

## Reflections on ‘Reasonableness’ in the Restatement (Fourth) of US Foreign Relations Law

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### 1. Introduction

In public international law, ‘jurisdiction’ may be defined as ‘the exercise of sovereign power or authority’.<sup>1</sup> As famously described in the *Island of Palmas* case, ‘sovereignty in the relations between States signifies independence’.<sup>2</sup> Yet, as noted by Oxman, while the ‘power to take action derives from sovereign independence’, its ‘scope and exercise’ is ‘circumscribed’ by sovereign equality.<sup>3</sup> Sovereign equality, however, remains a difficult norm to define, and there is very little clarity on how it should be operationalised in a jurisdictional context.<sup>4</sup> This is important because, in a globalised world, states’ regulatory acts will quickly have effects beyond their territories. Even when one state’s laws do not directly conflict with those of others, they may still encroach upon the regulatory space of other equal states. Furthermore, concurrent jurisdictional claims may

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<sup>1</sup> ‘Report of the International Law Commission on the Work of its 58th Session’ (1 May-9 June and 3 July-11 August 2006) UN Doc A/61/10, Annex E (ILC Report on Extraterritorial Jurisdiction) 517.

<sup>2</sup> *Island of Palmas (United States v The Netherlands)* (1928) II RIAA 829 838.

<sup>3</sup> B Oxman, ‘Jurisdiction of States’, in R Wolfrum (ed), *Max Planck Encyclopaedia of Public International Law (online ed)* (OUP 2007) 1.

<sup>4</sup> See eg M Koskenniemi, ‘What Use for Sovereignty Today?’ (2011) 1 *Asian J Intl L* 61.



result in overregulation of specific fields, inhibiting equitable burden-sharing and overall effectiveness.<sup>5</sup>

Against this backdrop, the Third and Fourth Restatements of the Foreign Relations Law of the United States (hereafter ‘Third’ and ‘Fourth Restatement’) offer a valuable discussion on the extent to which states must consider the interests of other states when exercising jurisdiction.<sup>6</sup> In the literature this is often referred to as jurisdictional interest-balancing or ‘reasonableness’.<sup>7</sup> As a source of legal discourse, these Restatements of the American Law Institute offer a perspective on international law ‘as it applies to the United States’, though the Fourth Restatement stresses that it ‘seeks to distinguish clearly between rules of U.S. domestic law and rules of international law’.<sup>8</sup>

Not only do these documents offer a uniquely comprehensive analysis of this topic, they also illustrate a striking transition in perspective on the legal nature and operationalisation of jurisdictional interest-balancing. Where the 1987 Third Restatement contained an extensive second-order ‘rule-of-reason’ which it asserted to be customary law, the 2018 Fourth Restatement considers second-order interest-balancing primarily a question of comity.<sup>9</sup> This article will reflect on these developments from the perspective of public international law. To foreground the analysis, Section 2 briefly sets out the theoretical framework of state jurisdiction and interest-balancing in international law. Comparing ‘reasonableness’ in the Third and the Fourth Restatements, Section 3 then examines the

<sup>5</sup> See for an economics-oriented perspective on the optimal level of regulation, J Trachtman, ‘Externalities and Extraterritoriality, the Law and Economics of Prescriptive Jurisdiction’ in J Bhandari, A Sykes (eds), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (CUP 1997). See also on the risk of overregulation, C Ryngaert, *Jurisdiction in International Law* (2nd edn, OUP 2015) 185.

<sup>6</sup> *Restatement (Third) of the Foreign Relations Law of the United States* (Am Law Inst 1987) (Third Restatement); *Restatement (Fourth) of the Foreign Relations Law of the United States* (Am Law Inst 2018) (Fourth Restatement).

<sup>7</sup> See eg AF Lowenfeld, ‘Sovereignty, Jurisdiction, and Reasonableness: A Reply to A. V. Lowe’ (1981) 75 *AJIL* 629; BJ Gans, ‘Reasonableness as a Limit to Extraterritorial Jurisdiction’ (1985) 62 *Wash ULQ* 681; HG Maier, ‘Interest Balancing and Extraterritorial Jurisdiction’ (1983) 31 *Am J Comp L* 579; Ryngaert (n 5) 152.

