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# The Restatement and the Law of Jurisdiction: A Commentary

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## Abstract

The Restatement of the Law (Fourth): The Foreign Relations Law of the United States is a monumental work, which, just like the Restatement (Third), may prove influential abroad. This also applies to its restatement of the law of jurisdiction. The clarity of the relevant chapters on jurisdiction, including the reporters' notes, is admirable. Comparing the Restatement (Third) to the Restatement (Fourth), it is striking that the latter places greater emphasis on US law-based jurisdictional limitations. The relevance of the customary international law of jurisdiction has correspondingly diminished, especially in regard to jurisdiction to prescribe and adjudicate. This commentary critiques this shift towards jurisdictional 'parochialism'. It singles out (i) the drafters' characterization of the principle of jurisdictional reasonableness as a principle of US statutory interpretation (prescriptive comity) rather than a customary international law norm limiting prescriptive jurisdiction and (ii) the drafters' view that the exercise of adjudicative jurisdiction is not constrained by customary international law.

## 1 Introduction

The Restatement of the Law (Fourth): The Foreign Relations Law of the United States is a monumental work, which, just like the Restatement (Third), may prove influential abroad.<sup>1</sup> This also applies to its restatement of the law of jurisdiction. The clarity of the relevant chapters on jurisdiction, including the reporters' notes, is admirable. In terms of structure, the Restatement (Fourth)'s chapters on jurisdiction follow the approach of the Restatement (Third).<sup>2</sup> Three categories of jurisdiction are distinguished: jurisdiction to prescribe (Chapter 1), to adjudicate (Chapter 2) and to enforce (Chapter 3). Jurisdiction to prescribe is concerned with 'the authority of a state to make law

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<sup>1</sup> Restatement of the Law (Fourth): The Foreign Relations Law of the United States (2018); Restatement of the Law (Third): The Foreign Relations Law of the United States (1987).

<sup>2</sup> The chapters on jurisdiction form part of Part IV on 'jurisdiction, state immunity, and judgments'. Restatement (Fourth), *supra* note 1, Part IV.

applicable to persons, property, or conduct'.<sup>3</sup> Jurisdiction to adjudicate pertains to 'the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals'.<sup>4</sup> Jurisdiction to enforce is 'the authority of a state to exercise its power to compel compliance with law'.<sup>5</sup> These categories are distinguished because different rules apply to each category.<sup>6</sup>

The drafters take the view that both international law and domestic law govern the exercise of jurisdiction.<sup>7</sup> Accordingly, the principles laid down in the *Restatement* represent a mix of international law and US law, mainly US constitutional law and canons of US statutory interpretation, such as the presumption against extraterritoriality.<sup>8</sup> Compared to the *Restatement (Third)*, greater emphasis is placed on US law-based jurisdictional limitations. The relevance of the customary international law of jurisdiction has correspondingly diminished, especially in regard to jurisdiction to prescribe and adjudicate. In this commentary, I critique this shift towards jurisdictional 'parochialism'.

In Section 1 of this article, I engage with jurisdiction to prescribe and, in particular, with the *Restatement (Fourth)*'s drafters' characterization of the principle of jurisdictional reasonableness as a principle of US statutory interpretation (prescriptive comity) rather than a customary international law norm limiting prescriptive jurisdiction. In Section 2, I discuss the drafters' view that the exercise of adjudicative jurisdiction is not constrained by customary international law. I have sympathy for the positions of the *Restatement (Fourth)*'s drafters, but I argue that the legal reality is somewhat more nuanced. I submit that reasonableness may play an indirect role in constraining prescriptive jurisdiction. I also submit that customary international law, at least potentially, limits the exercise of adjudicative jurisdiction.

## 2 Prescriptive Jurisdiction and Reasonableness

The *Restatement (Fourth)*'s approach to prescriptive jurisdiction mainly draws on the permissive principles of jurisdiction under customary international law (territoriality, nationality, security and universality), in line with the 1935 Harvard Draft Convention on Jurisdiction with Respect to Crime.<sup>9</sup> This was also the *Restatement (Third)*'s approach.<sup>10</sup> However, unlike the *Restatement (Third)*, the *Restatement (Fourth)* identifies a more fundamental principle of genuine connection, which undergirds the recognized permissive principles. Pursuant to section 407, '[c]ustomary international

<sup>3</sup> *Ibid.*, at 137.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, at 137–138.

<sup>6</sup> *Ibid.*, at 138.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, § 404.

<sup>9</sup> 'Draft Convention on Jurisdiction with Respect to Crime', 29 *American Journal of International Law* (1935) 439.

<sup>10</sup> *Restatement (Third)*, *supra* note 1, §§ 402, 404.

law permits exercises of prescriptive jurisdiction if there is a genuine connection between the subject of the regulation and the state seeking to regulate'. According to section 407, this genuine connection will usually be territory, personality, security or the universal concern of states in suppressing certain offences. The introduction of the genuine connection requirements nevertheless inserts a measure of dynamism in the law of prescriptive jurisdiction and leaves open the possibility that prescriptive jurisdiction can, in the future, be lawfully based on a connection that is not yet captured by a classic permissive principle, depending on the evolution of state practice and *opinio juris*.<sup>11</sup>

In practice, however, there may be less need for novel permissive principles and more need for clarification of the genuine connection requirement with respect to the existing permissive principles. This applies in particular to territoriality: what exactly is a sufficiently strong, 'genuine' territorial connection allowing states to exercise territorial jurisdiction under customary international law? The drafters of section 407 now make it appear as if territory as such qualifies as a genuine connection,<sup>12</sup> whereas, in reality, some territorial links may be too tenuous to qualify as a genuine connection. For instance, does the use of US correspondent bank accounts to clear transactions denominated in US dollars qualify as a genuine territorial connection with the USA?<sup>13</sup> One could regret that the drafters did not further define the requirement of 'genuine connection', although, admittedly, what qualifies as a genuine connection will very much depend on the context and the subject matter at issue.

