any tortious claim for harm that takes place overseas, provided that the domicile requirement is met. The question here is whether extraterritorial civil litigation in the business and human rights field should be encouraged or even mandated as a state policy, given the particular injustice faced by victims in these cases.

29 See, for example Schrage, *supra* note 15. When Bill C-300 was debated in the Canadian Parliament, the President of the Mining Association of Canada argued that the Bill did not demonstrate ‘any sensitivity in intruding into the sovereign right of other governments to manage resource development to meet their national needs’: Canada, Parliament, Standing Committee on Foreign Affairs and International Development, Minutes of Proceedings and Evidence, 40th Parl, 2nd Sess, issue 32 (8 October 2009) 10 (Gordon Peeling).

30 Schrage, *supra* note 15.

31 With regard to the ATS Apartheid litigation, *In re South African Apartheid Litigation*, 617 Supp.2d 288 (SDNY 2009), the two objections were used by South Africa interchangeably.

32 See Deva, *supra* note 5, pp. 37-65.

33 C. Grossman & D. Bradlow, ‘Are We Being Propelled towards a People-Centred Transnational Legal Order?’, (1994) 9 *American University Journal of International Law and Policy*, pp. 1-25.

34 *Ibid.*, p. 8.

35 M. Osborne ‘Apartheid and the Alien Torts Act: Global Justice Meets Sovereign Equality’, in M. du Plessis & S. Pete (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (2007), p. 283.

36 S. Sassen, *Losing Control: Sovereignty in an Age of Globalisation* (1996), pp. 1-30. O. De Schutter, ‘Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations’ (10 June 2010), CRIDHO WP no. 2010/5.

foreign investors, mean that corporate conduct frequently goes unregulated and misconduct unpunished. Host states may be less concerned about their sovereignty when transnational business, supported by home states and protected by the company law principles of separate personality and limited liability, is often able to evade accountability for its actions at the domestic level and barely needs to concern itself with regulation at the international level. But this does not provide a *carte blanche* to home states to regulate and adjudicate extraterritorially.

The historical context of state sovereignty is relevant too. In this light it may be questioned whether (developing country) host state sovereignty is the same as (developed country) home state sovereignty. Antony Anghie examines the background to the development of public international law including through the Mandate System of the League of Nations.³⁷ The Mandate System sought to convert colonial territories into sovereign states necessary for the claims to universality of international law. But what was, in his view, transferred was empty sovereignty that lacked political and economic power over the territory in question. Anghie's position fits under the umbrella of scholarship identified as Third World Approaches to International Law (TWAIL).³⁸ The underlying viewpoint is that public international law is an instrument of colonialism. Sara Seck applies Anghie's thesis to the business and human rights context, arguing that, given that host state sovereignty is already 'impoverished',

[t]his suggests that any claim that third-world sovereignty will be infringed by first-world home state regulation is suspect to the extent that it denies the on-going history of infringement that dates from the colonial encounter to the neo-colonialism of today's economic order.³⁹

Acknowledging that 'ongoing history of infringement', the fear being articulated is that the use of extraterritorial techniques may continue – and perhaps further consolidate – the historical violation of third world sovereignty.⁴⁰ Or, in other words, arguments about sovereignty fail to recognise that international law and international institutions create power imbalances between home and host state, and host state and foreign corporation. But even if host state sovereignty is impoverished in comparison to that of home states, it is still capable of being infringed and, one could argue, is even more in need of protection given the imperialist history of relations between home and host state and the risk of old patterns being repeated. This is a live issue: the impoverishment of host state sovereignty is still pertinent in light of concerns about the impact on host states' sovereignty of their obligations to foreign investors under bilateral investment treaties, which they frequently enter under pressure from home states.⁴¹ This leads scholars such as M. Sornarajah to challenge the present system of international law that allows the protection of corporate assets in the host state through investment agreements without inquiring into the duties owed by these corporations to host states.⁴²

A second wave of TWAIL scholarship introduces a new emphasis on how states treat their citizens.⁴³ Although the need for true state sovereignty for third world states is reasserted, the focus is on 'the destinies of the peoples of the third world states, as opposed to the states themselves'.⁴⁴ Through this lens, Chilene Nwapi makes a powerful point:

37 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), p. 179.

38 A. Anghie & B. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', (2004) 36 *Stud In Transnat'l Legal Pol'y*, p. 186. This article does not adopt a TWAIL approach, but cites it as part of the academic debate surrounding the issue of extraterritoriality / infringement of host state sovereignty.

39 S. Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?', (2008) 46 *Osgoode Hall Law Journal*, no. 3, p. 582.

40 Nwapi, supra note 18, p. 53.

41 Seck, supra note 39, p. 20 and Anghie, supra note 37, pp. 224-236 argue that even the formal conception of third world sovereignty is eroded by granting international legal personality to corporations via these clauses in bilateral investment treaties.

42 M. Sornarajah, 'Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States', in C. Scott (ed.), *Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), p. 491. See also L. Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera', (1999) 68 *Fordham L. Rev.*, no. 1, pp. 1-14.

43 Nwapi, supra note 18, p. 54.

44 Ibid.

it is submitted that any argument that home state litigation of transnational corporate crimes is imperialistic and that it would erode the sovereignty of third world states (...) may well serve to encourage home states to look away from the egregious and unethical conduct of their corporations operating in the third world.⁴⁵

He goes further, saying it is possible to argue that home state concerns about their violations of third-world sovereignty are 'self-righteous and nothing but excuse disguisedly calculated to evade responsibility.'⁴⁶ This second assertion is difficult to prove.⁴⁷ The first assertion is relevant to an examination of the sources of complaint about the infringement of host state sovereignty. This complaint can indeed be used to dissuade home states from taking action in relation to their companies. In one instance, concerns about sovereignty were raised by the corporate lobby as part of the parliamentary debate about a proposed regulatory mechanism, and could indeed have been a factor that encouraged the home state to reject the draft law, thus 'looking away' from its corporate nationals' misconduct.⁴⁸

Scrutiny should be applied when home states invoke host state concerns about exclusive jurisdiction and sovereignty as a reason not to adopt extraterritorial techniques,⁴⁹ an issue that will be returned to below in the section on host state opinion.⁵⁰ Turning now to the jurisdictional dilemma, at first sight, it seems intractable. The need for home states to exercise at least some degree of extraterritorial oversight over their corporate nationals to avoid a situation of impunity is widely acknowledged,⁵¹ this necessarily entails some degree of incursion into the domestic affairs of the host state.⁵² But how strong are the grounds for objecting to this incursion into domestic affairs whether as an impermissible infringement of exclusive jurisdiction or as an imperialist/neocolonialist act? The following sections address these questions.