<sup>8</sup> See, W Dodge, ‘Jurisdiction in the Fourth Restatement of Foreign Relations Law’ (2016/2017) 18 *YB Private Intl L* 143, 145, comparing the Fourth Restatement, Introduction to the Third Restatement’s definition of ‘US Foreign Relations Law’.

<sup>9</sup> Third Restatement (n 6) §403, comment a; Fourth Restatement (n 6) §407, Reporters’ Note 6.



recharacterization of this principle from one of custom, to one primarily of comity. Building on this, Section 4 critically analyses the reframing of reasonableness from an international law perspective. It is argued that, despite their amorphous nature, more attention is needed for the role of binding international norms in informing national comity principles.

## 2. *Theoretical framework: state jurisdiction and interest-balancing*

As the nature of 'reasonableness' is a very conceptual question, it is helpful to briefly outline the theoretical framework in which it operates. To start with, jurisdiction can be divided into different types, the focus of this reflection being on prescriptive jurisdiction, which is 'the authority of a state to make its law applicable to particular persons or circumstances'.<sup>10</sup> This must distinguished from a state's enforcement jurisdiction 'to ensure compliance with its laws', and adjudicative jurisdiction to subject cases to be tried and determined by a state's courts.<sup>11</sup> Notably, it is a prerequisite for the validity of both adjudicative and enforcement measures that they in turn be based on a valid act of prescriptive jurisdiction.<sup>12</sup>

Customary international law recognises several 'bases' or principles of prescriptive jurisdiction. The most well-accepted of these is that states may regulate conduct and circumstances within their territory.<sup>13</sup> In addition, according to the nationality principle, states may exercise jurisdiction over their nationals both in respect of their actions and when they are injured abroad (respectively active and passive nationality).<sup>14</sup> The protective principle provides a basis for jurisdiction over conduct that threatens vital national interests.<sup>15</sup> A more controversial basis is the effects doctrine, defined in the Third Restatement as state jurisdiction over 'conduct

<sup>10</sup> International Bar Association, 'Report of the Taskforce on Extraterritorial Jurisdiction' (2009) available at: <[tinyurl.com/task-force-etj-pdf](http://tinyurl.com/task-force-etj-pdf)> 7.

<sup>11</sup> M Kamminga, 'Extraterritoriality' in R Wolfrum (n 3) 1.

<sup>12</sup> ILC Report on Extraterritorial Jurisdiction (n 1) 521.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid* 522.

<sup>15</sup> See further, Harvard Draft Convention on Jurisdiction with Respect to Crime, 'Article 7. Protection-Security of the State' (1935) AJIL Supplement: Research in International Law 543.



outside its territory that has or is intended to have substantial effect within its territory'.<sup>16</sup> This has notably been 'upgraded' in the Fourth Restatement to its own independent Section 409, based on the observed increase in its acceptance by other states over recent years.<sup>17</sup> Finally, the universality principle allows for the exercise of jurisdiction in the absence of any specific link to the legislating state, for grave criminal offenses.<sup>18</sup>

In determining the existence of a valid basis for jurisdiction, an accepted approach is to turn to the 'common element' underlying the extraterritorial principles, namely the 'valid interest' of the asserting state 'on the basis of a sufficient connection to the persons, property or acts concerned'.<sup>19</sup> This is also referred to as the 'sufficient nexus' or 'genuine connection' requirement, described by some as its own 'single broad principle' of jurisdiction.<sup>20</sup>

There is comparatively less consensus, however, on how and where the interests of other states should be taken into account. To date one of the only authorities from an international tribunal has been the Separate Opinion of Judge Fitzmaurice to the 1970 *Barcelona Traction* case.<sup>21</sup> There he noted that international law involves 'an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another State'.<sup>22</sup> Over the past half century there has remained, however, much debate as to whether state practice of jurisdictional self-restraint is done out of a sense of *obligation*. This discussion also lies at the heart of the developments from the Third to the Fourth Restatement, which will now be examined further in Section 3.

