ZOOM IN

The Question:

Jurisdictional Reasonableness

Introduced by Cedric Ryngaert and Michail Vagias

In a globalized world, phenomena such as transnational crime, Internet transactions and climate change are not limited to just one state. Instead, they have connections with multiple states, each of which may want to exercise its jurisdiction over them, often on the basis of a version of the territoriality principle (which includes effects-based jurisdiction).[1] This state of affairs may give rise to overlapping claims of jurisdiction and overregulation, and trigger a quest for the identification of 'second order' jurisdictional principles that limit the scope of application of first order principles like territoriality or nationality. Second order principles are designed to make the exercise of jurisdiction *reasonable*.

The notion of jurisdictional reasonableness is by no means a novel one. In the 1970s, the notion was introduced and applied in the context of the 'extraterritorial' application of US antitrust law.[2] In 1987, the drafters of the US Restatement (Third) of US Foreign Relations Law even elevated it to the status of a customary international law norm (Section 403 of the Third Restatement). While this legal qualification proved controversial, few would contest that, if it is true that the classic principles of

[1] Eg CJEU, Case C-507/17 *Google LLC v Commission nationale de l'informatique et des libertés (CNIL)* (Grand Chamber, 24 September 2019) para 57 ('In a globalised world, internet users' access — including those outside the Union — to the referencing of a link referring to information regarding a person whose centre of interests is situated in the Union is thus likely to have immediate and substantial effects on that person within the Union itself.').

[2] Notably *Timberlane Lumber Co v Bank of America, NT & SA*, 549 F.2d 597 (9th Cir 1976) 613-14; *Mannington Mills, Inc v Congoleum Corp*, 595 F.2d 1287 (3d Cir 1979) 1297-98.

jurisdiction only weed out the most outrageous claims, jurisdictional restraint in another form may be called for.[3]

Recently, reasonableness has taken on renewed urgency in an area of far-reaching deterritorialization, as epitomized by the rise of borderless Internet and communications technology and transboundary pollution and climate change. Some authors have even gone as far as to suggest abandoning the basic principles of jurisdiction, in particular territoriality, and use criteria such as 'substantial connection' and 'reasonableness' as yardsticks instead.[4]

The American Law Institute in the meantime adopted a *Fourth* Restatement of US Foreign Relations Law (2017), addressing selected topics in treaties, jurisdiction, and sovereign immunity. Also the Fourth Restatement features a section on reasonableness, titled 'reasonableness in interpretation', pursuant to which, '[a]s a matter of prescriptive comity, courts in the United States may interpret federal statutory provisions to include other limitations on their applicability' (section 405). According to the commentary, '[t]his principle of interpretation accounts for the legitimate sovereign interests of other nations and helps the potentially conflicting laws of different nations work in harmony' (comment a). However, '[i]nterference with the sovereign authority of foreign states may be reasonable if application of federal law would serve the legitimate interests of the United States' (comment b). Conspicuously, the Fourth Restatement does not consider jurisdictional reasonableness to be required by international law.

These evolutions call for scholarly reflection. On 30 October 2018, a number of scholars assembled at Utrecht University to discuss various aspects of jurisdictional reasonableness, at a seminar organized by the UNIJURIS project.[5] This special issue grew out of that seminar, where all contributors to this issue presented their initial findings.

The authors have been requested to reflect on the nature and scope of the principle of jurisdictional reasonableness, on how it is or should

[3] See at length C Ryngaert, *Jurisdiction in International Law* (2nd ed, OUP 2015) chapter 5.

[4] See notably D Svantesson, *Solving the Internet Jurisdiction Puzzle* (OUP 2017).

[5] This seminar and the research were sponsored by the European Research Council under the Starting Grant Scheme (Proposal 336230— UNIJURIS) and the Dutch Organization for Scientific Research under the VIDI Scheme (No 016.135.322) (Principal Investigator: Prof C Ryngaert).

be operationalized in discreet fields of the law, and on what impact the US Restatements have had.

In the first contribution to this issue, Professor William Dodge, one of the drafters of the jurisdictional sections of the Fourth Restatement, clarifies the Fourth Restatement's approach to jurisdictional reasonableness. He engages specifically with the customary international law nature of reasonableness, and its relationship with the presumption against extraterritoriality (an often-used canon of statutory construction in the United States).

In the second contribution, Dr Natalie Dobson critically reflects on the new approach adopted by the Fourth Restatement on jurisdictional reasonableness. Her critical remarks on the Restatement's distinction between voluntary v mandatory state practice on jurisdiction as well as on the – often overlooked – interaction between international legal norms and comity call into question the Fourth Restatement's disentanglement of reasonableness and international law.

In the third contribution, Dr Mistale Taylor applies the principle of jurisdictional reasonableness to the field of data protection law, which is 'territorially extended' by the European Union so as to protect the fundamental rights of EU data subjects. Dr Taylor argues that the EU should use a notion of reasonableness that includes interest- and rights-balancing to mitigate any problematic jurisdictional overreach resulting from the application of its data protection laws.

As a whole, the contributions in this issue shed some light on the doctrinal implications of the key jurisdictional provisions of the 4th Restatement. Far from providing the final word on the matter, they seek to trigger renewed reflection on the limits imposed on unilateral assertions of state jurisdiction by international law. In light of the new challenges posed to the international legal order by contemporary developments in international relations, a measure of balanced contemplation upon this issue appears to be today more warranted than ever.