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CSR AND EXTRATERRITORIAL JURISDICTION



INTERNATIONAL LAW BOUNDARIES  
TO HUMAN RIGHTS LITIGATION

## **KENDAL · HUMAN RIGHTS CONSULTING**

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Copenhagen, February 2014 / David Michael Kendal, author

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**EXECUTIVE SUMMARY:** *Summary: This Issues Paper considers a distinct aspect of Corporate Social Responsibility (CSR) which has so far received relatively limited focus in the Danish CSR debate: the international law boundaries for human rights litigation in Danish courts based on extraterritorial, including universal civil jurisdiction. The Paper discusses the extent to which Danish courts can, and should, take up cases against corporations where the harmful acts have occurred abroad and plaintiffs and defendants have only very limited ties to Denmark. What nexus requirements exist under international law for Denmark to exercise jurisdiction, and how should the need for active Danish protection of human rights and promotion of CSR policies be balanced against the risk of jurisdictional overreach.*

*The Paper sets out how in recent years the Danish Government has pursued an ambitious policy on Corporate Social Responsibility, which is to a large degree borne out in practice through partnerships with corporations, the promotion of voluntary standards, the introduction of reporting obligations and the establishment of a number of new institutions within the CSR domain.*

*The Paper notes that while Danish CSR initiatives have proliferated, Denmark has traditionally looked to non-binding measures, rather than focusing on the use of its formal court system to address human rights violations by corporations in third countries. This is fully in line with an international trend within CSR to work through partnerships with business and rely on non-binding standards. But it does not – the Paper argues – negate the need to consider questions regarding jurisdiction of domestic courts.*

*Indeed, in recent years increased attention has been building around the need to ensure legal remedies for human rights violations committed by corporations abroad. Initial discussions have begun nationally in Denmark with policy recommendations from the Council on Corporate Social Responsibility, in regional bodies such as the Council of Europe, EU and OECD as well as at the UN level.*

*The Paper considers various aspects of extraterritorial civil jurisdiction in tort cases against corporations and the international law issues this may give rise to. Though universal jurisdiction has featured prominently in a number of cases before US courts, it is argued that it is unlikely that this jurisdictional basis will, or should, gain significant traction in a Danish context. Danish exercise of jurisdiction over extraterritorial acts of corporations domiciled in Denmark (personality principle) will in some instances raise sovereignty concerns in the host state. But such jurisdiction is much less controversial under general international law than universal jurisdiction. However, it is suggested that the scarcity of tort cases regarding such extraterritorial jurisdiction based on the “personality principle” can be attributed to a traditionally strong territorial focus in tort cases, and that the forum state should be the place where the tort occurs. In recognition hereof, it is proposed that another way of approaching instances where Danish-based corporations may be involved in extraterritorial acts could be to establish a link to the territory of the forum state through focus on the “duty of care” standards that a Danish company is required to live up to. In this context practice at the recently established, and so far largely untried, non-judicial complaints system (Mediation and Complaints-Handling Institution for Responsible Business Conduct) will develop, and hopefully provide clarity over the reach of the expansive, if rather opaque, jurisdictional provisions of this body.*

*The Paper recommends a cautious approach with regard to expansion of Danish extraterritorial jurisdiction, but also a greater readiness for Danish jurisdictional rules to be applied in light of a broader set of factors than is the case today. Jurisdictional delimitation should be based on a balancing test that encompasses both the sovereign interests of the affected states and the right of victims of violations to a judicial remedy.*

## I. INTRODUCTION

The UN's key document on Corporate Social Responsibility – the Guiding Principles and Business and Human Rights – states as its first Foundational Principle that “*States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.*”<sup>1</sup>

This seemingly innocuous delimitation of the legal scope of state obligation glosses over an extremely complex and not yet settled debate about where, and over which legal subjects, a state is obliged or permitted to extend its extraterritorial jurisdictional reach. It is, however, not surprising that this issue is not resolved in the Guiding Principles,<sup>2</sup> and it remains an important question in the domain of international human rights law and Corporate Social Responsibility (CSR).

Thus, the Danish Council for Social Responsibility in 2012 recommended that the Danish government engage in international processes to find solutions to the issue of extraterritorial jurisdiction in the context of CSR, and that the government consider enacting legislation with extraterritorial reach.<sup>3</sup> This recommendation was made in recognition of the fact that Denmark has a responsibility for preventing and protecting against the adverse effects of business activities internationally and was put forward with a particular focus on the international activities of Danish companies.

This paper considers various aspects of extraterritorial jurisdiction in the context of CSR. It asks the question to what extent Danish courts can, and should, take up tort claims in cases where the harmful acts have occurred abroad, and the plaintiffs have no, or only very limited, ties to Denmark. How should the need for active Danish protection of human rights and promotion of CSR policies be balanced against the risk of jurisdictional overreach? The paper briefly reviews three aspects of extraterritorial jurisdiction: universal jurisdiction, personal jurisdiction and jurisdiction over cases in which the harm may occur extraterritorially but there is a link to the territory of the forum state through the corporate headquarters’ “duty of care” towards a legal entity within the corporate structure or, indeed, a business associate further removed.