<sup>16</sup> See, US Third Restatement (n 6) §402(1), comment d.

<sup>17</sup> See Fourth Restatement (n 6) §409, Reporters' Note 5.

<sup>18</sup> R O'Keefe, 'Universal Jurisdiction Clarifying the Basic Concept' (2004) 2 J Intl Criminal Justice 735, 745.

<sup>19</sup> ILC Report on Extraterritorial Jurisdiction (n 1) 521

<sup>20</sup> See for example, J Crawford, *Brownlie's Principles of Public International Law* (8th edn, OUP 2012) 447; FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 9; Fourth Restatement (n 6) §407, Reporters' Note 2.

<sup>21</sup> ICJ, *Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain)* [1970] ICJ Rep 3, 105 Separate Opinion, Judge Fitzmaurice.

<sup>22</sup> *ibid.* See further, Ryngaert (n 5) 154.



### 3. The route of reasonableness from the Third to the Fourth Restatement

There is a good reason why the United States' Restatements contain some of the most comprehensive discussions on the notion of jurisdictional reasonableness. It was namely there that the rise of the controversial effects-based jurisdiction sparked much international criticism for failing to take into account foreign interests.<sup>23</sup> Drawing on the work of commentator Professor Kingman Brewster and developments in national case law (in particular the *Timberlane* and *Mannington Mills* cases), the Third Restatement incorporated an extensive interest-balancing test for prescriptive jurisdiction.<sup>24</sup> This was a second-order inquiry, preventing a state from exercising jurisdiction '[e]ven when one of the bases for jurisdiction ... is present' (Section 403(1)). The interests to be considered included the 'traditions of the international system', 'the extent to which another state may have an interest in regulating the activity' and 'the likelihood of conflict with regulation by another state' (Section 403(2)).

While inspired by antitrust law, the provision asserted to represent a requirement of customary international law.<sup>25</sup> As noted by commentators however, the basis for this claim was already quite thin.<sup>26</sup> Matters got worse when subsequent practice of US courts did not embrace the enthusiasm of the drafters. Thus in the 1984 *Laker Airways* case, it was found that 'there is no evidence that interest-balancing represents a rule of international law'.<sup>27</sup> Valid questions were also raised as to national courts' ability to 'neutrally' 'balance competing foreign interests', and the 'inherent noncorrelation between the interest balancing formula and the

<sup>23</sup> See further on the controversial development of the effects-doctrine, DL Hacking, 'The Increasing Extraterritorial Impact of U.S. Laws: A Cause for Concern Amongst Friends of America' (1979) 1 *Northwestern J Intl L Business* 1; EL Gilioli, 'Defining Jurisdictional Limits in International Antitrust: Should the EEC Adopt the Timberlane Approach?' (1981) 5 *Fordham Intl L J* 469.

<sup>24</sup> Third Restatement (n 6) §403; *Timberlane Lumber Co. v Bank of America (Timberlane I case)*, 549 F.2d 597 (9th Cir. 1976) *remanded*, 574 F Supp 1453 (N D Cal. 1983); *Mannington Mills, Inc. v Congoleum Corp*, 595 F.2d 1287 (*Mannington Mills*) (3d Cir. 1979); K Brewster, *Antitrust and American Business Abroad* (Shepard's/McGraw-Hill 1958) 301.

<sup>25</sup> Third Restatement (n 6) §403, comment a.

<sup>26</sup> See eg Ryngaert (n 5) 154, noting that the only source referred to for this statement is the German *Kammergericht* decision *Philip Morris/Rothmans*, Decision of 1 July, 1983, Kart 16/82. See also, Dodge (n 8) 152.