The most striking departure from the *Restatement (Third)*, as far as prescriptive jurisdiction is concerned, does not concern the foregrounding of the genuine connection requirement but, rather, the diminished importance of customary international law. In the *Restatement (Fourth)* and recent US practice more generally, principles of US statutory interpretation play an increasingly large role in the delimitation of the geographic scope of US law, thereby sidelining the international law of jurisdiction. The leading principle in this respect is the presumption against extraterritoriality, laid down in section 404 of the *Restatement (Fourth)*. Pursuant to this presumption, '[c]ourts in the United States interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary'.<sup>14</sup> This canon of construction has its roots in the *Charming Betsy* canon,<sup>15</sup> pursuant to which statutes ought to be construed to avoid conflict with international law, but both canons parted ways over the years.<sup>16</sup> While the *Charming Betsy* doctrine is clearly open to international law, the current

<sup>11</sup> *Restatement (Fourth)*, *supra* note 1, § 407, Reporters' Note 2, at 192.

<sup>12</sup> *Ibid.*, § 407 ('[t]he genuine connection usually rests on a specific connection between the state and the subject being regulated').

<sup>13</sup> For an argument against, see Ruys and Ryngaert, 'Secondary Sanctions: A Weapon Out of Control? The International Legality of, and European Responses to, US Secondary Sanctions', *British Yearbook of International Law* (forthcoming), available at <https://doi.org/10.1093/bybil/braa007>.

<sup>14</sup> *Restatement (Fourth)*, *supra* note 1, § 404.

<sup>15</sup> *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

<sup>16</sup> *Restatement (Fourth)*, *supra* note 1, Reporters' Note 1, at 171.

presumption against extraterritoriality is concerned with the intent of the US Congress rather than with international law constraints.<sup>17</sup> It is striking that the *Restatement (Third)* did not feature this presumption, arguably because the US Supreme Court had not applied it since 1949.<sup>18</sup> Since the adoption of the *Restatement (Third)*, however, the Supreme Court has increasingly applied the presumption to federal statutory provisions and even developed a two-step conceptual framework guiding the application of the presumption in specific cases.<sup>19</sup> It is understandable that the drafters of the *Restatement (Fourth)* wished to devote a separate section to the presumption to reflect this development.

The presumption against extraterritoriality certainly limits jurisdictional overreach. Even if the presumption is not as such based on international law, it may go a long way towards preventing violations of the international law of jurisdiction. Still, the presumption does not entirely dispel the risk of such violations occurring. After all, under the presumption, US courts are expected to ascertain congressional intent (concern), ‘regardless of whether there is a risk of conflict between the American statute and a foreign law’.<sup>20</sup> Accordingly, it is not excluded that courts will interpret federal statutes contrary to international law. This risk is admittedly mitigated by the *Charming Betsy* canon of statutory construction, which is laid down in section 406 of the *Restatement (Fourth)*. However, this section also provides that ‘[i]f a federal statute cannot be [construed to avoid conflict with international law], the federal statute is controlling as a matter of federal law’. The latter rule is simply an application of the rule that an act of Congress may supersede international law.<sup>21</sup> Such an act is the law of the land, even if it engages the international responsibility of the USA.<sup>22</sup>

The risk of violation of international law can additionally be mitigated by the principle of ‘reasonableness in interpretation’, another principle of statutory interpretation that is laid down in section 405 of the *Restatement (Fourth)*. Section 405 provides that, ‘[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 is, at least in part, the successor to section 403, which was inserted in 1987 to reflect developments in the practice of some US courts applying a ‘rule of reason’ in antitrust cases. Because the application of the territorial effects doctrine in the antitrust context could lead to jurisdictional overreach and tension with foreign nations, these courts have resorted to a multi-factor interest-balancing test to restrict the geographic reach of US law to those cases in which the USA has a sufficiently strong interest compared to the interests of other states.<sup>23</sup> This principle of reasonableness has the

<sup>17</sup> See *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949) (ruling that the presumption is based on ‘the assumption that Congress is primarily concerned with domestic conditions’).

<sup>18</sup> *Restatement (Fourth)*, *supra* note 1, § 404, Reporters’ Note 2, at 171.

<sup>19</sup> *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, at 255 (2010).

<sup>20</sup> *RJR Nabisco Inc v. European Community*, 136 S. Ct. 2090, at 2100 (2016).

<sup>21</sup> *Restatement (Fourth)*, *supra* note 1, § 406, Reporters’ Note 3, at 186.

<sup>22</sup> See also *ibid.*, Comment b, at 185.

<sup>23</sup> See notably *Timberlane Lumber Co. v. Bank of America*, 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 (3d Cir. 1979).

potential to limit the international havoc wrought by broadly construed permissive principles of jurisdiction – in particular, the territoriality principle and its cousin, the effects doctrine. It could provide a solution to international conflicts between states with concurring jurisdiction over a particular subject matter – for example, because both can claim a territorial link to the matter.