The paper focuses on civil extraterritorial jurisdiction, specifically for torts, and suits against corporations for direct or indirect responsibility for violations of human rights and CSR standards. Thus, it does not address cases against individuals, nor jurisdictional rules relating to criminal accountability for corporations except when and in so far as this is deemed relevant for the determination of the international law boundaries for civil jurisdiction. Focus is on the jurisdictional rules, not on standards of conduct, nor on the broader issue of the applicability under international law of international crimes to acts of corporations.

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1 Guiding Principles and Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework, United Nations High Commissioner for Human Rights, New York and Geneva, 2011, HR/PUB/11/04 (hereafter Guiding Principles).

2 The issues are addressed also in a number of other Guiding Principles and their Commentaries. The commentary to Principle 2 under State Duty to Protect the following, exposes the lack of clarity through an arguably circular, dictum regarding the State’s ability to regulate extraterritorial acts of business domiciled on their territory: “Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.”

3 Danish Council for Corporate Social Responsibility, ”Rådets anbefalinger til implementering af staternes ansvar for at beskytte mod virksomheder krænkelse af menneskerettighederne” (only available in Danish) 18 January, 2012. [http://raadeforsamfundsansvar.dk/file/311099/raadets\\_anbefalinger\\_til\\_protect\\_18012012.pdf](http://raadeforsamfundsansvar.dk/file/311099/raadets_anbefalinger_til_protect_18012012.pdf)

## II. INCREASING FOCUS ON EXTRATERRITORIALITY AS PART OF A COMPREHENSIVE DANISH CSR COMMITMENT

CSR has in recent years increasingly been prioritised by Danish governments and with the publication of the *Action Plan for Corporate Social Responsibility 2012-2015*<sup>4</sup> a strong policy framework was set out for addressing CSR both at home and abroad. Significant buy-in from Danish business and NGOs has helped focus attention focused on the issue. Action has been taken in important areas such as ensuring policy coherence across governmental departments and agencies, strengthening the legislative framework, clarifying governmental expectations of corporations, expanding advisory services, increasing reporting obligations for Danish corporations and engaging actively in the international cooperation, including on the UN Guiding Principles.

The Government's claim of being "an international frontrunner"<sup>5</sup> is born out by the wide-ranging set of initiatives undertaken. Among the most prominent is the establishment of a *Mediation and Complaints-Handling Institution for Responsible Business Conduct*. This institution has a broad mandate, allowing it to receive and consider complaints based on the standards of the *2011 OECD Guidelines for Multinational Enterprises*.

The dialogue between governmental bodies and business is facilitated by the *Danish Council on Corporate Social Responsibility*. This entity, established in 2009 by the Danish Government, has a broad membership of representatives from business, trade unions, civil society and local government. It aims to support the strong position of Danish companies internationally through diffusion of CSR in business, encouraging the debate on CSR, and making Denmark and Danish companies noted for responsible growth/sustainability.

As pointed out above, it is the Council that to a large degree has put the issue of extraterritorial jurisdiction and application of Danish legislation to acts abroad on the Danish CSR agenda. Its January 2012 report recommends that the Danish government engage in international processes to find solutions to the issue of extraterritorial jurisdiction in the context of CSR. With reference to a number of the Guiding Principles and their Commentaries it is suggested by the Council that focus be directed towards both civil and criminal measures to combat "particularly serious violations". It is worth noting that here the list of such violations, apart from those crimes normally associated with extraterritorial jurisdiction for individuals (torture, war crimes), also includes slavery and "particularly extensive pollution of the environment".<sup>6</sup> The recommendation emphasizes that such expanded extraterritorial jurisdiction should be compatible with practical possibilities for investigating crimes committed abroad, and reference is made to the establishment of the *Mediation and Complaints-Handling Institution for Responsible Business Conduct*.

It is in light of this recommendation that the present Paper seeks to contribute to a better understanding of some of the international law issues that extraterritorial jurisdiction may give rise to.

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4 Responsible Growth, Action Plan for Corporate Social Responsibility, 2012-2015, Government of Denmark, March 2012.

5 Website of Erhvervsstyrelsen (Danish Business Authority) [http://csrgov.dk/international\\_frontrunner](http://csrgov.dk/international_frontrunner)

6 Page 5 of the Report. Op.cit note 3.

### III. EXTRATERRITORIAL CIVIL JURISDICTION AND INTERNATIONAL LAW

Before considering particular issues relating to extraterritorial jurisdiction and CSR, it will be useful to clarify some aspects of the terminology used in connection with discussions of this concept.

Human rights defenders have continually sought new venues for vindicating rights and protecting freedoms. Traditionally focus has been on national courts and cases concerning acts on the territory of the state in question. Increasingly during the 20th century, attention was turned to the establishment of international and regional human rights bodies which were given jurisdiction under human rights conventions to consider/adjudicate complaints by individuals against states for acts on their territory and under their jurisdiction. These efforts have brought tremendous gains for the protection of human rights and must be presumed also in the future be the main venues for vindication of human rights.

Recently, however, a new trend has emerged, particularly in the US, namely that of using domestic courts to bring tort cases against human rights violations abroad. This has proven of particular relevance to violations in developing countries where corrupt or non-functioning state bodies make the availability of effective recourse before domestic courts illusory, and where in some cases state organs actively facilitate, or are themselves responsible for, these violations.