<sup>27</sup> *Laker Airways* 731 F.2d 909, 950 (D.C. Cir. 1984).



economic realities of modern commerce'.<sup>28</sup> Later, in *Hartford Fire Insurance*, the majority of the US Supreme Court also refused to engage in an extensive interest-balancing, focusing instead on whether 'there is in fact a true conflict between domestic and foreign law'.<sup>29</sup>

Noting that 'state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law', the Fourth Restatement adopts a different approach.<sup>30</sup> To start with, it 'gives effect to the principle of reasonableness by requiring a genuine connection between the subject of the regulation and the state seeking to regulate'.<sup>31</sup> At the same time it notes that 'states often seek to reduce conflicts of prescriptive jurisdiction through various rules of domestic law that are often motivated by international comity but not required by international law'.<sup>32</sup> This new approach is based on the conclusion that on the one hand, 'reasonableness in the sense of showing a genuine connection' constitutes 'an important touchstone' of international law.<sup>33</sup> On the other hand, there is insufficient state practice to support a legal requirement of 'case-by-case balancing to establish reasonableness'.<sup>34</sup> Compositely, comment c to Section 407 notes that international law poses no 'rules for assigning priority to competing jurisdictional claims'. Establishing reasonableness as a matter of international law is then no longer a second-order inquiry but a first-order question of identifying a jurisdictional basis. Further exercises of jurisdictional restraint reflect reasonableness as a matter of prescriptive comity.

In the United States, reasonableness as comity is 'reflected in Section 402(2) with respect to the exercise of jurisdiction to prescribe and in

<sup>28</sup> *ibid.* 951-2.

<sup>29</sup> *Hartford Fire Ins Co v California*, 509 US 764, 799 (1993). Justice Scalia's Dissenting Opinion in which he distinguished between adjudicative and prescriptive comity, was notably influential here.

<sup>30</sup> *ibid.* §407, Reporter's Note 3. Reference is also made to EU cases Joined Cases 89, 104, 114, 116, 117 and 125-129/85, *A Ahlstrom Osakeyhtiö v Commission* [1988] ECR 5193 (*Wood Pulp*), where a narrow 'true-conflict' analysis was used.

<sup>31</sup> *ibid.* §407, Reporters' Note 6.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid.* §407, Reporters' Note 3.

<sup>34</sup> Professor Dodge thus notes that the United States' approach to reasonableness is 'unilateral', 'only asking whether US law should be applied'. See, W Dodge, *Reasonableness in the Restatement (Fourth) of Foreign Relations Law*, 54 *Willamette L Rev* (forthcoming 2019) available at <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3373370](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373370)>.



Sections 404-405 with respect to questions of judicial interpretation'.<sup>35</sup> According to Section 402(2), '[i]n exercising jurisdiction to prescribe, the United States takes account of the legitimate interests of other nations as a matter of prescriptive comity'. Legislatures demonstrate prescriptive comity when they 'confine the scope of statutes to a greater extent than international law requires'.<sup>36</sup> Courts may notably do so too when they 'limit the geographical scope of a federal-common-law cause of action', and excuse legal compliance in line with the foreign state compulsion doctrine.<sup>37</sup> Of particular interest here is also that courts follow prescriptive comity when interpreting the law's geographical scope under the principles of interpretation in Section 404 (presumption against extraterritoriality) and Section 405 (reasonableness in interpretation).<sup>38</sup>

Throughout the Fourth Restatement, considerable emphasis is placed on the relationship between state practice and the formation of customary international law. Thus it is noted that 'state practice may contribute to the development and interpretation of customary international law if it is done out of a sense of legal right or obligation'.<sup>39</sup> Such practice must be contrasted with that done on the basis of 'international comity', which is defined as 'deference to foreign states that is *not* required by international law'.<sup>40</sup> As such 'US practice restricting the geographical scope of US law as a matter of international comity is not evidence of what customary international law requires, because it is not followed from a sense of international legal obligation'.<sup>41</sup> As will now be argued, however, this approach risks overlooking an important role of international law in informing national comity.

<sup>35</sup> Fourth Restatement (n 6) §402, Reporters Notes 13.

<sup>36</sup> *ibid* §402, Reporters' Note 3.

<sup>37</sup> *ibid*.

<sup>38</sup> *ibid*.

<sup>39</sup> *ibid* §401, Reporters' Note 2.

<sup>40</sup> *ibid* Chapter 1: Prescription, Introduction, 147 (emphasis added).

<sup>41</sup> *ibid* §402, Reporters' Note 3. See further on the nature and role of international comity, W Dodge, 'International Comity in a Comparative Perspective' in C Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP 2019) 701.