4. Incursion into host state exclusive jurisdiction

The question of the legality of regulatory and adjudicatory interference by one state in the domestic affairs of another state will be addressed first. The precise scope of the legal duty of non-intervention in a state's domestic affairs is unclear.⁵³ Exclusive domestic jurisdiction over a particular issue is ceded when that issue becomes the subject of public international law norms however. What does this mean for the extraterritorial techniques to bring human rights standards to bear on corporate misconduct? Is a host state's exclusive jurisdiction ceded in such a way as to permit home state intervention through domestic adjudication and/or regulation that protects host state citizens' rights as denoted in international human rights law? This is a question both of public and of private international law. To answer it requires some historical perspective on international human rights law. The development of international human rights law following the adoption of the UN Charter and the Universal Declaration on Human Rights (UDHR) reduced the scope of domestic exclusive jurisdiction by setting limits for a state's legitimate treatment of its own population.⁵⁴ The extent of this is the subject of debate, given that the human rights language of the UN Charter was vague, simply binding states to work together to promote human rights, and the UDHR was a non-binding resolution of the UN General Assembly. At the very least, as Johan Van Der Vyver says, 'it is fair to conclude that, in those formative years, the [UN] succeeded in mustering universal support for the affirmation of faith in human rights'.⁵⁵

45 Ibid., p. 55.

46 Ibid., p. 56.

47 There are of course reasons of self-interest why states do not regulate extraterritorially, prominent among which is the view that it will place corporate nationals at a competitive disadvantage vis-à-vis their foreign counterparts.

48 See for example the debate in the Canadian legislature about Bill C-300, supra note 10, which was to contain modest extraterritorial measures had it been adopted. The corporate lobby spoke against the proposed legislation, arguing that it would violate host state sovereignty: supra note 29. The Bill was rejected by a narrow margin.

49 Except of course when the host state itself is the primary perpetrator of the violation, on which see further Section 4.2.2, infra.

50 Section 4.2.3, infra.

51 See, for example, P. Simons & A. Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (2014).

52 For clarity, the part of this paper dealing primarily with issues of public international law (Section 4) will describe the legal infringements using the terminology of host state exclusive jurisdiction over domestic affairs rather than that of infringements of sovereignty.

53 Zerk, supra note 5, p. 136.

54 See De Schutter, supra note 36, p. 7 and Lord Millet's judgment in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, [1998] 3 WLR 1456 (House of Lords, England and Wales).

55 J. Van Der Vyver, 'Sovereignty', in D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (2013), p. 395.

In the years since the adoption of the UN Charter and the UDHR, states have agreed on standards for the protection of human rights and the UN has promulgated a number of treaties and declarations. States can accept binding obligations through voluntary ratification of these covenants and conventions.⁵⁶ Some argue that the Charter and the UDHR collectively also create customary international law, either related to the whole UDHR or, at the very least, to certain articles and protections within the UDHR.⁵⁷ More contentious is the question of whether other human rights standards, such as those contained in the two covenants, are customary international law.⁵⁸ But the combination of the Charter, the UDHR and the treaties creates a web of standards, expectations and monitoring bodies that can be termed international policy of protecting human rights, some of which amount to customary international law.⁵⁹ This situation has prompted Johan Van Der Vyver to conclude:

[s]tate sovereignty is thus no longer an absolute right. Even insofar as it remains a prominent principle in international relations, its implementation has, at least de facto if not de jure, become subordinate to the values embedded in the human rights doctrine.⁶⁰

Even if Van Der Vyver is correct and it is accepted among states that the human rights doctrine sets limits on the state's legitimate treatment of its own population, the question remains whether through the doctrine it can be implied that host states have consented to third party state intervention through (domestic) extraterritorial regulation and adjudication to uphold these rights. There are two aspects to this question: the legality of the third party state's intervention and the validity of the stance taken by the host state, if it takes issue with the use of the extraterritorial technique. The legality of the third party (home) state's intervention will be examined first.

4.1 The legality of the home state's intervention

A distinction between adjudication and regulatory mechanisms must be made here. The power of the host state court to adjudicate tort claims concerning foreign actors and/or activities is governed structurally by private international law. Domestic private international law, informed in some states by international agreements to which they are party such as the Recast Brussels Regulation,⁶¹ provides the rules.⁶² So long as these rules are followed, ensuring that the court has the requisite connections to the dispute, the court will have adjudicative jurisdiction, meaning that its 'intervention' is in principle lawful.⁶³

On the question of regulation, the commentary to the UNGPs provides that states are not generally prohibited from regulating the extraterritorial activities of business domiciled in their territory and/or jurisdiction, provided there is a recognised jurisdictional basis for so doing.⁶⁴ It continues '(...) some human rights treaty bodies recommend that home states take steps to prevent abuse abroad by business enterprises'.⁶⁵ The jurisdictional bases recognised in public international law apply to extraterritorial extensions of regulation by the state, and in particular to criminal law regulation. For example, there are certain human rights that the international community as a whole has a legal interest in protecting,⁶⁶ making the exercise of universal

56 Ibid.

57 Ibid.

58 O. Schachter, *International Law in Theory and in Practice* (1991), pp. 335-345. There has not been universal ratification of each Covenant and Convention.

59 Deva, *supra* note 5, p. 48.

60 Van Der Vyver, *supra* note 55, p. 400. See also P. Macklem, *The Sovereignty of Human Rights* (2015), p. 33.

61 *Supra* note 28.

62 Domestic private international law may of course be informed by background norms of public international law (as to, for instance, the limits of one state seeking to regulate another state's internal legal order), see Scott, *supra* note 22, pp. 51-53.

63 This has not prevented certain states from opposing the use of extraterritorial adjudicative jurisdiction, see for example the Brief of the Government of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner, *Sosa v Alvarez-Machain* No 03-339 (23 January 2004) (an ATS case).