Jurisdictional questions typically revolve around the issue of limits of *legislative/judicial* jurisdiction. Legislative jurisdiction concerns the authority of a state to regulate acts through laws or other prescriptive rules, and judicial jurisdiction has to do with the competence of courts to apply such laws. While such jurisdiction is primarily territorial, it can also apply extraterritorially: to acts of nationals abroad (active personality principle), to acts against nationals abroad (passive personality principle), to acts with effect on the territory of the legislating state (“effects doctrine” which is linked to the territorial principle) or, under certain conditions, to acts which have no connection to the legislating state (universal jurisdiction).

It should be noted that there is disagreement as to how far these jurisdictional prongs reflect a general principle of international law according to which states must positively point to a jurisdictional basis in order to exercise legislative jurisdiction. Or whether these jurisdictional prongs are in fact just ways in which states have ordered their jurisdictional rules domestically. The starting point is, of course, important because it determines which state in a jurisdictional conflict bears the “burden of proof”. Is it for the objecting state to prove illegality? Or must the state exercising jurisdiction prove that it is acting legally by pointing to an established jurisdictional basis? The latter is the more accepted view and probably the better legal position, but particularly within civil jurisdiction the fact still remains that there is very little consistency or clarity on the international law limits on jurisdiction and no comprehensive international regulation exists. Recently initiatives have been taken in eg. the Council of Europe in order to gain better common understanding of these standards particularly in a CSR context.<sup>7</sup>

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<sup>7</sup> Draft Preliminary Study on CSR in the field of human rights: Existing standards and outstanding issues, Steering Committee for Human Rights, CDDH(2012)12, Strasbourg, 4 June 2012, Work is ongoing and Denmark should actively engage in these efforts with other Council of Europe states, also with a view to gaining broader global acceptance of any conclusions that may derive from this work.

*Legislative* jurisdiction is to be contrasted with *enforcement* jurisdiction, which concerns the actual enforcement of laws through executive action. Enforcement jurisdiction is, as a general rule, strictly limited by international law to the territory of the state and is not dealt with here.<sup>8</sup>

It should be emphasized that the question of jurisdiction is related to, but also distinct from, the issue of the extraterritorial applicability of a particular law. Although a state may legally extend its jurisdiction abroad regarding particular acts or omissions, the legislation in question may not in fact apply extraterritorially. Most Danish statutes do not explicitly address the question of their territorial reach. Rather, the territorial reach of a Danish statute must be determined by an analysis of each individual piece of legislation and the legislator's intent.<sup>9</sup> Thus, one of the challenges for Danish authorities in a CSR context is to ensure clarity as to which laws and regulations apply to acts for Danish-domiciled corporations when acting abroad.

In the following a closer look will be taken at three aspects of jurisdiction in relation to harmful acts committed by corporations outside Danish territory and the international law boundaries for holding such companies<sup>10</sup> accountable in civil proceedings.

#### A. *Universal civil jurisdiction.*

Universal jurisdiction is, as noted, characterized by the fact that the basis of jurisdiction is neither territorial, personal nor in any other way linked to the state where proceedings may be undertaken (the forum state). Rather, jurisdiction is based on the premise that the issues under review are of common or universal interest to all states, and all states are therefore in principle competent to have their courts adjudicate the issue.

Perhaps surprisingly for outside observers, there is no clear answer under international law as to whether universal civil jurisdiction can legally be exercised. Even for the small group of serious human rights violations for which international *criminal* jurisdiction is relatively well established (torture, war crimes, genocide, piracy, etc.) views are divided. A key challenge is that there is no globally accepted standard in the form of conventions or treaties determining the issue with binding effect. Nor have there been any authoritative decisions by the International Court of Justice as to the boundaries of civil jurisdiction.

Rather, there is some state practice, partly in the form of domestic court cases, partly in the form of policy statements that indicate what the boundaries for civil universal jurisdiction may be.

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<sup>8</sup> Closely linked to legislative jurisdiction is the judicial jurisdiction of the courts to actually apply the said legislation. See generally regarding jurisdiction, David Kendal, "Jurisdiktion i Folkeretten – I krydsfeltet mellem jura og politik", pp.127-148" in *Max Sørensen 100 år* (Jens Hartig Danielsen (ed.)), DJØF, 2013.

<sup>9</sup> See, e.g. Chapter 3.6, "Dansk straffemyndighed, Betænkning nr. 1488", 2007, Justitsministeriet. Instead of the term "territorial application of laws" the terminology "subject-matter jurisdiction" is sometimes used as it also concerns and is a reflection of whether or not the court in question is competent to adjudicate the subject matter of a given case due to the location of the act itself. If a Danish law does not extend to a foreign territory, the Danish court does not have subject-matter jurisdiction over the act.

<sup>10</sup> It should be noted that this Paper only deals with private companies, i.e. not state-owned companies, where there are issues of immunities under general international law.