However, whereas the *Restatement (Third)* considered jurisdictional reasonableness to rise to the level of a customary international law norm,<sup>24</sup> the *Restatement (Fourth)* relegates it to merely a principle of US statutory interpretation. The *Restatement (Fourth)* does not formally repudiate section 403 of *Restatement (Third)*,<sup>25</sup> but the drafters unmistakably took issue with the customary international law status earlier ascribed to reasonableness. According to the drafters, ‘state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of international law’.<sup>26</sup> Going by the reporters’ notes, the relegation of reasonableness to a principle of US statutory interpretation is inspired by the US Supreme Court’s *Empagran* judgment in 2004, in which the Court referred to ‘prescriptive comity’ and the principle of ‘constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations’, in the context of delimiting the geographic scope of application of US antitrust law.<sup>27</sup>

Considering reasonableness to be a principle of US statutory interpretation rather than a customary international law norm may change its meaning. Parochialism notably looms large if statutory interpretation informs the meaning of reasonableness. Indeed, one can assume that the US Congress has US interests, rather than foreign states’ interests, in mind when it legislates, and statutes are to be construed accordingly.<sup>28</sup> Drawing on *Empagran*, the drafters note in this respect that ‘[i]nterference with the sovereign authority of another nation may be reasonable, and thus consistent with prescriptive comity if it advances a legitimate interest of the United States’.<sup>29</sup> This means that, even if under international law such interference may possibly be unreasonable because it impinges unjustifiably on a foreign State’s sovereign authority, under US law such interference may still be reasonable as long as it advances US interests – even if US interests are in fact outweighed by foreign interests. For instance, under US law, it could be reasonable for US antitrust law to apply to foreign-based defendants ‘conspiring’ to affect competition in the USA

<sup>24</sup> *Restatement (Third)*, *supra* note 1, § 403(1) ([e]ven when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable’).

<sup>25</sup> *Restatement (Fourth)*, *supra* note 1, § 405, Reporters’ Note 6, at 185 ([t]his Restatement continues to recognize a principle of reasonableness and acknowledges that lower courts have imposed comity limitations under particular statutes’).

<sup>26</sup> *Ibid.*, § 407, Reporters’ Note 3, at 193.

<sup>27</sup> *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 US 155, at 164–165 (2004).

<sup>28</sup> *Ibid.*, at 165. The US Supreme Court in *Empagran* tied reasonableness to congressional intent where it held that ‘application of [US] antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused’ (emphasis added).

<sup>29</sup> *Restatement (Fourth)*, *supra* note 1, § 405, Reporters’ Note 2, at 182.

on the grounds that the USA has a legitimate interest in protecting US-based firms and consumers, even if such defendants are already subject to a relatively comprehensive foreign antitrust regime.<sup>30</sup> In an international law version of the principle of reasonableness, courts would not only pay heed to the legitimate interest of the USA but also balance this interest with the legitimate regulatory interest of the foreign states, the interests of the foreign firms as well as the interests of the international community. This was more or less the approach of the *Restatement (Third)* in section 403.

As I will explain below, I agree with the drafters' doubts over the customary international law status of reasonableness. However, I argue in favour of a role for jurisdictional reasonableness via general principles of international law, such as non-intervention, proportionality and the prohibition of abuse of right. In my earlier work, I have engaged at length with the international legal status of jurisdictional reasonableness. I have concluded that, in spite of the pretensions of the *Restatement (Third)*, there was insufficient state practice and *opinio juris* to characterize reasonableness as a norm of customary international law<sup>31</sup> – just like the *Restatement (Fourth)* does now. I was only able to identify the 1982 German *Morris/Rothmans* decision,<sup>32</sup> and the US Supreme Court's *Empagran* decision as supporting such a rule.<sup>33</sup> Conspicuously, in the *Wood Pulp* competition case in 1988, the Court of Justice of the European Union turned a cold shoulder to international reasonableness or comity, where it held that heeding such concerns would 'amount ... to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found in this case'.<sup>34</sup>

<sup>30</sup> Compare the facts of *Hartford Fire Insurance Co. v. California*, 113 S. Ct. 2891 (1993), in which the US Supreme Court applied the Sherman (antitrust) Act to a 'conspiracy' of United Kingdom (UK)-based re-insurance companies adversely affecting US insurers, even if the UK companies were already subject to a UK antitrust regime. The Supreme Court ruled that no issue of comity was engaged, as there was no conflict between US and foreign (UK) laws. Judge Scalia vehemently criticized the majority in this case on the grounds that it did not take comity seriously and paid insufficient heed to the interests of the UK (at 2921). Some literature criticized the Supreme Court for deeming comity relevant in the first place and advanced the application of a pure effects doctrine. See, e.g., Zagalis, 'Hartford Fire Insurance Company v. California: Reassessing the Application of the McCarran-Ferguson Act to Foreign Reinsurers', 27 *Cornell International Law Journal* (1994) 241, at 269.

<sup>31</sup> C. Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015), at 182.

<sup>32</sup> FCO 1982, BKartA, WuW/E 1943 (the German Bundeskartellamt has given effect to the customary principle of non-intervention so as to restrict the exercise of statute-based German jurisdiction over foreign-based mergers).

<sup>33</sup> Note that the drafters of the *Restatement* consider *Empagran* as supporting reasonableness in interpretation rather than reasonableness under international law.

<sup>34</sup> Joined Cases 89, 104, 114, 116, 117, 125–129/85, *A. Ahlstrom Osakeyhtio v. Commission* (EU:C:1994:12), at 5244; see also Alford, 'The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches', 33 *Virginia Journal of International Law* (1992) 1, at 43 (pointing out that the Court only applied the territoriality principle and did not balance the interests of the European Union (EU) with other states pursuant to a reasonableness test). See also Case C-366/10, *Air Transport Association of America and Others (ATAA)* (EU:C:2011:864), para. 101 (reviewing EU secondary legislation in light of the customary international law principle of territoriality, without however engaging in a reasonableness analysis).