64 UNGPs, *supra* note 3, Principle 4.

65 UNGPs, *supra* note 3, Principle 2, Commentary. As Chiara Macchi notes, this is a strictly *de lege lata* approach: C. Macchi, 'Right to Water and the Threat of Business: Corporate Accountability and the State's Duty to Protect', (2017) 35 *Nordic Journal of Human Rights*, no. 3, p. 189.

66 *Barcelona Traction case (Belgium v Spain) (Second Phase)*, Judgment of 5 February 1970, [1970] ICJ Rep 3 at paras. 33-34 on obligations *erga omnes*. Universal civil jurisdiction exemplified in the ATS cases prior to *Kiobel*, *supra* note 14, arguably also provides a legal basis for extraterritorial intervention through civil litigation for breaches of *erga omnes* obligations.

jurisdiction over these international crimes lawful.⁶⁷ There are other potentially relevant legal bases for the exercise of extraterritorial jurisdiction over corporations. States may extend their regulation over events with a foreign element under the international law principles of subjective and objective territoriality. These allow the home state to regulate wrongful activities that are commenced or consummated in the home state, even if they are completed elsewhere, such as when a criminal conspiracy takes place in the home state. An exception to the territorial principle of jurisdiction is nationality: if the parent company operating through a foreign branch, not a legally separate affiliate, commits the human rights abuse in the host state then the home state is allowed to prosecute or extend the territorial reach of its regulation on the basis of nationality. These are jurisdictional bases for a state to extend its regulation extraterritorially (prescriptive jurisdiction) but not to enforce this regulation extraterritorially. Enforcement of the regulation must occur in the home state.

To summarise, there are a limited number of jurisdictional bases for the home state's extraterritorial extension of its regulation.⁶⁸ Two of these are of fairly minor relevance to the corporate misconduct here under consideration however. In relation to the nationality exception, transnational business is not usually conducted through foreign branches, but rather through subsidiaries, associate and affiliate companies that, in accordance with company law, are separate legal entities of different nationality to the parent company. In relation to the universal jurisdiction exception, the human rights abuses in which businesses are commonly implicated are breaches of economic, social and cultural rights and, to a lesser extent, civil and political rights rather than the breaches of *erga omnes* obligations that found the lawful exercise of universal jurisdiction. Of potentially greater relevance to the corporate misconduct at hand, and the extraterritorial techniques that address this misconduct, are the objective and subjective territoriality principles. These principles could be engaged by conduct that falls within the territorial jurisdiction of the home state, for instance, decision making / instructions to overseas affiliates by parents companies that are put into effect in the host state.

There are other situations in which states have agreed to the extension of criminal law extraterritorially in order to protect human rights in third states. The fight against impunity for certain serious human rights violations has led to agreement under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for instance, that states 'prosecute or extradite' alleged perpetrators present on their territory, no matter where the crime has taken place.⁶⁹ Although not a human rights instrument *per se*, the UN Convention against Corruption requires states to criminalise bribery of foreign public officials and thus applies to conduct overseas.⁷⁰ Similar commitments have not been made by states in the field of human rights regulation of companies, however.

Even if none of the jurisdictional bases or treaty provisions are present, it is not necessarily the case that the principle of non-intervention will be breached by extraterritorial regulation. While it can be said for certain that enforcement jurisdiction is essentially a domestic affair,⁷¹ regulation without extraterritorial enforcement is unlikely to receive approbation as a breach of public international law.⁷² Most, if not all, of the regulatory mechanisms in this field are so modest in their extraterritoriality that they come a long way from breaching the principle of non-intervention. The human rights reporting laws are a prime example. But even the more intrusive mechanisms such as the draft law considered by the Australian Government that would have prescribed conduct for the overseas subsidiaries of Australian companies is unlikely to meet the threshold for 'coercion' needed for such a breach.⁷³ Thus public international law does not provide a

67 C. Ryngaert, *Jurisdiction in International Law* (2015), p. 146.

68 There is another view of public international law jurisdiction, dating back to the *Lotus* case, *The Case of the S.S. 'Lotus' (France v Turkey)*, Judgment No 9 of 7 September 1927, [1928] PCIJ Reports, Series A, No. 10, which is that a state may extend its regulation extraterritorially provided that there is no legal ground prohibiting this. The UNGPs do not adopt this approach, nor is it adopted here.

69 Convention Against Torture, Arts. 5 and 8. Domestic law implementing the CAT could apply to companies, depending on whether the implementing state recognises corporate criminal liability.

70 205 United Nations Convention against Corruption, 2349 UNTS 41.

71 Only another state's consent can operate as a defence to the unlawfulness of extraterritorial enforcement.

72 The *Nicaragua* case, *supra* note 2, para. 205 holds that the principle of non-intervention 'forbids all States (...) to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. (...) Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.'

73 Code of Conduct Bill, *supra* note 5.

complete answer to the question of the legality of the regulatory intervention by the home state, and the debate becomes more of a political question about whether such intervention is considered legitimate by the host state (and other states).⁷⁴ In order to try to answer this, there will now be an examination of the role of the home state in the human rights abuse, and an assessment of the relevance of the home state's role to the question of the legality of its intervention, which will inform the answer to the question whether extensions of the law bringing human rights standards to bear on corporate misconduct are politically acceptable to host states.

4.1.1 The relevance of the home state's underlying conduct

To explore the concern about the extraterritorial techniques being an infringement of host state exclusive jurisdiction involves scrutinising the role of both the host and home state in the corporate misconduct. The host state's role will be examined below. Turning to the home state, if it supports the company in question through assistance such as the provision of export credit or political risk insurance, or by negotiating and agreeing favourable terms for its investment in the host state through a bilateral investment treaty, some would argue that this creates responsibility on the state's part to properly regulate the company, wherever it operates, and to provide access to a remedy if the company is accused of human rights abuse. Robert McCorquodale takes this argument one stage further and considers whether the home state could be held legally responsible in these circumstances.⁷⁵ Noting that states may incur responsibility under international law for the acts of non-state actors when their acts can be attributed to the state, including because the state is complicit in the activities of the non-state actor, he argues that active support by the home state of a company's activities overseas may amount to such complicity.⁷⁶ For the company to incur international responsibility its activities would have to be human rights violations that also constitute internationally wrongful acts, meaning that this applies to a very narrow subset of violations, however.⁷⁷ He contends '[t]his active support can lead to the state being internationally responsible for the consequences of a corporate national's activities.'⁷⁸ If McCorquodale is correct and the home state can be held legally responsible for certain corporate misconduct in which it plays a part, then it must be entitled to regulate the company's overseas operations to try to prevent this misconduct. But the level of home state active support varies from, at one end of the continuum, 100% state ownership of the business to, at the other end, a more minor role such as diplomatic and consular support for the business. The level of active support that could expose the home state to potential legal responsibility for the company's actions would, it is submitted, need to be very high, but the premise that there may be international law consequences for the home state if it fails to act in relation to its corporate nationals and their associates is potentially an important one for this evaluation of the legality of the home state's intervention.