#### 4. *Reflections on Reasonableness in the Fourth Restatement*

As seen in Section 3, the Fourth Restatement focuses considerably on the formation of customary rules of jurisdictional restraint, and emphasis is placed on the voluntary nature of interest-balancing practice in the US.<sup>42</sup> This is understandable given that the Third Restatement's characterisation of Section 403 as custom rested on a very tenuous basis. As suggested by Professor Dodge, this perhaps offered an opportunity for international acceptance rather than a confirmation of it.<sup>43</sup> It is argued here, however, that more attention is needed for the opposite dynamic, namely the role of customary rules in (in)forming comity. In light of the interaction between international law and comity, it is questionable whether one can establish such a defined boundary between acts committed out of a sense of obligation and acts committed voluntarily.

That international law has a limiting role to play, comes down to the nature of jurisdiction as an exercise of sovereignty. In the words of Koskeniemi, '[i]n practice, we have used sovereignty to limit sovereignty.'<sup>44</sup> By logical implication, where a jurisdictional assertion may interfere with the legitimate sovereign interests of other states, this principle requires that consideration be given to these interests as matter of international law. Also of relevance here are the principles of non-intervention and non-interference, which are derived from the '*Grundnorm*' of sovereign equality, and serve to realise its protection.<sup>45</sup> As will now be discussed, this is not a new or revolutionary idea. Professor Meessen put it clearly in his 1948 contribution:

'Under that principle [of sovereign equality], each state must have an equal opportunity to exercise its sovereignty, i.e., in the present context, to pursue the regulatory goals it has decided to adopt. If the pursuance of those goals conflicts with those of other states, *reconciliation must be sought on a basis of equality*'.<sup>46</sup>

<sup>42</sup> Fourth Restatement (n 6) §401, Reporters' Note 1.

<sup>43</sup> See the contribution in this issue, W Dodge, 'Jurisdictional reasonableness under customary international law: The approach of the Restatement (Fourth) of US Foreign Relations Law' (2019) 62 QIL-Questions Intl L 5.

<sup>44</sup> Koskeniemi (n 4) 62.

<sup>45</sup> See further eg J Kokott, 'States, Sovereign Equality' in Wolfrum (n 3) 1.

<sup>46</sup> KM Meessen, 'Antitrust Jurisdiction under Customary International Law' (1984) 78 AJIL 783, 804 (emphasis added).





According to Professor Meessen, '[n]ormally, *reducing the foreign-related impact of regulatory action* is sufficient to maintain sovereign equality'.<sup>47</sup>

Accepting this argument, there appears to be more to these sovereignty-conditioning principles than is reflected in the 'genuine connection' requirement alone, at least as the latter is defined in the US Fourth Restatement. The 'genuine connection' requirement focuses only on the interests of the acting state.<sup>48</sup> The US practice of considering other states' interests through its comity principles is characterised as voluntary. Where then does this leave the binding sovereignty-conditioning principles, which undoubtedly remain *applicable* to jurisdictional acts?

On one approach, the genuine connection requirement may be constructed so that it is relative to other claims. *Oppenheim's International Law* for example, formulates the substantial connection threshold as a 'sufficiently close connection to justify that state in regulating the matter and perhaps also to override any competing rights of other states'.<sup>49</sup> This approach is however not supported here. In essence it would still necessitate a case-by-case interest-balancing requirement to determine whether there is a 'reasonable' connection to 'override' claims of other states. This would raise problems given the established lack of supporting state practice and *opinio juris*, and the absence of clear rules assigning priority to concurrent jurisdictional claims.

It is argued here that more attention is needed for sovereignty-conditioning principles in a different manifestation. Rather than mandating hard-and-fast customary rules of priority, they play an important role in informing the development of national comity principles. This interaction is described clearly in the Canadian case *R v Hape*, concerning the extraterritorial application of Section 8 of the Canadian Charter of Rights and Freedoms on protection against 'unreasonable search and seizure'.<sup>50</sup> While the extraterritorial application of human rights laws differs from the general rules of prescriptive jurisdiction discussed here, the finding on the relationship between comity and binding legal principles is relevant in both contexts. In determining whether the Charter applied to

<sup>47</sup> *ibid.*

<sup>48</sup> Fourth Restatement (n 6) §407, comment b.