The issue of universal civil jurisdiction has been particularly hotly contested in the US courts, where a series of cases regarding the US Alien Tort Statute (ATS) has brought the issue to the fore.<sup>11</sup> The ATS was adopted in the late 18th century with the aim of combating piracy and certain other international crimes and giving US courts jurisdiction over “any civil action by an alien for a tort only committed in violation of the law of nations” (i.e. international law). The law lay dormant until the 1980s, when it was revived by human rights activists as the basis for prosecuting human rights offenders from other countries in the US.<sup>12</sup> Until recently there was real doubt as to whether ATS could be applied to purely extraterritorial conduct, i.e. where a case had no relation whatsoever to the US, or whether ATS required some connection to the US?

As a broad range of cases were making their way through the US court system, the US Supreme Court decided to take up a series of ATS cases arising from claims that Royal Dutch Petroleum (Shell) was complicit with Nigerian security forces in human rights violations against the Ogoni tribe in Nigeria (Kiobel case).<sup>13</sup> The case was purely “foreign cubed” as the plaintiffs and defendants were foreign (Shell incorporated in the Netherlands and the UK) and the alleged acts of torture, disappearances, etc. had taken place in Nigeria.

After a lengthy process in the US court system, the Supreme Court with Chief Justice Roberts writing the judgment rejected the notion that the ATS provided universal jurisdiction. Even the liberal justice Breyer, who had been sympathetic to universal jurisdiction in earlier ATS cases, concurred in this reading.<sup>14</sup> While the case will undoubtedly serve to reinforce the arguments against the existence of universal civil jurisdiction under international law, it is arguably primarily a case concerning the jurisdictional reach of a domestic US act, not one laying down international law boundaries.

A significant aspect of the case, and one which gives it broader relevance as an indicator of where general international law stands, was the great number of *amicus curia* briefs submitted by various states and organisations containing strong *opinio juris* on the legality of universal civil jurisdiction. Thus Germany, the Netherlands and the UK vociferously cautioned the US Supreme Court against a broad reading of ATS, arguing that international law does not support universal jurisdiction. These governments stated that jurisdictional restraints were imposed by international law as a fundamental underpinning of the international legal order and are essential to maintaining international peace and comity.<sup>15</sup> The risk of jurisdictional and diplomatic conflict was referred to. And it was argued that such universal jurisdiction could prevent another state with a greater nexus to such cases from effectively resolving a dispute. By way of example the UK/NL brief included reference to South African objections to a number of ATS cases against mainly foreign and South African banks and mining companies for aiding and abetting the Apartheid regime in their crimes.

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11 “Kiobel and the surprising death of universal jurisdiction under the Alien Tort Statute, Julian G. Ku, American Society of International Law”, *Agora on Kiobel*, (forthcoming), 2014

12 See eg. *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), and later *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

13 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013)

14 Justice Breyer finding that that the ATS only provides jurisdiction where the defendant is a U.S. national, or where the defendant’s conduct “substantially and adversely affects an important American national interest.” Breyer then lays out how preventing the US from becoming a safe haven for torturers constitutes an important American national interest, but rejects the notion of universal jurisdiction under ATS as such.

15 Brief of the Governments of the Netherlands and the UK, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013) (No. 10-1491).

In a declaration from 2003 the new South African government strongly opposed US courts taking jurisdiction in such cases because this conflicted with its “reconstruction, reparation and goodwill” program including the right of the government to define and finalize issues of reparations and singling out certain companies which interfered with the reconciliations efforts in South Africa.<sup>16</sup>

A great number of NGOs, academics and indeed Argentina submitted briefs in support of the plaintiffs. Also the European Commission submitted a brief in the *Kiobel* case on behalf of the EU. Although the Commission’s brief was in support of neither party, it forcefully – and perhaps somewhat unexpectedly for the three EU states that had submitted their own brief – argued for universal civil jurisdiction being legal under international law.<sup>17</sup> The Commission based this reading primarily on a simple analogy between criminal and civil law, arguing that the internationally recognized justifications for universal criminal jurisdiction (torture, certain war crimes, genocide, crimes against humanity<sup>18</sup> and piracy), although typically articulated in the criminal context, also contemplated and supported a civil component. The Commission referred to the fact that a number of the EU’s member states can exercise universal civil jurisdiction through *action civiles*, i.e. a civil claim by the victims of a crime when brought within criminal proceedings.<sup>19</sup>

Furthermore, the Commission asserted that ten European states allows civil courts to assume jurisdiction in exceptional circumstances on a “necessity basis” (*forum necessitatis*) where the claimant has no other forum available.<sup>20</sup>

The Commission was careful to point out that universal civil jurisdiction should only be considered available in cases regarding those crimes where there is universal *criminal* jurisdiction. It was contended that civil jurisdiction is less intrusive than criminal jurisdiction, and thereby the sovereignty concerns are less immediate. This conclusion can, however, be questioned particularly considering the extensive pecuniary damages that especially US courts may award in tort cases.

It was furthermore suggested by the Commission that a principle of exhaustion of local and international remedies should apply for universal civil jurisdiction to be exercised. An exhaustion rule of this nature requires that jurisdictions with a closer nexus to the case must have considered the issue, or that it must be evident that such remedies are unavailable, or that their pursuit is futile. The Commission derives the principle of exhaustion from international tribunals and complaints procedures (e.g. European Court of Human Rights and UN Human Rights bodies) and from the International Criminal Court’s complementarity principle. Intuitively, such a principle seems logical and perhaps desirable as part of a universal jurisdiction doctrine.