Also potentially relevant are extraterritorial obligations (ETOs). If, as is argued by some,⁷⁹ the home state is in certain circumstances obliged under international human rights law to protect the human rights of persons outside its territory, this clearly legitimises its intervention into the domestic affairs of the host state, in the same way that the risk of incurring state responsibility under international law would. The UNGPs

74 In accordance with the TWAIL approach, Section 3, *infra*, there is a further question (not addressed here) of the view(s) of 'the peoples of the third world' – i.e. the rights holders who are impacted by corporate behaviour – on this regulatory intervention. Potentially for them the concern about intrusion into host state exclusive jurisdiction is overshadowed by more profound concerns about their rights being protected and upheld vis-à-vis foreign corporations.

75 R. McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights', in L. Blecher et al. (eds.), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (2014), pp. 60-61 drawing on the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts.

76 To illustrate 'active support' McCorquodale, *ibid.*, uses the example of the UK Government's negotiation of stabilisation clauses in the agreements with the host states for the Baku-Tbilisi-Ceyhan pipeline.

77 R. McCorquodale & P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', (2007) 70 *Modern Law Review*, no. 4, p. 614.

78 McCorquodale, *supra* note 75, p. 61.

79 See the Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights.

do not however acknowledge the existence of ETOs, even when state support is in place for companies.⁸⁰ Instead they say that there are ‘strong policy reasons’ why states should regulate the extraterritorial activities of state-supported businesses. Leading thinkers challenge this viewpoint,⁸¹ arguing that the law may be changing especially as far as economic, social and cultural rights are concerned. Their argument has been accepted by the human rights committees, e.g. the latest General Comment from the Committee on Economic Social and Cultural Rights says that ‘States Parties are required to take the necessary steps to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (...) *without infringing the sovereignty* or diminishing the obligations of the host States under the Covenant.’⁸² (Emphasis added). What it means to adjudicate/regulate extraterritorially without infringing sovereignty is left unanswered. But the support that the Committee gives for home state efforts to regulate and adjudicate with respect to economic, social and cultural rights is important given the frequency with which these rights are impacted by corporate misconduct. It also provides a counterpoint to the opinion which will be discussed below that extraterritorial techniques for implementing economic, social and cultural rights have a greater potential to infringe host state exclusive jurisdiction than extraterritorial techniques that address egregious human rights violations amounting to violations of norms of international criminal law. A further point on the legality or propriety of home state intervention is discussed in the next subsection, namely when the home state has a pretext for its intervention.

4.1.2 Home state pretext for intervention

The question here is whether home states truly seek to protect human rights through their extraterritorial measures or whether they use these as a pretext to pursue other national policies, such as the protection of domestic jobs, by increasing labour costs overseas for their corporate nationals operating extraterritorially. Host states have reason to be wary in view of the controversy over the insertion of a ‘social clause’ into the World Trade Organisation legal order and the subsequent introduction of protectionist measures by certain states under the guise of social protection.⁸³ Additionally, host state recipients of aid from industrialised states and/or loans from international institutions exhibit caution about the attachment of what they consider to be ‘conditions’ for this assistance.⁸⁴ Sigrun Skogly links this caution back to the policies of the United States in particular which, under President Carter, aimed to prevent financial support from the US being provided to countries where widescale human rights violations took place. Under American influence, these policies were subsequently adopted by the international finance institutions. Host states, she says, are concerned that home states ‘will use the regulation of corporations as another form of conditions regarding their domestic policies.’⁸⁵ The fear is that this represents an illegitimate interference with internal affairs.

Is there evidence of this in practice or is it merely a theoretical concern? Some commentators argue that political motivation lies behind Alien Tort Statute judgments.⁸⁶ The harshest critics say that this transnational

80 Commentary to UNGP 2. This is the orthodoxy under public international law, expressed for example in O. De Schutter, *International Human Rights Law* (2010), pp. 19-20 ‘[i]n the current state of development of international law, a clear obligation for states to control private actors operating outside their national territory, in order to ensure that these actors will not violate the human rights of others, has not crystallised yet.’

81 E.g. McCorquodale, supra note 75, p. 59 who calls this approach ‘hesitant’. See also D. Augenstein & D. Kinley, ‘When Human Rights “Responsibilities” Become “Duties”: The Extra-territorial Obligations of States that Bind Corporations’, in S. Deva & D. Bilchitz (eds.), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (2013), p. 281.

82 General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, para. 26.

83 See for example M. Ming Du, ‘Permitting Moral Imperialism? The Public Morals Exception to Free Trade at the Bar of the World Trade Organisation’, (2016) 50 *Journal of World Trade*, no. 4, pp. 675-704 and the ‘chapeau’ to Art. XX of the GATT discussed briefly in footnote 48 of C. Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’, in M. Langford et al. (eds.), *Global Justice State Duties The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (2013), p. 208. See Zerk, supra note 5, p. 137 generally on home state motivation.

84 S. Skogly, ‘Regulatory Obligations in a Complex World: States’ Extraterritorial Obligations related to Business and Human Rights’, in S. Deva & D. Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (2017), pp. 334-335.

85 Ibid. and N. Krisch, ‘International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order’, (2005) 16 *EJIL*, no. 3, pp. 402-403.