Writing in 2008 and later in 2015, I harbored some expectations that the very codification of international reasonableness in section 403 of the *Restatement (Third)* could encourage courts to more readily apply the norm as a matter of international law.<sup>35</sup> I took my cue in this respect from David Massey's observation that, '[b]y the time the Restatement (Fourth) is published ... there may be enough state practice supported by *opinio juris*, by the United States and others, to support the reasonableness requirement as customary law'.<sup>36</sup> This moment has not come to pass, however. While some lower US courts continue to apply an interest-balancing test, as the drafters themselves admit,<sup>37</sup> in light of rival practice, also outside the USA, this may not be enough to consider reasonableness as mandated by customary international law.

Nonetheless, the fact that jurisdictional reasonableness is not a norm of customary international law does not mean that reasonableness has no international legal value. While the drafters of the *Restatement (Fourth)* take the view that reasonableness (prescriptive comity) is simply a matter of US statutory construction, it arguably derives from a number of existing general principles of international law and may even be considered as a general principle of international law in its own right.<sup>38</sup> This means that applying jurisdictional reasonableness may not just be authorized by domestic law but also, in fact, be mandated by international law. In terms of content, such a principle would obviously pay heed to all relevant interests involved and would not put a premium on the interests of the forum state.

It bears emphasis that there is no requirement of uniformity of state practice for the existence of general principles. Instead, such principles may be no more than 'general notions which are necessary or inherent in the concept of law or a legal system'.<sup>39</sup> As it happens, there are a number of long-standing international law principles from which a principle of reasonableness, including jurisdictional reasonableness, could be derived – in particular, the principles of non-intervention, genuine connection, equity, proportionality and abuse of rights.<sup>40</sup> In the law of the sea, which the drafters of the *Restatement* include in its remit,<sup>41</sup> jurisdictional reasonableness is even explicitly recognized as a mechanism to balance the interests of states with concurring jurisdiction.<sup>42</sup> By the same token, Natalie Dobson has submitted that 'sovereignty-conditioning

<sup>35</sup> Ryngaert, *supra* note 31, at 181.

<sup>36</sup> Massey, 'How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law', 22 *Yale Journal of International Law* (1997) 419, at 445.

<sup>37</sup> Dodge, 'Jurisdiction, State Immunity, and Judgments in the Restatement (Fourth) of US Foreign Relations Law', 19 *Chinese Journal of International Law* (2020) 101, at 111 (cases cited in notes 63 and 65 above).

<sup>38</sup> Ryngaert, *supra* note 31, at 184.

<sup>39</sup> G. Hernandez, *International Law* (2019), at 47.

<sup>40</sup> Ryngaert, *supra* note 31, ch. 5.2.

<sup>41</sup> *Restatement (Fourth)*, *supra* note 1, § 408, Reporters' Note 3, at 197–198 (discussing the Convention on the Law of the Sea (UNCLOS) 1982, 1833 UNTS 3 as reflecting 'many of the customary international law rules governing prescriptive jurisdiction under the law of the sea').

<sup>42</sup> See, e.g., UNCLOS, *supra* note 41, Art. 56(2) ('[i]n exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States'); Art. 300 ('States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right'). For a discussion, see R.R. Holst, *Change in the*

principles', such as non-intervention and proportionality, while perhaps not customary law norms, should nevertheless inform comity-based jurisdictional practices of domestic courts.<sup>43</sup>

It is striking, in this respect, that the aforementioned US Supreme Court judgment in *Empagran* linked the prescriptive comity-based rule of statutory construction to 'principles of customary international law'.<sup>44</sup> Combined with the Court's observation that 'America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs',<sup>45</sup> it appears that the Court considered the customary international law principle of non-intervention to be relevant in construing US law.<sup>46</sup> Similarly, other principles of international law, such as proportionality and abuse of rights, may inform domestic courts' comity analyses. The upshot is that international law may have a role to play, even if a somewhat indirect one, in rendering jurisdictional assertions reasonable.<sup>47</sup> Within the US system, my international law concerns could be met via the abovementioned *Charming Betsy* canon of statutory construction, which suggests interpreting statutes to avoid conflict with international law. Arguably, in *Empagran*, which the drafters cite as evidence of prescriptive comity, the Supreme Court in fact applied the *Charming Betsy* doctrine.

It is finally of note that, in the field of adjudicative jurisdiction, reasonableness plays an explicit role as a constitutional principle, derived from the Due Process Clause, limiting the exercise of personal jurisdiction.<sup>48</sup> However, this principle of reasonableness

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*Law of the Sea: Context, Mechanisms and Practice* (2020) (PhD dissertation on file at Utrecht University), at 48–49 ('[r]ights and freedoms granted under the Convention are inherently conditional; subject to a complex web of limitations contained in the Convention itself, as well as in other applicable instruments of international law. The "boundaries" between different rights and interests are furthermore not static, but often determined by recourse to certain "balancing principles", or "power modifiers" (e.g., references to "due regard", "taking account of", "reasonableness" or "equitableness"). As a result, the substance of a specific right or legal relationship is ultimately determined by the sum of these conditions and balancing principles, rather than the allocation of the "sovereign right" or "freedom as such') (footnote omitted).

<sup>43</sup> Dobson, 'Reflections on "Reasonableness" in the Restatement (Fourth) of US Foreign Relations Law', 62 *Questions of International Law Zoom-in* (2019) 19, at 27, citing the Canadian case of *R v. Hape*, 2007 SCC 26, paras 48, 50 ('[n]onetheless, 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', at 28).