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16 Declaration by South African Minister of Justice, Maduna, July 11, 2003.

17 Brief of the European Commission on Behalf of the European Union in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, June 13, 2012, 133 S.Ct. 1659 (2013) (No. 10-1491)

18 It should be noted that unlike the other international crimes, there is no treaty basis for asserting universal criminal jurisdiction over crimes against humanity. A number of states have, however, conferred universal jurisdiction over this crime on their domestic courts in connection with ratification of the ICC Rome Statute, and while no duty can be said to exist to exercise universal criminal jurisdiction in these cases, there is probably a right to do so.

19 Reference is made to Cedric Ryngaert, “Universal Tort Jurisdiction over Gross Human Rights Violations”, 38 *Netherlands Yearbook of International Law*.

20 Commission brief, page 24. See further Arnaud Nuyts, “Study on Residual Jurisdiction, General Report Sept. 2007”. Available at [http://ec.europa.eu/civiljustice/news/docs/study\\_residual\\_jurisdiction\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf)

Presently, however, there would appear to be little basis in practice from domestic courts to consider such a requirement already to be established, and it is also unclear how it would play out in a state-state relationship. Rather than constituting a decisive criteria for jurisdiction, exhaustion considerations may be more suitably applied in a possible balancing test, i.e. as part of a broader assessment of whether the forum state can plausibly argue that its exercise of jurisdiction does not infringe on sovereign rights of other states but is required to protect the under-lying humanitarian interests at stake.

More generally, it is the lack of practice from domestic courts that raises questions as to the soundness of the Commission's argument regarding universal jurisdiction. While the Commission brief in general conveys a reasonable and sympathetic view of how international law could be construed, there is very little evidence to support the proposition that states believe that a general rule of civil universal jurisdiction exists under international law. Reference was made in the Commission brief to, interestingly, a Dutch case from 2012, in which a non-Dutch citizen (a Bulgarian doctor) was granted 1 million Euro in damages for torture and inhumane treatment to which he had been subjected in Libya by the Gadaffi regime.<sup>21</sup> In other words, a case of what would seem to be universal civil jurisdiction. But also here the Dutch legal basis for the claim, as with other *forum necessitatis* rules, presupposed not only necessity, but also a sufficient link with the Netherlands; in this case the plaintiff had been living in the Netherlands for some time.

In conclusion, the lesson from the Kiobel case and the ongoing debate internationally on civil universal jurisdiction is probably that caution should be exercised in extending civil jurisdiction to include universal civil jurisdiction over foreign corporations. The broad assertion of universal civil jurisdiction would risk being subject not only of political controversy but also to legal challenges based on general notions of sovereignty and comity, challenges which might very well be successful in national or international courts. Even for the select group of international crimes listed above, attempts at introducing a broad civil jurisdictional basis should arguably be avoided. This is not to say that international practice may not develop with regard to civil universal jurisdiction over corporations, but at present such initiatives would probably place Denmark out of step with the international community.

Universal civil jurisdiction over core crimes could also be seen as being problematic as the principles and standards applicable in an CSR context are significantly broader than the human rights violations for which universal jurisdiction may exist.<sup>22</sup> Promoting such universal jurisdiction would risk creating an unhelpful division between the CSR standards to be promoted and other major CSR issues such as labour rights, the large number of human rights the violation of which do not rise to international crimes, and issues relating to general working and environmental conditions.

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21 Rechtsbank Gravenhagen, 21 March 2012, no. 400882/HA ZA 11-2252 (El-Hojouj/Derba el al.) The Dutch Government strongly contested that this was a case of universal civil jurisdiction relevant to the Kiobel case for the reasons laid out above and the case, furthermore, was directed against Libyan individuals, not corporations.

22 See, e.g. "The Corporate Responsibility to Respect Human Rights, An interpretative Guide", page 9ff, elaborated by Professor Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. United Nations Human Rights Office of the High Commissioner, New York and Geneva, 2012, HR/PUB/2012; OECD Watch, Calling for Corporate Accountability, A Guide to the 2011 OECD Guidelines for Multinational Enterprises, June 2013.

## B. Personal jurisdiction/home-state jurisdiction over extraterritorial acts

Proceeding from the notion that universal civil jurisdiction is at present probably not well suited to address Danish policy concerns concerning corporate civil accountability for extraterritorial violations of human rights standards and CSR more broadly, the question arises what other jurisdictional bases may be available for such tort legislation.

It is a well-established principle of international law that a state may exercise jurisdiction over its nationals (“personality principle”). And, similarly, that a state may exercise jurisdiction over corporations that are domiciled in their territory. Thus, under general international law domestic courts in EU states have a *prima facie* right to exercise jurisdiction over any defendant corporation that is “domiciled” in the EU, irrespective of where the harm is alleged to have occurred (“the host state”) or the nationality of the plaintiff. This general principle of home-state jurisdiction is laid down in EC Council Regulation 44/2001 as amended in 2012 (Regulation (EU) No 1215/2012) with the amendments coming into effect in 2015.<sup>23</sup> It is worth noting that within the EU context the term domiciled refer only to the location of the corporation’s “statutory seat,” “central administration”, or “principal place of business.”<sup>24</sup> In this regard European jurisdictional rules differ from US rules regarding personal jurisdiction over corporations, where a much more limited corporate presence under certain conditions gives rise to jurisdiction.<sup>25</sup>