<sup>49</sup> R Jennings, A Watts, *Oppenheim's International Law* (9th edn, OUP 1992) 456–8. See also, Crawford (n 20) 456–7.

<sup>50</sup> *R v Hape* 2007 SCC 26.



searches and seizures carried out by Canadian authorities outside of Canada,<sup>51</sup> the Majority judgment, given by Justice LeBel, held that as sovereign equality and its ‘foundational principles’ of non-intervention and respect for territorial sovereignty are binding upon all states, they ‘must also be drawn upon in determining the scope of extraterritorial application of the Charter’.<sup>52</sup> Highlighting the interaction between customary law and comity, it was then held that:

The nature and limitations of comity need to be clearly understood. International law is a positive legal order, whereas comity, which is of the nature of a principle of interpretation, is based on a desire for states to act courteously towards one another. Nonetheless, *many rules of international law promote mutual respect and, conversely, courtesy among states requires that certain legal rules be followed*. In this way, “courtesy and international law *lend reciprocal support* to one another”. ... The principle of comity reinforces sovereign equality and contributes to the functioning of the international legal system’.<sup>53</sup>

Drawing on these findings, the judgement interpreted the scope of the Charter ‘in light of ... the direct application of international custom, territorial sovereignty and non-intervention as customary rules, and comity and the presumption of conformity as tools of construction’.<sup>54</sup>

As this case concerned enforcement jurisdiction, the interaction was quite clear. Based on comity, the Canadian officers could voluntarily participate in investigations abroad, but, based on the principles of sovereign equality and non-intervention, ‘they must do so under the laws of the foreign state’.<sup>55</sup> Justice LeBel did also consider prescriptive jurisdiction in the abstract, but defined the ‘real and substantial link’ requirement in the relative sense.<sup>56</sup> Still, this requirement was constructed with a clear interrelationship between comity and international law, the judgment providing that ‘what constitutes a “real and substantial link” justifying

<sup>51</sup> *ibid* para 24.

<sup>52</sup> *ibid* para 46.

<sup>53</sup> *ibid* paras 48, 50 (references omitted).

<sup>54</sup> *ibid* para 56.

<sup>55</sup> Though there may be exceptions when a state consents to the Charter’s extraterritorial application. See *ibid* paras 99, 106, 112.

<sup>56</sup> *ibid* para 62, referring to *La Forest J.* noted in *Libman v The Queen* [1985] 2 S.C.R. 178, 213.



jurisdiction may be “coterminous with the requirements of international comity”<sup>57</sup>.

Much then comes down to how one defines international comity, as some would argue that it cannot be meaningfully separated from international law.<sup>58</sup> However, even if one were to sharply distinguish between these two categories, international law, as a separate body of norms, continues to apply. One could in fact consider *further* legal principles beyond those related to sovereign equality. Indeed, Professor Ryngaert has noted that ‘despite a dearth of State practice as to the application of the rule of reason’ other ‘general principles of international law’ such as proportionality and abuse of rights ‘may subsume more specific principles of jurisdiction that could inform a practice of jurisdictional restraint or reasonableness on the part of States’.<sup>59</sup>

An interesting recent case in this regard is *Glawischnig-Piesczek v Facebook Ireland Limited*, where the Court of Justice of the EU (CJEU) considered the permissibility of injunctions from EU Member State courts ordering data removal by host providers.<sup>60</sup> There the CJEU explicitly considered whether the Electronic Commerce Directive precluded injunction measures ‘from producing effects worldwide’.<sup>61</sup> Given the absence of a territorial limitation in the relevant provision, ‘with reference’ also to the discretion left to EU Member States, the court found that it did not.<sup>62</sup> ‘However’, the judgment continued, ‘in view of the global dimension of electronic commerce, the EU legislature considered it necessary to ensure that EU rules in that area are consistent with the rules applicable at an international level’.<sup>63</sup> Presumably by extension, it was left ‘up to Member States to ensure that the measures which they adopt and which produce effects worldwide take due account of those rules’.<sup>64</sup> While the court did not make specific reference to sovereignty-conditioning principles, it arguably left room for this, finding that the Directive

<sup>57</sup> *ibid.*

<sup>58</sup> See for discussion, Ryngaert (n 5) 147, noting that: ‘Comity is widely believed to occupy a place between custom and customary international law’.