86 For example Mattei & Lena, supra note 5.

litigation is the product of intentional hegemonic behaviour.⁸⁷ Different United States administrations have held different opinions about whether human rights litigation in domestic courts under the ATS should be encouraged but, given that the courts have shown restraint in finding the ATS applicable, particularly since the Supreme Court decision in *Kiobel*,⁸⁸ this argument is difficult to sustain. Scholarship in the business and human rights field does not cite other examples of extraterritorial measures being used for protectionist purposes or the use of such measures as a form of conditionality.

4.1.3 Can the home state's actions amplify, rather than detract from, the host state?

In an article specifically addressing host state sovereignty concerns, Olivier De Schutter notes the traditional understanding that when a state adopts regulations that seek to influence situations extraterritorially, it competes with the sovereignty of the territorially competent state and should only do this in exceptional circumstances.⁸⁹ He argues however that theoretically extraterritorial regulation of corporate misconduct facilitates the role of the host state in regulating foreign investors. By ensuring that foreign direct investment contributes to human development and benefits local communities, he continues, extraterritorial regulation enhances rather than restricts the exercise by the host state of its sovereignty.⁹⁰

The policies being implemented through the extraterritorial techniques may not be aligned with host state policies however, if for instance these policies include minimalist labour protection as an incentive to foreign investment.⁹¹ It is also at least debateable whether host states value the assistance of home states to help them to regulate the conduct of foreign investors. The drafting of the UN Draft Code of Conduct for Transnational Corporations in the 1970s and 80s and the current business and human rights treaty negotiations underway in the UN Human Rights Council illustrate that certain host states have sought multilateral agreement to help them to regulate foreign direct investment. But multilateral agreement is very different to a unilateral exercise of extraterritorial jurisdiction: the desire for one cannot be taken as acceptance of the other. Even when multilateral agreement is proposed, concerns about infringement of host state sovereignty are raised and addressed, notably in the provisions of the UN Draft Code of Conduct.⁹² The fear of infringement of sovereignty remains a prescient one in the current treaty negotiations. At the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights meeting in 2015, some host states expressed concern that if the proposed treaty were addressed to domestic enterprises, in addition to transnational corporations, their sovereignty might be infringed.⁹³

The discussion in this subsection brings the article's focus from the legality and political acceptability of the home state's intervention to the validity of the stance taken by the host state. For the purpose of the following subsections, it is assumed that the host state objects to the use of the extraterritorial techniques. The validity of this stance in legal and policy terms will be explored next.

4.2 The validity of an oppositional stance taken by the host state

This first subsection analyses whether the type of right being addressed by the extraterritorial technique is relevant to the question of the validity of the host state's stance. The role of the host state in the violation is considered next. Last there is a discussion of host state objections that have occurred in practice.

87 H. Buxbaum, 'Transnational Regulatory Litigation', (2006) 46 *Va. J. Int'l L.*, p. 304, citing M.O. Chibundu, 'Making Customary International Law Through Municipal Adjudication', (1999) 39 *Va. J. Int'l L.*, p. 1147.

88 *Kiobel v Royal Dutch Petroleum Co*, supra note 14. Even before this decision the Supreme Court had confined the ATS to a narrow jurisdiction in *Sosa v Alvarez-Machain* 542 U.S. 692 (2004).

89 De Schutter, supra note 36, p. 5.

90 Ibid.

91 See further Ssubsection 4.1.2 infra.

92 Paragraph 60 provides: 'Where the exercise of jurisdiction over transnational corporations and their entities by more than one state may lead to conflicts of jurisdiction, states concerned should endeavour to avoid such conflicts, in particular by seeking to avoid the exercise of jurisdiction by one state where jurisdiction appertains to another state (...) on the basis of respect for the principle of sovereign equality and for their mutual interests.'

93 C. Lopez & B. Shea, 'Negotiating a Treaty on Business and Human Rights: A Review of the First Intergovernmental Session', (2015) 1 *Business and Human Rights Journal*, p. 13.

4.2.1 Does the type of right matter?

It is submitted that the level of infringement of host state exclusive jurisdiction of the extraterritorial techniques under consideration varies, depending on the human rights violation that the regulation or adjudication seeks to address.⁹⁴ There is a distinction here between rights of immediate realisation and rights of progressive realisation, the latter being a subset of economic, social and cultural rights. For example, if the right to life is violated (e.g. a member of a private security force shoots and kills an unarmed protester) and a foreign company is complicit in this violation, it is arguably disingenuous to talk about an infringement of the host state's exclusive jurisdiction for the company's home state to regulate and adjudicate over the company's role in this violation, if the host state does not. To put it another way, it is difficult to argue that the host state has a right *not* to adjudicate over the company's role in the human rights violation and that this is a function of its exclusive jurisdiction. This is because under the state duty to protect, the host state has a duty to investigate suspicious deaths such as this. The role of the company would form part of a proper investigation. If the host state fails in its duty to protect, it should not be able to argue that other states with connections to the company cannot take on the responsibilities under that duty. As August Reinisch puts it, 'states will have a hard time justifying their disregard of human rights in rejecting the extraterritorial acts of others'.⁹⁵

The situation is different where, for example, the foreign company operates to poor standards of health and safety resulting in workers suffering from industrial disease. The rights engaged include the right to health⁹⁶ and the right to safe and healthy working conditions.⁹⁷ The host state's obligation under the state duty to protect these rights of progressive realisation is the subject of an evolving debate. One prominent commentator described it as the obligation to take all measures that can reasonably be adopted to ensure that these rights are not abused as a consequence of the conduct of corporate actors, i.e. an obligation of means not an obligation of result.⁹⁸ Thus, international human rights law allows states some leeway in terms of domestic regulatory and adjudicative jurisdiction to protect their citizens and uphold these rights. Substantive determination of national policy choices is left to the host state,⁹⁹ with greater deference to the means etc. of the state than is afforded for rights of immediate realisation.

