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A Modest Approach to the Customary International Law of Jurisdiction

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Abstract

This article responds to Cedric Ryngaert's commentary on the treatment of the customary international law of jurisdiction in the Restatement of the Law (Fourth): The Foreign Relations Law of the United States. *With respect to prescriptive jurisdiction, the article explains that the* Restatement (Fourth) *has not abandoned reasonableness as a rule of customary international law, although its 'genuine connection' requirement differs from the interest-balancing approach of the* Restatement (Third). *With respect to adjudicative jurisdiction, the article explains that the* Restatement *does not exclude the possibility of limits under customary international law but simply finds that no such limits currently exist, apart from the rules on foreign sovereign immunity. In each case, the* Restatement *reflects a modest approach to the customary international law of jurisdiction that insists on state practice and opinio juris.*

1 Introduction

Perhaps no one is more qualified to critique the jurisdictional provisions of the *Restatement of the Law (Fourth): The Foreign Relations Law of the United States* than Cedric Ryngaert. Ryngaert has written the leading monograph on jurisdiction in international law,[1] an analysis on which the *Restatement* repeatedly relies.[2] In his contribution to this issue, Ryngaert notes that the *Restatement (Fourth)* emphasizes US domestic-law limitations on jurisdiction to a greater extent than the *Restatement*

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1 C. Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015); *Restatement of the Law (Fourth): Foreign Relations Law of the United States* (2018).

2 See *Restatement (Fourth)*, *supra* note 1, § 401, Reporters' Note 1; § 407, Reporters' Notes 1, 2; § 411, Reporters' Note 1; § 413, Reporters' Note 2.

(Third) did and that '[t]he relevance of the customary international law of jurisdiction has correspondingly diminished'.[3] He sees this differing emphasis as a 'shift towards jurisdictional "parochialism"'.[4] I suggest that it reflects instead a modest approach to the customary international law of jurisdiction.

That is not to say that the *Restatement (Fourth)*'s positions on customary international law represent a distinctively US approach. The *Restatement (Fourth)* addresses both US domestic law and international law, and it is this combination that gives the *Restatement* the US-centric character that other contributions to this symposium have noted. In identifying the content of customary international law, however, the reporters applied the widely accepted test articulated by the International Court of Justice and relied on the practice of more than 50 jurisdictions from six different continents. The *Restatement*'s positions on the customary international law of jurisdiction represent an 'American' view only in the tautological sense that reporters working on behalf of the American Law Institute did the analysis.

It is common ground that 'the existence of a rule of customary international law requires that there be "a settled practice" together with *opinio juris*'.[5] The *Restatement (Third)* recognized this requirement, stating that '[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation'.[6] But some jurisdictional provisions in the *Restatement (Third)* did not apply the test faithfully. With respect to prescriptive jurisdiction, section 403 of the *Restatement (Third)* required, as 'a rule of international law', case-by-case determinations of reasonableness by weighing the contacts and interests of states along with other factors.[7] Yet the old *Restatement* cited little state practice to support this rule beyond the decisions of US courts, which had not adopted interest balancing based on any sense of international legal obligation.[8]

With respect to adjudicative jurisdiction, section 421 of the *Restatement (Third)* listed acceptable bases for personal jurisdiction under customary international law that bore a striking resemblance to US constitutional rules as of 1987.[9] Indeed, the

[3] Ryngaert, '*The Restatement* and the Law of Jurisdiction: A Commentary', 32 *European Journal of International Law* (*Eur. J. Int'l L.*) (2021) 1455; *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987).

[4] Ryngaert, *supra* note 3, at 1456.

[5] *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 55 (quoting *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)*, Judgment, 20 February, ICJ Reports (1969) 3, para. 77; see also International Law Commission (ILC), Draft Conclusions on Identification of Customary International Law, UN Doc. A/73/10 (2018), Conclusion 2 ('[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'). *Restatement (Fourth)*, *supra* note 1, § 401, Comment *a* (noting that customary international law 'results from a general and consistent practice of states followed out of a sense of international legal right or obligation'); Ryngaert, *supra* note 1, at 181 (noting the requirements of state practice and *opinio juris*).

[6] *Restatement (Third)*, *supra* note 3, § 102(2).

[7] *Ibid.*, § 403, Comment *a*.

[8] *Ibid.*, § 403, Reporters' Note 2.