<sup>44</sup> *Hoffmann-La Roche Ltd et al v. Empagran SA et al (Empagran)*, 542 US 155, at 164 (2004) (adding that this rule 'cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws', thereby 'help[ing] the potentially conflicting laws of different nations work together in harmony').

<sup>45</sup> *Ibid.*, at 165.

<sup>46</sup> See also Dobson, *supra* note 43, at 31.

<sup>47</sup> Possibly this is how Case C18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* (ECLI:EU:C:2019:821), can be interpreted (holding that EU member states' courts could order a host provider 'to remove information covered by the injunction or to block access to that information worldwide ... within the framework of the relevant international law', without however clarifying what international law is meant).

<sup>48</sup> *Restatement (Fourth)*, *supra* note 1, § 422(2) ('[t]he Due Process Clauses of the Constitution require sufficient contacts with the forum and that the exercise of jurisdiction be reasonable').



is a matter of US domestic law only. This is in keeping with the drafters' restatement of 'rules of personal jurisdiction exclusively as domestic law of the United States'.<sup>49</sup> I engage with this issue in the next section.

### 3 Adjudicative Jurisdiction

The *Restatement (Third)*'s most important conceptual contribution to the doctrine of jurisdiction was probably its introduction of the category of 'jurisdiction to adjudicate' in section 401, alongside the known categories of jurisdiction to prescribe and jurisdiction to enforce.<sup>50</sup> In section 401(b), the *Restatement (Fourth)* maintains jurisdiction to adjudicate as one of the three relevant categories of jurisdiction, defining it as 'the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals'. Considerable international literature has embraced adjudicative jurisdiction, although some UK-based authors appear to be more reserved and may consider adjudicative jurisdiction as a subspecies of enforcement jurisdiction.<sup>51</sup>

Conceptualizing jurisdiction to adjudicate as a separate category deserves support, as it captures the specific jurisdictional activity of courts, especially courts hearing civil (private) cases.<sup>52</sup> In civil cases, under rules of private international law (conflict of laws), principles of jurisdiction other than the permissive principles of prescriptive jurisdiction apply. In Europe, the general principle of jurisdiction is the principle of domicile, pursuant to which persons domiciled in a state can be sued in the courts of that state.<sup>53</sup> In the USA, jurisdiction in private law matters is denoted as personal jurisdiction. There is personal jurisdiction over a defendant if the defendant has 'sufficient contacts' with the USA.<sup>54</sup> It is important to realize that, when exercising jurisdiction

<sup>49</sup> *Ibid.*, Reporters' Note 11, at 237.

<sup>50</sup> The *Restatement (Second)* only put forward jurisdiction to prescribe and to enforce as categories.

<sup>51</sup> For an overview of relevant literature, see *Restatement (Fourth)*, *supra* note 1, § 401, Reporters' Note 2, at 143. As the drafters note, I myself have also supported jurisdiction to adjudicate as a separate category. For recent non-US textbooks on international law supporting jurisdiction to adjudicate, see Wouters *et al.*, *International Law from a European Perspective* (2018), at 415–416; G. Hernandez, *International Law* (2019), at 96–98. For a recent publication considering adjudicative jurisdiction as a subspecies of enforcement jurisdiction, see Mouland, 'Rethinking Adjudicative Jurisdiction in International Law', 29 *Washington Law Review* (2019) 173 (arguing that 'in enforcement proceedings for international arbitral awards, arising at the intersection between the law of state immunity and the law governing the enforcement of arbitral awards ... adjudicative jurisdiction may be emerging as a specific manifestation of the state's enforcement jurisdiction').

<sup>52</sup> The *Restatement (Fourth)* also addresses jurisdiction to adjudicate in criminal law, in the context of which it discusses the presence of the defendant at the time the trial begins as well as issues of extradition and mutual legal assistance (see *Restatement (Fourth)*, *supra* note 1, ss 427–429). However, these issues are not jurisdictional in the strict sense of the word; rather, they relate to fair trial and international cooperation. Accordingly, I consider the category of adjudicative jurisdiction in a criminal law context as superfluous.

<sup>53</sup> See, e.g., Council Regulation (EU) 1215/2012, OJ 2012 L 351. A substantial number of more specific jurisdictional principles exist alongside the domicile principle. *Ibid.*, Arts 7–26.

<sup>54</sup> *Restatement (Fourth)*, *supra* note 1, § 422.

to adjudicate, courts do not prescribe law: they simply offer a forum. In fact, depending on choice-of-law rules, they may even apply another state's law, thereby vicariously exercising the latter's prescriptive jurisdiction. The hearing of a tort case brought against a corporation in its home state in relation to harm caused abroad offers a good example. The home state court has adjudicative jurisdiction over such a case on the basis of the domicile (incorporation) principle, whereas, on the merits, it may well go on to apply foreign law on the basis of the choice-of-law rule of *lex loci delicti* (place of the harmful activity).<sup>55</sup>

A thorny issue is whether this exercise of adjudicative jurisdiction in private international law matters is subject to public international law constraints. Such constraints seem to be called for where domestic rules of jurisdiction are particularly far-reaching. For instance, some states exercise 'tag' adjudicative jurisdiction, based merely on the transient presence of a foreign or out-of-state defendant.<sup>56</sup> Other states are willing to exercise exceptional adjudicative jurisdiction over a foreign defendant in case the plaintiff (who is also often foreign) faces a denial of justice elsewhere.<sup>57</sup> These types of adjudicative jurisdiction operate on the basis of a relatively weak connection to the forum state and may well affect the judicial and regulatory interests of other more closely connected states. Inevitably, this begs the question whether the exercise of jurisdiction to adjudicate is subject to public international law constraints. In particular, does the genuine connection requirement under customary international law, as it applies in the field of jurisdiction to prescribe,<sup>58</sup> also govern adjudicative jurisdiction?