Economic self-determination can be argued to include the sovereign prerogative of host states to determine their national economic policy including, if they wish to make it, the decision to take an active advantage of the ability to attract investment capital through minimalist labour rights protection.¹⁰⁰ This is recognised in the different context of recent environmental protection treaties, in which developing states are given more time than their developed state counterparts to implement environmental standards. Host states can give economic, social and cultural rights of progressive realisation content commensurate with their level of economic development – they are in agreement with home states about the menu of human rights that need satisfying and the core minimum requirements for these, but they differ in their policy about the weight to be attributed to those rights and the priority in which they will be addressed. Returning to the case of the foreign company operating to poor standards of health and safety resulting in workers suffering from industrial disease, although the relevant rights might be engaged, there may be no human rights violation on the host state's part for failing to protect those rights. There may just be different approaches by the home and host states to rights content. Thus, it can be argued that it is more likely that home state intervention through extraterritorial regulation or adjudication would amount to infringement of the host state's exclusive jurisdiction over the relevant rights. But domestic jurisdiction is not unfettered:

94 Commentators such as Seck, *supra* note 39, make similar points.

95 A. Reinisch, 'The Changing International Legal Framework for Dealing with Non-State Actors', in P. Alston (ed.), *Non-State Actors and Human Rights* (2005), p. 58.

96 ICESCR Art. 12.

97 ICESCR Art. 7(b).

98 O. De Schutter, 'Corporations and Economic, Social and Cultural Rights', in E. Riedel et al. (eds.), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (2014), p. 197. See also Chapter 4 of De Schutter's book *International Human Rights Law*, *supra* note 80, and D. Aguierre, 'Corporate Liability for Economic, Social and Cultural Rights Revisited: The Failure of International Cooperation', (2011) 42 *Cal. W. Int'l L. J.*, no. 1, p. 136.

99 Reinisch, *supra* note 95.

100 See Scott, *supra* note 22, p. 54.

when a host state fails to take all measures that can reasonably be adopted to ensure that these rights are not abused by non-state actors such as business enterprises then it fails to meet its obligations under the International Covenant on Economic, Social and Cultural Rights (which the majority of states have signed) and, arguably, intervention by the corporation's home state is more justifiable.¹⁰¹

There are more radical viewpoints than the one adopted in this article. Reinisch for example does not differentiate between types of rights, as has been done above.¹⁰² Drawing on the legal steps taken to prevent bribery and corruption, he examines the extraterritorial 'prosecution' of human rights violations exemplified by ATS litigation and the tort law cases described in this work. He argues that there is a shared interest among states in preventing human rights violations, not only by states but also by non-state actors.¹⁰³ If the host state is bound by international agreements to ensure human rights then, he argues, any opposition to extraterritorial enforcement would be hard to justify. The host state would be under an obligation to take action itself. 'If it refused to do so and coupled this refusal with a rejection of action by other states to enforce the same treaty rights extraterritorially, this non-co-operation would be qualified as an act of bad faith.'¹⁰⁴ Reinisch's position rests on the assumption that by agreeing to be bound by international agreements to ensure human rights, the state is agreeing to the extraterritorial enforcement of those rights by other states within its territory if it fails to enforce them. As already discussed, this may be controversial. There is an important difference between international human rights monitoring and unilateral monitoring or intervention by home states, which is not captured.

To summarise this subsection, the potential level of intrusion into host state exclusive jurisdiction will vary depending on the type of human right being brought to bear on corporate misconduct by the extraterritorial technique. The type of human right affects the requirements of the host state under international human rights law's protect and (in the case of economic, social and cultural rights of progressive realisation) fulfil obligations. If the host state is in clear breach of these, it is arguably more difficult for it to adopt a position of opposition to home state extraterritorial measures. Another factor that affects the legitimacy of the host state opposition towards these measures is its own role in the human rights abuse. This will be the subject of the next subsection.

4.2.2 The relevance of the host states' underlying conduct

If the host state is the principal actor in a human rights violation and the company is a secondary actor such as a conspirator, can a host state validly object to the home state adjudicating over the company's role in the human rights violation if the host state does not do so? The military junta formerly in charge of Burma that was accused, in conjunction with its corporate partners, of gross human rights violations presumably disapproved of the proceedings against these companies in the United States, France and Belgium.¹⁰⁵ But the state where the harm has occurred may not be well placed to act impartially over human rights complaints against it brought by its own citizens, particularly if the scale of the abuse is egregious.¹⁰⁶ Hence, in the analogous field of ICL, the provisions of the UN Convention Against Torture and the Rome Statute allow for extraterritorial prosecutions, by Member States and the ICC respectively. An assertion of exclusive jurisdiction over events occurring on the national territory when the host state is the perpetrator of the violation and there is no legal process to hold those responsible to account, is difficult to sustain.

101 Treaty Status: International Covenant on Economic, Social and Cultural Rights, UN Treaty Collection: <<http://indicators.ohchr.org>> (last visited 1 February 2018). The ratification numbers are: State Party (166), Signatory (4), and No Action (27).

102 De Schutter does not differentiate between rights in his working paper on how extraterritorial measures can enhance host state sovereignty, supra note 36.

103 Reinisch, supra note 95, p. 60. See also M. Salmon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (2007), p. 109.

104 Reinisch, *ibid.*

105 *Doe v Unocal*, 395 F.3d 932 (9th Cir. 2002), opinion vacated and rehearing en banc granted, 395 F.3d 978 (9th Cir. 2003). See S. Joseph, *Corporations and Transnational Human Rights Litigation* (2004), p. 150. In the US and France, out of court settlements were reached. In Belgium, the charges were dropped.

106 U. Kohl, 'Corporate human rights accountability: the objections of Western governments to the Alien Tort Statute', (2014) 63 *International and Comparative Law Quarterly*, p. 684 and N. Bernaz, 'Corporate Criminal Liability under International Law: The New TV S.A.L. and Akhbar Beirut S.A.L. Cases at the Special Tribunal for Lebanon', (2015) 13 *Journal of International Criminal Law*, p. 319: 'it is very difficult to envisage how victims can obtain justice before that very state's judicial system.'

Section 4.2 has thus far demonstrated that home state intervention can be justified, both legally and in policy terms but that host state concerns about intrusion into exclusive domestic jurisdiction deserve more careful examination in light of the full picture – i.e. the type of rights violation and the role of the host state (if any) in the violation. Another important factor when considering the use of these extraterritorial techniques is the viewpoint of the host state.

4.2.3 The viewpoint of the host state

There is no established method for home states to consult with host states regarding proposed extraterritorial regulation. Therefore, with one notable exception,¹⁰⁷ it is difficult to know how host states view these extraterritorial regulatory mechanisms in practice. It may be possible to glean host state opinion from contributions to multilateral discussions, as noted above with respect to the treaty negotiations, but this is at a general level rather than in relation to specific mechanisms.