[9] The US Supreme Court has since changed some of these rules. Compare *Restatement (Third)*, *supra* note 3, § 421(2)(h) (approving general personal jurisdiction over a person who 'regularly carries on business in the state'), with *Daimler AG v. Bauman*, 571 U.S. 117 (2014) (disapproving such jurisdiction); compare

reporters' notes asserted that '[t]he modern concepts of jurisdiction to adjudicate under international law are similar to those developed under the due process clause of the United States Constitution'.[10] But, again, the old *Restatement* cited little state practice beyond US cases and conducted no analysis of *opinio juris*.[11] In these two instances at least, the *Restatement (Third)* engaged in a sort of jurisdictional 'imperialism', writing the US domestic law of jurisdiction into provisions that were supposed to reflect customary international law.

Although Ryngaert largely agrees with the *Restatement (Fourth)*'s analysis of state practice and *opinio juris* on both issues, he nevertheless worries that the new *Restatement* 'diminish[es] [the] importance of customary international law'.[12] 'That jurisdictional reasonableness is not a norm of customary international law', he writes, 'does not mean that reasonableness has no international legal value'.[13] And he fears that the *Restatement (Fourth)* 'excludes any role for public international law in checking the exercise of adjudicative jurisdiction'.[14] This response argues that Ryngaert's fears are unwarranted. As explained below, the *Restatement (Fourth)* does recognize reasonableness as a rule of customary international law governing prescriptive jurisdiction, just not in the same form as the *Restatement (Third)*. The *Restatement (Fourth)* also does not exclude the possibility that customary international law may limit the exercise of adjudicative jurisdiction – it simply concludes that no customary international law rules limiting personal jurisdiction currently exist. And when customary international law fails to constrain jurisdiction, domestic rules fill the gaps. The result is a system that avoids unnecessary jurisdictional conflicts in most instances, but not one in which customary international law does all the work.

2 Prescriptive Jurisdiction and Reasonableness

Whether one reads the *Restatement (Fourth)* as having abandoned reasonableness as a requirement of customary international law depends on the form of reasonableness one has in mind. Section 407 of the *Restatement (Fourth)* states that the customary international law of prescriptive jurisdiction requires a 'genuine connection' between the subject of the regulation and the state seeking to regulate.[15] I agree with Ryngaert that identifying 'genuine connection' as a fundamental principle underlying the traditional bases for prescriptive jurisdiction is an important advance,[16] although I hasten to point out that the *Restatement* was not the first to identify it.[17] I also agree

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Restatement (Third), *supra* note 3, § 421, Comment *e* (disapproving personal jurisdiction based on transitory presence), with *Burnham v. Superior Court*, 495 U.S. 604 (1990) (approving such jurisdiction).

10 *Restatement (Third)*, *supra* note 3, § 421, Reporters' Note 1.

11 The only non-US practice cited was United Kingdom Order 11 and the Brussels Convention. See *ibid.*

12 Ryngaert, *supra* note 3, at 1457.

13 *Ibid.*, at 1461.

14 *Ibid.*, at 1465.

15 *Restatement (Fourth)*, *supra* note 1, § 407.

16 Ryngaert, *supra* note 3, at 1456–1457.

17 See *Restatement (Fourth)*, *supra* note 1, § 407, Reporters' Note 2 (citing sources).

with Ryngaert that this principle may find purchase in situations where a traditional basis for prescriptive jurisdiction exists but where the link to the regulating state is 'too tenuous to qualify as a genuine connection'.[18]

The *Restatement*'s reporters view the 'genuine connection' requirement as a form of reasonableness that is required by customary international law. The reporters' notes state that 'reasonableness, in the sense of showing a genuine connection, is an important touchstone for determining whether an exercise of jurisdiction is permissible under international law'.[19] To be sure, this form of reasonableness is unilateral rather than multilateral.[20] It evaluates the connection to the regulating state, but it does not weigh the interests of the regulating state against those of other states.