The drafters of the *Restatement (Fourth)* take the firm position that 'modern customary international law generally does not impose limits on jurisdiction to adjudicate'.<sup>59</sup> According to the drafters, the only public international law limit to adjudicative jurisdiction relates to international immunities.<sup>60</sup> This is a striking departure from the *Restatement (Third)*, the drafters of which wrote that '[t]he exercise of jurisdiction by courts of one state that affects interests of other states is now generally considered as coming within the domain of customary international law and international agreement'.<sup>61</sup> The drafters of the *Restatement (Fourth)* explicitly recognize this departure

<sup>55</sup> Compare The Hague Court of Appeal, (ECLI:NL:GHDHA:2015:3586), Judgment of 18 December 2015 (upholding jurisdiction over Shell and its Nigerian subsidiary in relation to oil spills in Nigeria) with The Hague Court of Appeal (ECLI:NL:GHDHA:2021:133), Judgment of 21 January 2021 (addressing Shell's liability under Nigerian law for harm caused by oil leakage from a pipeline in Nigeria).

<sup>56</sup> *Burnham v. Superior Court*, 495 U.S. 604 (1990).

<sup>57</sup> Dutch Code of Civil Procedure, Art. 9c (also requiring that the case is sufficiently connected with the Netherlands). This is known as forum of necessity-based jurisdiction.

<sup>58</sup> *Restatement (Fourth)*, *supra* note 1, § 407, as discussed above.

<sup>59</sup> *Ibid.*, § 422, Reporters' Note 1. The drafters admitted that '[t]he [US] Supreme Court once regarded the exercise of personal jurisdiction ... as subject to international law' (at 230).

<sup>60</sup> *Ibid.*, § 422, Reporters' Note 1, at 230. The immunity of states from jurisdiction is addressed in *ibid.*, Part IV, ch. 5.

<sup>61</sup> *Restatement (Third)*, *supra* note 1, § 421, Reporters' Note 1. More specifically, they considered the exercise of 'tag' jurisdiction based on the service of process to a person with only a transitory presence in the jurisdiction, as 'not generally acceptable under international law.' *Ibid.*, § 421, Comment *e*.

from the *Restatement (Third)* and consider rules of personal jurisdiction ‘exclusively as domestic law of the United States’.<sup>62</sup> This excludes any role for public international law in checking the exercise of adjudicative jurisdiction by US courts. Recourse to the genuine connection principle or the *Charming Betsy* principle of international law’s consistent interpretation is not possible in the *Restatement (Fourth)*’s scheme, as the drafters considered these principles to be only relevant for jurisdiction to prescribe.<sup>63</sup>

The absence of public international law constraints does not mean that US adjudicative jurisdiction knows no limits. On the contrary, the US Supreme Court has become stricter over the years and has required – for general jurisdiction to adjudicate to obtain under the constitutional Due Process Clause – that the defendant’s affiliations with the USA must be ‘so “continuous and systematic” as to render them essentially at home’ in the USA.<sup>64</sup> Such restrictions under domestic law will go a long way to limiting jurisdictional overreach, as they will usually ensure that US courts only exercise adjudicative jurisdiction if there is a genuine connection with the USA. Accordingly, in terms of outcome, the US minimum contacts test may do the same heavy lifting as the international law-based genuine connection test. However, the conceptual question remains whether, regardless of domestic law constraints, the drafters are correct when stating that customary international law does not impose outer limits on the exercise of adjudicative jurisdiction. This question is not just academic. For one thing, US court practice, while currently restrictive, can change in the years to come. External, international law-based constraints may then have to supplant domestic constraints to limit jurisdictional overreach. For another, the *Restatement*’s position on the irrelevance of international law risks lowering the threshold for a finding of jurisdiction by courts in other states, especially those states that do not have an elaborate system of domestic law constraints.

The scholarly field is quite divided on the issue whether public international law limits adjudicative jurisdiction. The position of the drafters of the *Restatement (Fourth)* appears to be informed largely by Michael Akehurst’s view that ‘(apart from the well-known rules of immunity ...) customary international law imposes no limits on the jurisdiction of municipal courts in civil trials’.<sup>65</sup> This view is not shared by all authors, however. Austen Parrish, for instance, is of the view that both international and US legal practice demonstrate the existence of international law limits and that the *Restatement* is accordingly misguided.<sup>66</sup> Also Alex Mills, one of the world’s leading

<sup>62</sup> *Restatement (Fourth)*, *supra* note 1, § 422, Reporters’ Note 11, at 237.

<sup>63</sup> The relevant section 405 (*Charming Betsy*) and section 407 (genuine connection) of the *Restatement (Fourth)* only feature in chapter 1 regarding jurisdiction to prescribe. They do not apply to the other categories of jurisdiction, which are addressed in separate chapters.

<sup>64</sup> *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, at 919 (2011); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

<sup>65</sup> Akehurst, ‘Jurisdiction in International Law’, 46 *British Yearbook of International Law* (1975) 145, at 177 (footnotes omitted).