There are established methods by which host states can convey their views about extraterritorial civil litigation such as amicus curiae briefs as well as more informal means such as letters or declarations. A survey for the Office of the UN High Commissioner for Human Rights of state views on extraterritorial civil litigation¹⁰⁸ as expressed in ATS amicus briefs shows that host states rarely intervene in this way.¹⁰⁹ It is interesting to note that the ATS cases in which the host state governments protested about the use of home state adjudication as an intrusion into its domestic affairs, concerned allegations of gross human rights violations by the host state, in which the company was complicit.¹¹⁰ In one of these cases, the regime accused of the gross human rights violation was still in power.¹¹¹ By contrast, in one of the only cases¹¹² for which coincidentally one of the same host states, under a different government, gave positive approval for home state adjudication of a tort law claim, the South African Government sanctioned the adjudicatory jurisdiction of the English court in a case in which health and safety failings caused sickness and death.¹¹³ Host state objections to the extraterritorial techniques based on exclusivity of jurisdiction on these occasions did not follow the logic about the type of human rights violation described in the preceding paragraphs. The desire to avoid extraterritorial scrutiny of host state human rights violations is arguably a factor that overrides other ones.

One recent development indicates that, contrary to the notion that extraterritorial civil litigation creates an incursion into host state domestic affairs, at least one host state is seeking to mandate through bilateral treaties that home states make their legal systems available for extraterritorial civil litigation. The Indian Draft Model Investment Treaty 2015 requires that investors be subject to civil actions for liability in the judicial process of their home state, for acts and omissions that take place in the home state causing significant damage, injury or loss of life in the host state. Furthermore:

[t]he home state shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before their domestic courts relating to the civil liability of investors.¹¹⁴

107 Opinion from two host states voiced during the debate on Canadian Bill C-300 (supra note 10) was strongly in favour of it being passed into law, see for example House of Commons, Standing Committee on Foreign Affairs and International Development, 'Evidence' 041 (24 November 2009) 2-3 (Romina Picolotti) (Argentine former Environment Secretary).

108 OHCHR, 'Business and Human Rights: Enhancing Accountability and Access to Remedy: Project 2: Roles and Responsibilities of Interested States', Working Paper #2, 'State positions on the use of extraterritorial jurisdiction in cases of allegations of business involvement in severe human rights abuses: a survey of amicus curiae briefs filed by States and State agencies in ATS cases (2000-2015)' (April 2015).

109 A 'very small group' of territorial states have made interventions. Two are mentioned: South Africa in the Apartheid litigation, supra note 31, and Papua New Guinea in *Sarei v Rio Tinto* 221 F.Supp.2d 1116 (2002).

110 Apartheid litigation, *ibid.*

111 *Sarei*, supra note 109.

112 The other case is *In re Union Carbide*, supra note 9: the Indian Government initially wanted the case to be heard in the United States.

113 *Lubbe v Cape Plc*, supra note 16.

114 The Indian Draft Model Investment Treaty 2015 Art. 13(b). The provision was deleted from the Model Investment Treaty as adopted. However, there is a similar provision in Art. 20 of the Morocco-Nigeria Bilateral Investment Treaty 2016 which has been signed but as yet not ratified.

5. Ways to confront the jurisdictional dilemma

The section will draw on ‘reasonableness’ factors for home states to consider, in order to avoid or minimise actual or perceived interference in the domestic affairs of other states through their use of extraterritorial techniques. These were proposed by experts in a consultation which took place as part of the Ruggie mandate.¹¹⁵

The first of these factors is improved consultation and co-operation between states in relation to their unilateral measures.¹¹⁶ This proposal is commended and it is submitted that the consultation should extend to the host states that might be affected by the technique in question. Two parliamentary debates about draft laws in this field heard submissions about host state dilemmas from sources other than the host states themselves.¹¹⁷ In the Bhopal litigation in the United States, the judge made an assumption about the opportunity presented by the case for the Indian judiciary to ‘stand tall before the world and to pass judgment on behalf of its people’.¹¹⁸ As noted by Sarah Joseph, this contention was ironic in view of the fact that the Government of India had argued as plaintiff in the litigation against the case being heard in India.¹¹⁹ Even acknowledging the fact that host state opinion may change with the political regime,¹²⁰ assumptions should not be made about this without a factual basis. Cedric Ryngaert supports the proposition of consultation.¹²¹ He talks about the possibility of overcoming the ‘democratic deficit of extraterritoriality’ by legislatures, courts and regulators commencing a dialogue with their foreign equivalents, ‘either through institutionalised channels, or through *amicus curiae* briefs or statements of interest’.¹²² He notes that business regulators on the one hand have day-to-day working contacts with their counterparts overseas, ‘so that a measure of representation of foreign sovereign interests may seep into [their decisions]’. Courts on the other hand do not have organised contacts with foreign states or their representatives. He proposes a system of international jurisdiction in which courts, through transnational judicial networks, develop a more active working relationship with foreign regulators and courts.¹²³ ‘Such a relationship might further reciprocal understanding of each other’s concerns and organically restrain jurisdictional assertions.’¹²⁴ Applied here this idea would have home state judges consulting their host state counterparts where there is discretion whether to exercise extraterritorial jurisdiction in a particular case, for example when the test of *forum non conveniens* is being applied. This proposal could extend to include legislatures when they are considering adopting extraterritorial measures that would affect identifiable host states.

Another ‘reasonableness’ factor from Ruggie’s expert consultation is that ‘principle-based and outcomes-oriented approaches to standards that apply extraterritorially, or have extraterritorial implications, may be less problematic than prescriptive, rules-based approaches’.¹²⁵ As the examples of human rights reporting for company law and securities law illustrate, generally the approach in this field is to adopt principle-based and outcome-orientated measures rather than prescriptive, rules-based regulatory techniques. A concern is that without prescription, measures can be abstract or generic and ultimately will fail in their objective of bringing human rights standards to bear on corporate misconduct. The reporting provisions from the UK Modern Slavery Act¹²⁶ are a case in point. The ‘slavery and human trafficking statement’ it mandates demands very little of companies either in terms of what must be reported or, as a result, what must be addressed substantively in order to paint a satisfactory picture to external stakeholders through the statement. It is therefore submitted that this factor could be relevant for lawmakers considering the

115 ‘Exploring extraterritoriality in business and human rights: Summary note of expert meeting’, UN Special Representative on Business and Human Rights (SRSG), Professor John Ruggie, Harvard Kennedy School, Cambridge MA, USA, 14 Sept. 2010.