<sup>59</sup> Ryngaert (n 5) 181, 231.

<sup>60</sup> Case C-18/18 *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* (3 October 2019).

<sup>61</sup> *ibid* para 21.

<sup>62</sup> *ibid* paras 49, 29.

<sup>63</sup> *ibid* para 51.

<sup>64</sup> *ibid* paras 49, 52.

permitted such injunctions ‘within the framework of the relevant international law’.<sup>65</sup>

This then, however, leaves an evidentiary dilemma. It is very difficult to determine which part of an act of jurisdictional self-restraint is done on a voluntary basis and which is adhered to as a matter of law.<sup>66</sup> Consequently, acts of self-restraint are very likely to reflect both. An important catalyst when considering the influence of binding norms on state practice is the doctrine of consistent interpretation with international law. As noted by the International Law Association, this is a well-accepted principle in a ‘significant number’ of other national and supranational legal orders, including for example, Germany (*Völkerrechtsfreundlichkeit*), Switzerland (*Schubert—Praxis*), Australia (principle of consistent interpretation), and the EU (principle of consistent interpretation of EU law with international obligations).<sup>67</sup>

The principle can also be found in Section 406 of the Fourth Restatement on ‘Interpretation Consistent with International Law’.<sup>68</sup> Notably, Section 406 is not characterized as reflecting ‘reasonableness’, but rather as general rule of statutory interpretation. The latter is not superseded by reasonableness but rather ‘works in combination’ with it.<sup>69</sup> Regardless of the characterisation of this interpretative rule, its effect is to blur the distinction between voluntary acts and those done out of a sense of obligation. As this doctrine operates alongside other reasonableness or comity principles, it inevitably affects state practice over time. It then cannot be said with certainty that when states restrict the geographical scope of their laws, despite having a genuine connection to the regulated subject matter, this is done purely on a voluntary basis.

<sup>65</sup> *ibid* para 53.

<sup>66</sup> See further on the hurdles of identifying *opinio juris* for legitimate jurisdictional assertions, Harvard Draft Convention on Jurisdiction with Respect to Crime (n 15) 546; Ryngaert (n 5) 42.

<sup>67</sup> See for further detail, A Tzanakopoulos, ‘Principles on the Engagement of Domestic Courts with International Law’ (ILA 2012) Preliminary Report 8. The principle of ‘conformity with international law’ was also discussed extensively in *R v Hape* (n 50) para 53.

<sup>68</sup> See *Murray v Schooner Charming Betsy* (1804) 6 U.S. (2 Cranch) 64, 118, where the court held that ‘an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains’.

<sup>69</sup> Fourth Restatement (n 6) §405, Reporters’ Note 3.



At this junction it is also interesting to look at Section 405 of the Fourth Restatement containing a principle of reasonableness in interpretation. According to this principle, 'as a matter of prescriptive comity', US courts 'may interpret federal statutory provisions to include other limitations on their applicability'. The accompanying comment elaborates on this, providing that 'in interpreting the geographical scope of federal law, courts seek to avoid unreasonable interference with the sovereign authority of other states'. In support, the comments and Reporters' Notes refer repeatedly to the 2004 *Hoffman-La Roche v Empagran* case.<sup>70</sup> There, the Supreme Court held that it 'ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations'.<sup>71</sup> However in doing so, it in fact went on to hold that 'this rule of construction reflects principles of *customary international law*—law that (we must assume) Congress ordinarily seeks to follow'.<sup>72</sup> As such, legislators are 'cautioned' to 'take account of the legitimate sovereign interests of other nations when they write American laws'.<sup>73</sup>

Interestingly, the reference to customary international law does not appear to have been given much weight in the Fourth Restatement. It could be that the finding in one domestic case is not considered determinative of what international law requires. Still, from an international law perspective it would seem logical that the comity principle of reasonableness in interpretation is informed by the international law principle of non-interference.