Despite what at first glance appears as very extensive “personal jurisdiction” for European courts the rules are in reality more restrictive, and there have been relatively few tort cases brought against European corporations in European courts in relation to human rights violations connected to business activities in developing countries.<sup>26</sup> There are a number of reasons for this, but the scarcity of practice in this regard can also be attributed to the strong territorial focus of European courts. Specifically in matters relating to tort, the starting point under the Brussels system is territorial, i.e. that the courts where the harmful event is alleged to have occurred will be competent.<sup>27</sup>

Though sovereignty concerns are, as noted above, much less immediate and profound when it comes to personal jurisdiction than in instances of universal jurisdiction, subjecting private actors operating abroad to legislation of the home state can still meet with resistance from host states alleging infringement of the principle of state sovereignty. Host states may object to the application of (high) standards for acts on their territory concerning labour laws, human rights

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23 EC Council Regulation 44/2001, 2001 Official Journal (Brussels Regulation). Due to its opt-out Denmark is not bound by Regulation 44/2001 directly but has acceded to the Brussels framework through the 2005 *Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, OJ L 299, 16.11.2005, p. 62–70. This set of regulations and agreements is generally referred to as the “Brussels system”.

24 As to “a dispute arising out of the operations of a branch, agency or other establishment,” a corporation may be sued “in the courts for the place where the branch, agency or other establishment is situated”.

25 See e.g. US Supreme Court, *Daimler AG v Bauman et al*, No. 11–965. January 14, 2014. It should be noted that there are a number of specific jurisdictional rules which, also in tort cases, provide jurisdiction over corporations on other bases. For example, under Danish law a corporation can in principle be sued in Danish courts, if the corporation has goods present - even only briefly - in Denmark (“godsværneting”) and even when those goods are of limited value, re. Administration of Justice Act §246.

26 Jan Wouters and Cedric Ryngaert, “Litigation for overseas corporate human rights abuses in the European Union: The Challenge of Jurisdiction,” *The George Washington International Law Review*, 2009, Vol. 40 (2009).

27 Regulation 44/200, article 5(3).

and environmental protection<sup>28</sup> arguing that this may affect economic growth and development and constitute an unwarranted interference in domestic affairs. The host state may also, as referred above regarding the Apartheid litigation in the US,<sup>29</sup> claim that such cases interfere with sensitive policy choices as to the handling of post-conflict rehabilitation and mediation.

Though not directly related to jurisdiction, other bars to corporate accountability such as doctrines regarding “act of state” and “non-justiciable political questions” may come into play.<sup>30</sup> These doctrines, which are more or less developed in various jurisdictions, also express basic sovereignty concerns relating to the appropriateness of domestic courts in the home country adjudicating acts of a governmental nature in another country.

This may particularly be the case where the harmful acts for which the corporation is sued are allegedly an integral part of state institutions’ acts in the host state.<sup>31</sup> There may, of course, also be instances where states do not object to home-state jurisdictions over a corporation’s acts abroad. For example, in the *Trafigura* case, there is no indication that the Ivory Coast raised sovereignty issues when an English court took on a mass suit from 12,500 Ivory Coast citizens over the alleged dumping of toxic waste.

In general, however, the threshold for when civil jurisdiction of the home state over the extraterritorial acts of a corporation constitutes inappropriate interference in the sovereign affairs of another state under international law is probably in the process of being raised. Unlike the criminal law sphere where there are uniform international jurisdictional rules for the most serious crimes, there are no such agreed standards regarding civil jurisdiction for tort cases. Also for this reason, the boundaries for such civil jurisdiction relating to extraterritorial human rights violations can be expected to develop slowly and unevenly as domestic courts grapple with the issues. But, as human rights principles gain importance and increased focus is put on ensuring corporate accountability in general, the scope of home state/personal jurisdiction over extraterritorial acts of corporation should be expanded.

For states like Denmark, a traditionally strong proponent of the human rights agenda, it should be considered how this process can be promoted without risking jurisdictional overreach. One way of approaching this issue could be a stronger focus on applying a balancing test in the interpretation of jurisdictional rules. In common law countries there is a tradition of applying a broad set of competing factors to determine the nexus of a case to the domestic legal sphere.

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28 In some instances the home state court will apply the tort law of the host state/the law of the place of the tort to determine a claim. Thereby sovereignty concerns over extraterritorial jurisdiction can to some extent be mitigated.

29 Op. cit. note 16.

30 See Jennicer A. Zerk, “Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas”, pp 20-21, and p. 151, June 2010, Working Paper of the Harvard Corporate Social Responsibility Initiative.

31 For example, in the above referenced *Kiobel* cases Shell was alleged to have aided and abetted violations committed by Nigerian security forces, thus potentially making the veracity of allegations against Nigerian state organs the subject of the proceedings in US courts.

This would include an analysis of, for instance, the various connecting factors of the case to the forum such as the corporate structure linking the home state and the host-state, sovereignty concerns and interest of the involved countries, possible ongoing litigation in other fora, including internationally, whether the human rights standards at play are the subject of broad criminal law jurisdiction, and the availability of evidence in the forum state.