The *Restatement (Fourth)* rejects multilateral reasonableness as a requirement of customary international law, commenting that '[i]nternational law recognizes no hierarchy of bases of prescriptive jurisdiction and contains no rules for assigning priority to competing jurisdictional claims'.[21] In particular, the *Restatement (Fourth)* rejects the approach of old section 403, noting that 'state practice does not support a requirement of case-by-case balancing to establish reasonableness as a matter of customary international law'.[22] Ryngaert agrees with the reporters' evaluation of state practice.[23] He notes that the Court of Justice of the European Union rejected the *Restatement (Third)*'s approach in *Wood Pulp*.[24] I would add that the US Supreme Court did so too in *Hartford Fire*[25] and in *Empagran*, observing in the latter case that case-by-case balancing is 'too complex to prove workable'.[26] Without consistent state practice applying a multilateral reasonableness requirement based on a sense of legal obligation, no such requirement can be said to exist as a matter of customary international law.

Ryngaert would ground a multilateral reasonableness requirement instead on general principles of international law, including 'the principles of non-intervention, genuine connection, equity, proportionality, and abuse of rights'.[27] Much uncertainty

[18] Ryngaert, *supra* note 3, at 1457.

[19] *Restatement (Fourth)*, *supra* note 1, § 407, Reporters' Note 3.

[20] Dodge, 'Jurisdictional Reasonableness under Customary International Law: The Approach of the Restatement (Fourth) of Foreign Relations Law', 62 *Questions of International Law: Zoom In* (2019) 5, at 16–17 (distinguishing unilateral and multilateral approaches to reasonableness).

[21] *Restatement (Fourth)*, *supra* note 1, § 407, Comment *d*.

[22] *Ibid.*, § 407, Reporters' Note 3.

[23] Ryngaert, *supra* note 3, at 1460; see also Ryngaert, *supra* note 1, at 182 (noting that 'there is simply no clearly discernible norm of customary international law subjecting a State's jurisdictional assertions to a reasonableness requirement').

[24] Ryngaert, *supra* note 3, at 1460 (quoting Joined Cases 89, 104, 114, 116, 117, 125 to 129/85, *A. Ahlstrom Osakeyhtio v. Commission* (EU:C:1994:12), paras 5193, 5244).

[25] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, at 797–799 (1993).

[26] *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004). Ryngaert sees some support for multilateral reasonableness as a requirement of customary international law in *Empagran*'s reference to 'principles of customary international law'. *Ibid.*, at 164; see Ryngaert, *supra* note 3, at 1462. I read the reference as the US Supreme Court confusing international law with international comity, which the Court does with some frequency.

[27] Ryngaert, *supra* note 3, at 1462.

surrounds the identification and role of general principles in the international legal system, which is currently a subject of study at the International Law Commission.[28] Even putting such concerns to one side, the principle of reasonableness that one might derive from such general principles is concededly 'vague'.[29] It is difficult to imagine a reasonableness requirement so derived and of such uncertain content having much influence on the behaviour of states.[30]

In sum, the *Restatement (Fourth)* recognizes a unilateral reasonableness requirement for prescriptive jurisdiction under customary international law but not a multilateral one. Customary international law requires a 'genuine connection' between the subject of the regulation and the regulating state. But state practice and *opinio juris* do not support a further rule of customary international law requiring states to weigh their own interests against those of other states.

3 Adjudicative Jurisdiction and Customary International Law

The *Restatement (Fourth)* states: 'With the significant exception of various forms of immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate.'[31] This statement does not 'exclude[] any role for public international law in checking the exercise of adjudicative jurisdiction'.[32] Indeed, the statement expressly recognizes that customary international law currently does impose limits on jurisdiction to adjudicate in the form of state immunity and foreign official immunity.[33] Nor does the statement exclude the possibility that customary

[28] See ILC, First Report on General Principles of Law, UN Doc. A/CN.4/732 (2019).

[29] Ryngaert, *supra* note 1, at 184.

[30] Courts in the US almost never rely on general principles of law. A rare counter-example is the decision by the US Court of Military Commissions Review in *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (USCMCR 2011), which relied on general principles to find that providing material support for terrorism was punishable by military commission (*ibid.*, at 1218). The decision was reversed on appeal as a violation of the *Ex Post Facto* Clause in the US Constitution. See *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (en banc).

[31] *Restatement (Fourth)*, *supra* note 1, part IV, ch. 2, introductory note; see also § 422, Reporters' Note 1 (similar).