<sup>66</sup> Parrish, ‘Judicial Jurisdiction: The Transnational Difference’, 59 *Virginia Journal of International Law* (2019) 97; see also Parrish, ‘Remaking International Law? Personal Jurisdiction and the Fourth Restatement of the Foreign Relations Law’, *Opinio Juris Blog*, 6 September 2018.

experts on the interface between private and public international law, has regretted the *Restatement (Fourth)*'s departure from the *Restatement (Third)*'s position; while he admits that 'the range of connecting factors on which states rely in the context of private law disputes is broader than those commonly recognised in criminal law', he argues that states consider that public international law requires the existence of a connection to a dispute for adjudicative jurisdiction to be validly exercised.<sup>67</sup> Other authors take a somewhat more reserved position. Ralf Michaels has noted that the question of public international law limits to adjudicative jurisdiction 'remains open' and has called for 'more work ... to be done before we find consensus on this question'.<sup>68</sup> Duncan French and Veronica Ruiz Abou-Nigm similarly counsel further reflection on the existence, or not, of public international law limits to adjudicative jurisdiction.<sup>69</sup> At the far end of the spectrum, there is one rather peculiar view, pursuant to which there are no public international law limits to the exercise of adjudicative jurisdiction in civil matters, because this category of jurisdiction is subsumed under the classification of territorial enforcement jurisdiction. In this view, when domestic courts assume jurisdiction, they apply the law in given cases and thus exercise enforcement jurisdiction.<sup>70</sup> As such adjudication/enforcement by domestic courts naturally takes place on the very territory of the forum state, there is no issue of prohibited extraterritorial enforcement jurisdiction.<sup>71</sup>

In my view, the better position regarding the relationship between public international law and adjudicative jurisdiction in civil matters is that the latter is at least potentially governed by public international law. The international law of jurisdiction regulates assertions of state authority in the international realm in order to prevent international discord. It does so regardless of the identity of the domestic actor asserting jurisdiction. What matters is that the state projects authority in the

<sup>67</sup> Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction', in S. Allen *et al.* (eds), *Oxford Handbook on Jurisdiction in International Law* (2019) 330, at 338, n. 31.

<sup>68</sup> Michaels, 'Is Adjudicative Jurisdiction a Category of Public International Law?', *Opinio Juris Blog*, 20 September 2018 (although going by the text of his reaction, he was leaning towards the position that public international law constraints do exist).

<sup>69</sup> French and Ruiz Abou-Nigm, 'Jurisdiction: Betwixt Unilateralism and Global Coordination', in V. Ruiz Abou-Nigm, K. McCall-Smith and D. French (eds), *Linkages and Boundaries in Private and Public International Law* (2018) 84 (pointing out that the Harvard Draft Convention on Jurisdiction with Respect to Crime (1935), which is widely seen as codifying the basic principles of the international law of (criminal) jurisdiction, is 'almost without much thought' applied to adjudicative jurisdiction (in civil matters)).

<sup>70</sup> Mora, 'Universal Civil Jurisdiction and *Forum Necessitatis*: The Confusion of Public and Private International Law in *Nait-Liman v. Switzerland*', 65(2) *Netherlands International Law Review* (2018) 155, at 159. Mora defines enforcement jurisdiction as 'the ability of States to implement and give effect to prescribed municipal norms', an 'enforcement function [which] is performed by *municipal courts* or the executive agencies of a State' (at 159; emphasis added).

<sup>71</sup> States can only exercise enforcement jurisdiction on their own territory. See *The Case of The S.S. 'Lotus' (France v. Turkey)*, 1927 PCIJ Series A, No. 10, at 18–19. Nor is there, in this view, an issue of possibly prohibited extraterritorial prescriptive jurisdiction in case the domestic court goes on to apply the forum law under (private international law) choice-of-law rules. Arguably, the forum state has 'already substantively characterised the conduct forming the subject matter of the dispute as a legal wrong in municipal law' and limits itself to enforcing the norm in specific disputes. See Mora, *supra* note 70, at 166.

international arena in ways that may impinge on the sovereignty of other states and may violate the principle of non-intervention. The 'extraterritorial' exercise of jurisdiction, or at least the exercise of jurisdiction over matters that do not have an exclusively domestic character, may amount to prohibited intervention, especially in the absence of a genuine connection between the state and the subject matter.<sup>72</sup> While the *Restatement (Fourth)* considers the genuine connection requirement under customary international law to be relevant only in the context of jurisdiction to prescribe, there is no reason why it should not also apply to adjudicative jurisdiction, as Frederick Mann already pointed out in his 1964 Hague lecture.<sup>73</sup> It would indeed be incongruous to remove assertions of state authority by one particular state actor – the judiciary – entirely from the field of international law.<sup>74</sup>

This does not mean that, currently, public international law imposes hard limits on adjudicative jurisdiction. In fact, where a domestic court's assumption of adjudicative jurisdiction is followed by a choice-of-law analysis that may lead to the application of foreign law, so far there has been relatively little evidence that foreign states have taken fundamental issue with particular types of adjudicative jurisdiction. As acquiescence may be relevant state practice,<sup>75</sup> adjudicative jurisdiction, as it is currently exercised by states, including the USA, may accordingly be lawful under customary international law. This does not mean, however, that states necessarily acquiesce in any assertion of adjudicative jurisdiction. In fact, the absence of foreign protest may have been informed by the perception that these types of jurisdictions were based on the existence of a genuine connection between the subject matter and the forum state and, precisely on this ground, considered unproblematic under international law.<sup>76</sup>

<sup>72</sup> Jamnejad and Wood, 'The Principle of Non-Intervention', 22 *Leiden Journal of International Law* (2009) 345, at 372–373 ('[a]lthough it is difficult to see how a non-discriminatory application of a state's laws by the judicial branch could be coercive, the extraterritorial exercise of jurisdiction could amount to intervention in some situations. Where there is no basis at all for the exercise of jurisdiction, for example over a non-national for conduct carried out overseas and not attracting universal jurisdiction, then the exercise of jurisdiction will very likely contravene the non-intervention principle' (footnotes omitted). The authors write in the context of prescriptive jurisdiction, but they may also have included adjudicative jurisdiction in civil matters, as they note that 'doctrines of non-justiciability developed by national courts in both civil and criminal cases are often based – expressly or implicitly – on the principle of non-intervention' (emphasis added).