Applying such a test, which includes broader policy issues, may put Danish courts in the unfamiliar and often unenviable position of assessing foreign policy, business and human rights interests when determining whether or not to take jurisdiction. But with the complexity of such cases it is arguably a better and more flexible approach than trying to solve these jurisdictional questions once and for all legislatively through mechanical criteria that give no discretion to the courts.

### *C. Territorial jurisdiction over extraterritorial harm – “due diligence” and “duty of care standards”*

Another way of addressing the challenges of extraterritorial jurisdiction is, where possible, for plaintiffs to seek to situate the origin of the negligent behavior of a corporation or its subsidiary in the home state, even where the harm was suffered abroad. Such an approach may be more attractive to European courts, which, as noted, have a strong preference for tort jurisdiction being exercised by the courts of the state where the wrongful behavior took place. Where a territorial nexus can be established, jurisdictional concerns are significantly reduced.

Although the plaintiffs are foreign and the harm occurred abroad, this approach is strictly speaking not an instance of extraterritorial jurisdiction. It is the acts by the corporation in the home state that come under review, and thereby provide plaintiffs with a way of framing the issue as focusing on acts and standards in the home state. Of course, this approach to corporate liability potentially has significant extraterritorial implications and can be an important remedy for plaintiffs abroad. It can also have real effect on how a parent company approaches the management of foreign subsidiaries and business partners.

Such an approach can be argued to necessitate a significant degree of clarity as to the legal characterization of various entities within a transnational corporation and their relationship to each other. It also requires clarity over what standards for “due diligence” or “duty of care” may give rise to responsibility and furthermore presuppose closer analysis of how the particular corporate structure affects the “due diligence standard”. The greater and more direct the degree of legal and factual control over a subsidiary or business associate, the stricter the standards.

A more detailed understanding of such a “due diligence standard” has been under development in recent years with extensive research and guidelines being developed particularly within the CSR field, including in the UN Guiding Principles.<sup>32</sup> This paper does not focus on the content of such a standard, but rather on the jurisdictional issues that the change in focus from the extraterritorial act of a subsidiary or a business partner to the acts of the parent company in the home state raise.

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32 For analysis on this concept see “The Corporate Responsibility to Respect Human Rights, An Interpretative Guide” op.cit., i.a. comments on Guiding Principles 16-21. See also the homepage of the The Mediation and Complaints-Handling Institution for Responsible Business Conduct <http://businessconduct.dk/due-dilligence>

This shift in focus to the territory of the forum state is interestingly illustrated by the “jurisdictional” rules of the newly established Danish complaint mechanism, the Mediation and Complaints-Handling Institution for Responsible Business Conduct (hereafter the Complaints-Handling Institution).<sup>33</sup> This institution has the mandate to make determinations regarding corporate compliance with the 2011 OECD Guidelines for Multinational Enterprises.

The Act on the Mediation and Complaints-Handling Institution for Responsible Business Conduct establishes quite expansive “jurisdiction” regarding what companies can be brought before the Complaints-Handling Institution and for what actions. On the face of this institution’s mandate the “jurisdiction” extends not only to businesses domiciled in Denmark but also to any business associate of such a corporation: By the term business associate is meant “business partners, entities in the supply chain, and other non-public or public entities that can be related directly to the business activities, products or services of the company, authority or organisation.”<sup>34</sup>

From the wording of the provision it would thus seem that complaints *directly* against such business partners can be made to the Danish the Complaints-Handling Institution which will then consider the complaint. Without any lack of restrictions on who can bring such a complaint this smacks of “universal jurisdiction” for this institution, though it is, of course, important to stress the significant difference between formal judicial proceedings and such a complaint mechanisms.

From the preparatory comments (*lovbemærkninger*) it would, however, seem that such a broad jurisdiction is in fact not anticipated, nor that the last supplier in the overseas supply chain of a Danish corporation is expected to be a party to the complaints procedure.<sup>35</sup> Rather, the preparatory comments indicate that the Danish complaints mechanisms is meant to deal with complaints regarding Danish companies and their responsibility for lack of oversight with business associates/ companies in the supply chain that have caused harm. This follows, for example, from the provision regarding the reach of the Danish-domiciled company that “*This does not concern objective liability. However, the liability of the party concerned does extend further than, for example, a company’s own entities and subsidiaries.*”

It does not appear that any practice from the Danish the Complaints-Handling Institution has led to a more detailed consideration of the jurisdictional reach of the institution, including whether Section 3 (4) should be read as a provision regarding territorial jurisdiction over Danish companies and their potential liability for violation of due diligence standards with regard to “business associates”, and indeed subsidiaries abroad. Or whether Section 3 (4) is in fact closer to a “universal jurisdiction” provision allowing the institution to receive and consider complaints against any company which falls under the definition of a “business associate” in the Act.

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33 Act no. 546 of 18 June, 2012, Danish Ministry of Business and Growth, Act on a Mediation and Complaints-Handling Institution for Responsible, Business Conduct. This institution also serves as the Danish OECD National Contact Point.