[32] Ryngaert, *supra* note 3, at 1465. Ryngaert is not the only scholar to have misread the *Restatement (Fourth)* in this regard. See also Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction', in S. Allen *et al.*, eds, *The Oxford Handbook of Jurisdiction in International Law* (2019) 330, at 338 (regretting that the *Restatement (Fourth)* 'suggests that customary international law does not constrain the exercise of adjudicative jurisdiction at all'); Parrish, 'Adjudicatory Jurisdiction and Public International Law: The Fourth Restatement's New Approach', in P.B. Stephan and S.H. Cleveland, eds, *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law* (2020) 303 ('[i]n the context of adjudicatory jurisdiction, the Fourth Restatement breaks with common understandings to find that personal jurisdiction is not a concern of international law').

[33] See *Jurisdictional Immunities*, *supra* note 5, para. 78 (concluding that customary international law requires state immunity for torts committed by armed forces during armed conflict); *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, ICJ Reports (2002) 3, paras 51, 54–55 (concluding that customary international law requires absolute

international law may in the future develop further limits on jurisdiction to adjudicate based on state practice and *opinio juris*. It simply says – in the present tense – that customary international law 'does not' impose further limits on jurisdiction to adjudicate. Ryngaert says that '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'.[34] That is also the *Restatement*'s position.

To assess the *Restatement (Fourth)*'s claim that customary international law does not currently impose limits on adjudicative jurisdiction other than rules of immunity, one must look at state practice, which in turn requires a judgment about how to categorize such practice.[35] The *Restatement (Fourth)* distinguishes three categories of jurisdiction: (i) jurisdiction to prescribe; (ii) jurisdiction to adjudicate; and (iii) jurisdiction to enforce.[36] The distinction is important because '[c]ustomary international law imposes different rules on different kinds of jurisdiction'.[37] Jurisdiction to enforce is strictly territorial,[38] jurisdiction to prescribe is not strictly territorial but does require a 'genuine connection' to the regulating state[39] and jurisdiction to adjudicate (according to the *Restatement*) is not currently subject to any limits other than certain rules of immunity.[40] Today, most scholars divide jurisdiction in this tripartite way.[41] If one accepts that jurisdiction to adjudicate is a separate category of jurisdiction, then the relevant state practice is practice that relates to the exercise of adjudicative jurisdiction specifically.[42]

There is a related question of the baseline from which to evaluate state practice: are exercises of jurisdiction prohibited unless a rule of customary international law

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immunity for heads of state, head of government, and foreign ministers during their terms of office). States have discretion how to implement in their domestic legal systems the immunity that customary international law requires, so long as the defendant is not 'subjected to the trial process'. *Jurisdictional Immunities*, *supra* note 5, para. 82. In the US, state immunity is codified in the Foreign Sovereign Immunities Act, which treats immunity as a question of subject matter jurisdiction. See *Restatement (Fourth)*, *supra* note 1, §§ 451–464 (restating US law on state immunity). In the US, foreign official immunity is generally governed by treaties and federal common law and should be treated as an affirmative defence, though one that must be decided at the threshold of the proceeding. See Dodge and Keitner, 'A Roadmap for Foreign Official Immunity Cases in U.S. Courts', 90 *Fordham Law Review* (2021) 677.

34 Ryngaert, *supra* note 3, at 1466 (emphasis in original).

35 See R. Michaels, 'Is Adjudicatory Jurisdiction a Category of Public International Law?', *Opinio Juris* (20 September 2018), available at http://opiniojuris.org/2018/09/20/is-adjudicatory-jurisdiction-a-category-of-public-international-law/ ('[t]his question of categorization matters for the proper assessment of state practice').

36 *Restatement (Fourth)*, *supra* note 1, § 401.

37 *Ibid.*, § 401, Comment *b*.

38 *Ibid.*, § 432(b) ('[u]nder customary international law … a state may not exercise jurisdiction to enforce in the territory of another state without the consent of the other state').

39 *Ibid.*, § 407.

40 *Ibid.*, part IV, ch. 2, introductory note.

41 *Ibid.*, § 401, Reporters' Note 2 (discussing authorities).