116 *Ibid.*, pp. 3-4.

117 For example the debate about Canadian Bill C-300, note 10.

118 *In re Union Carbide*, *supra* note 9, pp. 865-867.

119 Joseph, *supra* note 105, p. 148.

120 The opinion of the President of South Africa about the Apartheid litigation, *supra* note 31, changed with the arrival of a new president.

121 Ryngaert, *supra* note 67, p. 194.

122 *Ibid.*

123 *Ibid.*, p. 195.

124 *Ibid.* Judicial independence should not be compromised through this process, however.

125 Expert meeting, *supra* note 115.

126 Modern Slavery Act 2015 (UK).

adoption of extraterritorial techniques, but should be balanced against the need for the measures in question to be effective at bringing human rights standards to bear on corporate misconduct.

A final ‘reasonableness’ factor looks at whether there is a reasonable degree of international consensus on the wrongfulness of an activity. It suggests a need to focus extraterritorial measures on internationally agreed standards such as labour rights, rather than domestic standards such as those on consumer protection. This is a useful indicator for judges and legislators when considering extraterritorial techniques. The UK Principles for Assessing the Appropriateness of Extraterritorial Legislation¹²⁷ make a similar point, although they specify that the international consensus should cover not just the wrongfulness of the activity but also the power to exercise extraterritorial jurisdiction over it. This type of international consensus exists for anti-corruption measures and for breaches of obligations *erga omnes* that attract universal jurisdiction but, as discussed above, is not present for other human rights abuses. Therefore this added factor would not for the most part assist in addressing the jurisdictional dilemmas, unless international consensus could be built around the power to exercise extraterritorial jurisdiction over the relevant business-related human rights abuse. This type of consensus might develop following the adoption of unilateral regulation, as it did over bribery of foreign officials in the years following the enactment of the US Foreign Corrupt Practices Act,¹²⁸ which led to the eventual agreement of the UN Convention against Corruption.

The UK Principles for Assessing the Appropriateness of Extraterritorial Legislation include assessing the risk that an offence would not otherwise be justiciable and the vulnerability of the victim, as factors in favour of the exercise of extraterritorial jurisdiction. These two factors are both frequently present in the case of corporate misconduct: host states are frequently unwilling or unable to adjudicate and regulate, and victims are often vulnerable, economically and socially, all the more so because they have no access to a remedy for the corporate misconduct in question. Various tests can determine whether an offence would not otherwise be justiciable. Complementarity is one: under the Rome Statute for example, a case will be inadmissible when it is ‘being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution’.¹²⁹ Exhaustion of local remedies is another, with the proviso that this does not apply when local remedies are unavailable, ineffective or unreasonably delayed. These tests are important because they address one of the premises underlying the jurisdictional dilemma, namely that host states are unwilling or unable to regulate or adjudicate. If the host state *is* willing and able to regulate or adjudicate, in a fashion that is neither ineffective nor unreasonably delayed, then there is no dilemma. But, as discussed earlier in the article, this is often not the position, and is less likely still when the host state is the primary actor perpetrating the abuse.

This work has shown that there are other reasonableness factors for home states to consider in order to avoid any actual or perceived interference in the domestic affairs of host states through their use of the extraterritorial techniques. They include: looking at support from the home state for the company in question and whether the home state could be argued to have extraterritorial obligations to protect non-citizens from human rights abuses by the company. Relevant to this line of enquiry are the rights bestowed upon the company under international investment law agreements between the home and host states. An implicit reasonableness factor is that home state motivation for regulating or adjudicating should be primarily to bring human rights standards to bear on corporate misconduct. There should be no ulterior motives such as protectionist ones.

6. Conclusion

This article has shown that in policy terms there are often grounds for the home state’s use of extraterritorial techniques. While host state objections to these techniques based on the exclusivity of jurisdiction may be justified in relation to some incursions, this is not always the case. These objections hold greater weight when they are raised by the host states themselves in response to the extraterritorial techniques (in contrast

127 Home Office Communications Directorate, Steering Committee Report, ‘Review of Extra-Territorial Jurisdiction’ (July 1996).

128 15 USC (1977), Foreign Corrupt Practices Act (FCPA), para. 78dd-1, et seq.

129 UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 Rome Statute of the International Criminal Court, Art. 17(1).

to when they are raised purportedly on host states' behalf). Even then, their use can of course be motivated by political considerations or the desire to avoid attention being focused on the host state's role in the human rights abuse, and they can alter with regime change. It was noted, however, that from the cases and regulatory mechanisms discussed in this work, examples of host states' objections in practice are rare.

The type of extraterritorial intervention affects the assessment of it. For example, it is arguably less intrusive to litigate a tort claim concerning events that take place overseas where the home state court applies host state law than for the home state to unilaterally determine the minimum wage for workers in subsidiaries or suppliers of its corporate nationals, through extraterritorial regulation.

The foregoing discussion leads to the conclusion that infringement of exclusive jurisdiction, imperialism and neocolonialism might not be the powerful objections that they are frequently perceived to be, meaning that the dilemma in relation to them is not always intractable, as was first suggested. The necessary incursion by extraterritorial techniques into host state domestic affairs may be legal and/or justifiable in policy terms. Whether or not this is the case will vary depending on the technique being used extraterritorially and the type of human rights being brought to bear. Thus the picture is a more nuanced one than is frequently presented and is case or regulatory mechanism-specific. Judges and lawmakers need to interrogate assertions of 'imperialism' or 'infringement of exclusive host state jurisdiction': establishing whether or not the assertion is genuine and justifiable. With the methods described in Section 5 in place the jurisdictional dilemma can be confronted and extraterritorial techniques evaluated on a case-by-case or mechanism-by-mechanism basis to ensure that assertions of extraterritorial jurisdiction are kept within reasonable bounds, but human rights standards upheld. ■