34 Section 3 (4) of the Act. <http://businessconduct.dk/file/298159/act-on-mediation.pdf> (unofficial translation). It would seem that this expansive definition is meant to reflect the scope of the responsibility to respect human rights that is laid down in Guiding Principle 13 of the UN Guiding Principles. As noted below, the distinction between “jurisdictional” reach and the substantive obligation of due diligence has perhaps been conflated here.

35 Remarks to the Act on a Mediation and Complaints-Handling Institution for Responsible Business Conduct, page 13, Folketinget 2011/12. <http://businessconduct.dk/file/302379/minister-of-business-and-growth-remarks.pdf>

It would seem likely that the former approach will be followed, thereby contributing to a greater understanding of the “duty of care” standard within the non-binding complaints system and thereby a strengthening of the relevant OECD standards in this field. To what extent, and how, such standards will transfer to the formal system is difficult to foresee but it seems unlikely that the two venues for ensuring corporate compliance with human rights standards will remain separate.

#### **IV. CONCLUSION AND RECOMMENDATIONS**

Historically, few rules on civil jurisdiction over extraterritorial acts have been established either through treaty or general practice. Unlike the case with criminal jurisdiction, attempts at international codification and development of global standards have been inconsistent and yielded few results. Rather, principles for civil jurisdiction have largely developed within domestic and regional legal systems.

The lack of a global framework for civil jurisdiction over corporations has been manageable because many transnational disputes between corporations involving issues of extraterritoriality have been settled through negotiation, arbitration or by other means available in a traditional business context. Where such disputes have been contractual, the question of jurisdiction and choice of law will often have been regulated in the contract itself, reflecting the will of the parties.

Corporate Social Responsibility by its very nature focuses on the relationship between the corporation and the societies they operate in, be it at home or abroad. Underlying CSR standards are fundamental rights and freedoms that, although formally owed to individuals by states, contain important principles of relevance to virtually all aspects of a corporation’s relationship with the surrounding society.

Much has been done in the way of “de-legalising” the CSR debate and of working with business through voluntary standards and non-binding dispute settlement mechanisms. It would, however, be surprising if this approach was not increasingly followed up by more suits before domestic courts.

It is on that basis that the present Paper has considered a number of jurisdictional questions relating to CSR and extraterritoriality. The Paper serves primarily as an overview of key issues in existing international law civil jurisdiction and setting out some of the questions that the Danish government may be confronted with in its continuing work on CSR and extraterritoriality. The conclusion and recommendations made throughout the paper can be summarized as follows.

- The promotion of voluntary standards and non-judicial complaints mechanisms remain the best venue for promoting CSR in an inclusive fashion. However, litigation before the regular courts against also Danish corporations for extraterritorial acts can be expected to increase and with it jurisdictional disputes. Public perception of CSR standards as being universally applicable, and by extension immune to general sovereignty concerns, may lead to criticism of narrow (interpretations of) jurisdictional rules. Denmark should develop a clear policy response to such potential criticism and consider possible modifications that this gives rise to.



- Universal civil jurisdiction over tort claims remains at the outer limit of international law as it stands today. A general expansion of Danish jurisdiction to cover cases with no significant link to Denmark can be expected to be met by objections by both the business community and other states. This is probably the case even for civil suits relating to international crimes (such as torture, war crimes, crimes against humanity, genocide, etc) where international law allows, or obliges, states to exercise universal criminal jurisdiction. While Denmark may at the international level seek to promote a broader acceptance for universal civil jurisdiction for a limited category of crimes, it is not recommended that Denmark at present, domestically and unilaterally, take significant steps towards expanding Danish civil jurisdiction in this regard.
- Basing extraterritorial jurisdiction on the nationality or domicile of a corporation significantly reduces sovereignty concerns. However, subjecting acts on foreign soil to Danish jurisdiction will in many instances nevertheless raise criticism from the host state and corporations.

Taking jurisdiction over such cases should only happen on the basis of a comprehensive balancing of all relevant interests of the states and other actors concerned. Denmark should ensure that its legislative framework allows its courts to perform such an assessment that include a broad range of criteria such as the various connecting factors of the case to the forum, the corporate structure linking the case to the states involved, sovereignty concerns relevant states in the subject-matter of the case, possible ongoing litigation in other fora, including internationally, whether the human rights standards at play are the subject of universal criminal law jurisdiction, and the availability of evidence in the forum state.

- Seeking to situate the origin of negligent corporate behavior of a corporation or its subsidiary in the home state, even where the harm was suffered abroad, is an effective way of addressing and in some instances circumventing sovereignty concerns. Where a territorial nexus to the forum state can be established, jurisdictional concerns are significantly reduced. Working to clarify corporate duty of care standards are important also in the formal dispute settlement system. In this context, the UN Guiding Principles and OECD developed for application in non-binding fora can positively influence and guide the judicial standard. Denmark should carefully analyze the effect that non-binding bodies such as the Mediation and Complaints-Handling Institution for Responsible Business Conduct may have on the formal court system both with regard to jurisdictional limits and standards, and as appropriate seek to ensure consistency.
- Denmark should actively engage in international efforts to clarify the limits under international law for the exercise of civil jurisdiction relating to CSR. The ongoing work in the Council of Europe in this respect provides an opportunity for gaining common regional understanding on principles, if not agreement on treaties, and these results could be sought expanded to other regional and global bodies.