42 See Mills, *supra* note 32, at 344–349 (discussing the separation of adjudicative and prescriptive jurisdiction); Ryngaert, *supra* note 3, at 1463 (noting that the bases on which courts exercise personal jurisdiction are different from those upon which nations exercise prescriptive jurisdiction).

permits them, or are exercises of jurisdiction permitted unless a rule of customary international law prohibits them? Notwithstanding the statement in *The Lotus* that states have 'a wide measure of discretion which is only limited in certain cases by prohibitive rules',[43] state practice with respect to prescriptive jurisdiction reveals a baseline of prohibition, requiring justification under a permissive rule. As the *Restatement* notes, 'states typically justify and critique exercises of prescriptive jurisdiction based on whether an accepted basis for such jurisdiction exists'.[44] Alex Mills and Austen Parrish think the baseline for adjudicative jurisdiction must be the same.[45] But it is not clear why this is so if jurisdiction to adjudicate is a separate category, governed by separate rules and determined on the basis of separate state practice, as both Mills and Parrish agree that it is.[46] As with prescriptive jurisdiction, the key question is what state practice reveals the baseline to be: do states justify and critique exercises of adjudicative jurisdiction on the basis of permissive rules, or do they act as though they have a wide measure of discretion limited only by certain prohibitive rules like immunity?

As Ryngaert notes, when courts consider adjudicative jurisdiction, 'principles of jurisdiction other than the permissive principles of prescriptive jurisdiction apply'.[47] To justify the exercise of adjudicative jurisdiction, courts do not rely on principles of prescription such as territory, effects, active personality, passive personality, the protective principle and universal jurisdiction. Instead, they speak of domicile, consent and where the cause of action arose.[48] Another difference is that states determine adjudicative jurisdiction 'at the time the proceedings are commenced', whereas prescriptive jurisdiction evaluates connections 'as they were at the time the cause of action arose'.[49] Such differences in practice make it puzzling to suggest that the 'genuine connection' requirement for prescriptive jurisdiction should apply to adjudicative jurisdiction as well.[50] State practice does not support applying the same rules.

43 *The S.S. Lotus (France v. Turkey)*, 1927 PCIJ Series A, No. 10, at 19.

44 *Restatement (Fourth)*, *supra* note 1, § 407, Reporters' Note 1.

45 See Mills, *supra* note 32, at 338, n. 31 (asking whether 'there state practice and *opinio juris* to support the claim that states can exercise adjudicative jurisdiction in the absence of any connection to the dispute'); Parrish, *supra* note 32, at 313 (quoting Mills).

46 See Mills, *supra* note 32, at 332 (distinguishing adjudicative jurisdiction from prescriptive and enforcement jurisdiction); Parrish, *supra* note 32, at 305 (same).

47 Ryngaert, *supra* note 3, at 1463.

48 See, e.g., Regulation 1215/2012 (Brussels Regulation (Recast)), OJ 2012 L 351. US law on personal jurisdiction introduces additional concepts, such as 'minimum contacts', 'purposeful availment' and 'arising out of or relating to' that are also quite different from the concepts applied to prescriptive jurisdiction. See *Restatement (Fourth)*, *supra* note 1, § 422 (summarizing US rules on personal jurisdiction).

49 Mills, *supra* note 32, at 347.

50 Ryngaert, *supra* note 3, at 1467 ('[w]hile the Fourth Restatement 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'). To be clear, the customary international law limits on prescriptive jurisdiction do govern the substantive law that courts apply when exercising their adjudicative jurisdiction, including law that is made by courts themselves. See *Restatement (Fourth)*, *supra* note 1, § 401, Comment *c* (noting that courts exercise prescriptive jurisdiction 'when they make generally applicable common law'). But the customary international law limits on prescriptive jurisdiction – including the requirement of genuine connection – do not apply to the exercise of adjudicative jurisdiction itself.

The problem of exorbitant personal jurisdiction seems to motivate the quest for customary international law limits on adjudicative jurisdiction. Citing the example of tag jurisdiction based on transient presence, Ryngaert writes that 'public international law constraints … seem to be called for where domestic rules of jurisdiction are particularly far-reaching'.[51] But when states exercise exorbitant personal jurisdiction, other states typically do not protest such exercises as violations of customary international law.[52] Instead, states respond to exorbitant jurisdiction on the level of domestic law by refusing to recognize and enforce the judgment.[53]

The practice of the European Union (EU) with respect to exorbitant jurisdiction is telling. Article 5(2) of the Brussels Regulation (Recast) prohibits EU member states from exercising personal jurisdiction over persons domiciled in other member states on certain bases identified as exorbitant.[54] But Article 6(2) expressly permits the use of such exorbitant bases against persons domiciled elsewhere (including the United States).[55] What is more, judgments rendered on exorbitant bases of jurisdiction against non-EU domiciliaries are entitled to recognition and enforcement in other EU member states.[56] This treatment hardly seems consistent with the proposition that the exorbitant bases identified under the Brussels Regulation, including jurisdiction based on transient presence, violate customary international law. If they did, the Brussels Regulation would not only authorize violations of customary international law by EU member states but would also make other EU members states complicit in such violations by requiring them to recognize and enforce the resulting judgments.[57]