<sup>73</sup> F.A. Mann, *The Doctrine of Jurisdiction in International Law*, edited by A.W. Sijthoff (1964), at 46–47.

<sup>74</sup> This is especially the case where such an assertion may, in the words of the International Court of Justice in the *Nicaragua* judgment, 'bear[] on matters in which each State is permitted, by the principle of State sovereignty, to decide freely' and 'uses methods of coercion in regard to such choices, which must remain free ones'. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, Judgment of 27 June 1986 ICJ Reports (1986) 14, para. 205.

<sup>75</sup> As the International Law Commission stated in its Draft Conclusions on Identification of Customary International Law, UN Doc. A/73/10 (2018), Conclusion 10.3, '[f]ailure to react over time to a practice may serve as evidence of acceptance as law (*opinio juris*)'. This ties in with Akehurst's view that '[t]he acid test of the limits of jurisdiction in international law is the presence or absence of diplomatic protests'. Akehurst, *supra* note 65, at 176. Akehurst admits that protests against the assumption of adjudicative jurisdiction do exist but that, at least at the time of his writing, they were too isolated to legally challenge such jurisdiction (*ibid.*).

<sup>76</sup> Compare Parrish, 'Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach', in P.B. Stephan and S.A. Cleveland (eds), *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law* (2020) 303, at 312. Parrish takes the view that the absence of

Still, it remains difficult to make definitive statements regarding the motives driving states' inaction.<sup>77</sup>

In any event, even if it is true indeed that, currently, customary international law does not impose limits on adjudicative jurisdiction, one cannot exclude evolutions in customary international law that may impose limits. Limits may in fact be envisaged in the foreseeable future, as transnational litigation is increasing, especially outside the USA, to the extent that the USA is turning more isolationist in terms of allowing such litigation to move forward.<sup>78</sup> As Austen Parrish has suggested, the *Restatement's* removal of any public international law constraints to adjudicative jurisdiction may be influential abroad and encourage foreign courts to exercise their jurisdiction without strong connections of the disputes to the forum – to the detriment of US nationals.<sup>79</sup> This may possibly lead a *Restatement (Fifth)* to reconsider the proclaimed absence of international law limits and to extend the application of the customary international law requirement of genuine connection to a state's jurisdiction to adjudicate.

## 4 Concluding Observations

Compared to the *Restatement (Third)*, the jurisdictional sections of the *Restatement (Fourth)* appear to be more parochial, in the sense that they restrict the role for public international law in checking the geographic reach of domestic law and adjudication. Unlike the *Restatement (Third)*, the *Restatement (Fourth)*, while requiring a genuine connection for prescriptive jurisdiction to be validly exercised under international law, does not consider that customary international law requires that such jurisdiction be exercised reasonably. Unlike the *Restatement (Third)*, the *Restatement (Fourth)* takes the view that adjudicative jurisdiction is not constrained by customary international law. This may be a more or less accurate restatement of the actual practice of US courts. Moreover, there is scant foreign practice that explicitly considers reasonableness as a norm of international law or considers adjudicative jurisdiction to be limited by public international law. However, this does not mean that fundamental principles of the

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protests is not necessarily decisive as to the legality of a particular course of action. In his view, it is unclear how this absence 'can cause long-standing, fundamental structural principles limiting state power – to which there is widespread agreement – to disappear'. This structural limit is the requirement of genuine connection, to which Parrish appears to ascribe a quasi *ius cogens* status.

<sup>77</sup> The issue of state silence, for example, in the context of customary international law formation, is a relatively unexplored theme in international law. Currently, Danae Azaria heads a research project funded by the European Research Council on this issue at University College London. See 'Dr. Danae Azaria Receives Prestigious Starting Grant from the European Research Council', *UCL Home*, 6 September 2019, available at [www.ucl.ac.uk/laws/news/2019/sep/dr-danae-azaria-receives-prestigious-starting-grant-european-research-council](http://www.ucl.ac.uk/laws/news/2019/sep/dr-danae-azaria-receives-prestigious-starting-grant-european-research-council).

<sup>78</sup> Bookman, 'Litigation Isolationism', 67 *Stanford Law Review* (2015) 1081, at 1087 (describing foreign courts' growing attractiveness to transnational litigants and arguing that the 'rise of American litigation isolationism ... encourages plaintiffs not only to sue abroad once a case is dismissed from a U.S. court, but also to sue abroad *instead* of suing in a U.S. court, or at the same time in a parallel litigation') (emphasis in the original).

<sup>79</sup> Parrish, *supra* note 76.

international legal order, such as the requirement of a genuine connection, no longer play a role. They do, and they may weed out outrageous claims of both prescriptive and adjudicative jurisdiction. At the same time, one should not overlook the fact that limiting domestic doctrines, such as the presumption against extraterritoriality and constitutional due process requirements, may go a long way to restricting assertions of exorbitant jurisdiction. Still, for those wide jurisdictional assertions that may pass muster with the domestic legal framework, but nevertheless unduly impact on the interest of foreign states, principles of international law provide the ultimate check.