That being said, doubts can be raised as to whether the application of Section 405 actually places primacy on non-interference. When another state has jurisdiction to prescribe under international law, its sovereign interests will be considered 'legitimate'. However, 'prescriptive comity does not seek to avoid *all* interference' rather only '*unreasonable* interference' with these interests.<sup>74</sup> The catch is in the rule that interference may be reasonable 'if application of federal law would serve the legitimate interests of the United States'. Whenever the US can claim a 'genuine connection', this will then automatically justify any interference

<sup>70</sup> *F Hoffmann-La Roche Ltd et al v Empagran SA et al (Empagran)* (2004) 542 US 155.

<sup>71</sup> *ibid* 162.

<sup>72</sup> *ibid* 162 (emphasis added).

<sup>73</sup> *ibid* 164-165.

<sup>74</sup> Fourth Restatement (n 6) §405, comment b (emphasis added).



with the sovereign interests of other nations, doing away with interest-balancing. Arguably, far from illustrating self-restraint to a greater extent than required by international law, the principle of reasonable interpretation in Section 405 may in fact contradict the principle of non-interference and the *Grundnorm* of sovereign equality.

The arguments above assume that there is a ‘core’ of international law that may be effectuated and built upon by international comity. Admittedly however, there remains very little clarity on how this core should be defined. It is submitted that, rather than focusing on priority and whether jurisdiction may be exercised, perhaps these norms may tell us more about how jurisdiction should be exercised. Specifically, they may provide an instruction to legislatures on how to *design* their measures in a manner that takes into account the legitimate interests of states likely to be affected. This consideration of other states’ interests may in fact have multiple dimensions. For example, it may encompass recognition for equivalent protection, bilateral standard-setting and flexibility in implementation. Such an approach has been advanced by the present author as one of ‘considerate design’.<sup>75</sup> In essence it seeks to guide states in the way they exercise their prescriptive competence more generally, serving to *avoid* rather than to resolve conflicting jurisdictional claims. This remains however a functional suggestion rather than a conclusive legal answer.

##### 5. Concluding remarks

Where the Third Restatement contained an ambitious ‘rule-of-reason’ that it asserted was customary international law, the Fourth Restatement is much more cautious, placing an emphasis on jurisdictional self-restraint as a matter of voluntary comity. This hesitance is understandable given the established lack of state practice supporting second-order interest-balancing requirements or rules of priority.

As such, we see a strong focus in the Fourth Restatement on the state practice and *opinio juris* needed for the formation of customary rules of self-restraint. There it is repeatedly asserted that United States’ practice

<sup>75</sup> NL Dobson, *Extraterritoriality and Climate Change Jurisdiction: Exploring EU Climate Protection under International Law* (Hart Publishing, forthcoming 2021).



based on its domestic principles of prescriptive comity is not done out of a sense of obligation, and is therefore not evidence of what international law requires. This article has argued however, that more attention is needed for the opposite dynamic, namely the role of international law in (in)forming comity. As state jurisdiction is the lawful exercise of sovereign power, the principle of sovereign equality, and the related principles of non-interference and non-intervention, continue to condition how this is done. While they may not manifest themselves as a customary 'rule-of-reason' or other rule of priority, they do reinforce comity doctrines. As such, while acts of comity may go beyond what is required by international law, they cannot be characterised as entirely voluntary.

Evidentiary dilemmas certainly remain when seeking to determine the precise contours of the binding norms themselves. The principle of consistent interpretation with international law is a particular catalyst in blurring the motives behind state practice. Arguably, rather than focusing on *whether* a norm should apply, these principles may be more helpfully operationalised as an instruction towards legislatures, cautioning them to *design* their measures 'considerately', in a manner that takes into account the legitimate interests of other states. In light of our increasing interdependence, 'reasonableness' remains of relevance for the law of state jurisdiction, and an issue on which we are yet to hear the last word.