State practice also reveals that states operate from a permissive baseline with respect to adjudicative jurisdiction, allowing states to exercise adjudicative jurisdiction as they wish unless prohibited by a specific rule of customary international law. States exercise personal jurisdiction on many different bases. Some bases, such as domicile, are widely shared and would provide evidence of a general and consistent practice of states followed out of a sense of legal right if a permissive rule were required. But others are not widely shared. This is particularly true of exorbitant bases. A few states exercise personal jurisdiction based on transient presence (for example, the United Kingdom and the US), the nationality of the plaintiff (for example, France and Luxembourg) or the presence of unrelated property (for example, Austria, Germany

51 Ryngaert, *supra* note 3, at 1464.

52 Mills, *supra* note 32, at 345 (noting that 'it is rare for states to directly criticize the grounds of jurisdiction exercised by other states in civil matters, and this might be viewed as acquiescence in such expansive grounds or jurisdiction'); Ryngaert, *supra* note 3, at 1467 (discussing lack of protests).

53 See *Restatement (Fourth)*, *supra* note 1, § 422, Reporters' Note 1 ('[i]f one country exercises personal jurisdiction on a basis that another country considers exorbitant, the second country may refuse to recognize and enforce the resulting judgment'); see also Mills, *supra* note 32, at 346 (noting that states express their disapproval of exorbitant jurisdiction by refusing recognition).

54 Brussels Regulation (Recast), *supra* note 48, Art. 5(2).

55 *Ibid.*, Art. 6(2).

56 *Ibid.*, Arts 36, 39.

57 See Draft Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Arts 16, 19, UN GAOR Supplement No. 10 (recognizing international responsibility for a 'State which aids or assists another State in the commission of an internationally wrongful act').

and Sweden). But there is certainly no general and consistent practice of states sufficient to establish permissive rules of customary international law for any of these bases. The fact that states do not treat the use of these bases as violations of customary international law shows that states do not consider that a permissive rule is necessary for the exercise of jurisdiction to adjudicate. The baseline for adjudicative jurisdiction is different from the baseline for prescriptive jurisdiction, and this is because the practice of states shows that they operate from a different baseline.

4 Conclusion

The *Restatement (Fourth)* recognizes the important role of customary international law in regulating the exercise of jurisdiction by states. It recognizes that jurisdiction to enforce is strictly territorial and may not be exercised in the territory of another state without the other state's consent.[58] It recognizes that jurisdiction to prescribe requires a 'genuine connection' with the regulating state.[59] And it recognizes that jurisdiction to adjudicate is subject to customary international law rules of immunity, though for the most part it does not attempt to restate those rules.[60] Unlike the *Restatement (Third)*, however, the *Restatement (Fourth)* does not recognize a customary international law rule requiring a multilateral weighing of other states' interests to determine reasonableness or customary international law rules governing personal jurisdiction. The *Restatement (Fourth)*'s modest approach to the customary international law of jurisdiction leads naturally to a greater emphasis on domestic law rules limiting jurisdiction.[61] In the US, these rules are generally called doctrines of international comity.[62]

With respect to prescriptive jurisdiction, the doctrines that limit the reach of statutes are rules of interpretation. The principal tool for determining the geographic scope of federal statutes is the presumption against extraterritoriality, restated in section 404 of the *Restatement (Fourth)*.[63] Under this presumption, a federal statutory provision applies to cases touching other countries if there is a clear indication of congressional intent that the provision should apply or if the 'focus' of the provision is found in the US.[64] Section 405 of the *Restatement (Fourth)* articulates a supplementary principle of

58 *Restatement (Fourth)*, *supra* note 1, § 432.

59 *Ibid.*, § 407.

60 *Ibid.*, part IV, ch. 2, introductory note. The *Restatement*'s provisions on state immunity focus on US domestic law rather than international law. See *ibid.*, part IV, ch. 5, introductory note ('[e]xcept as specifically noted, the Sections in this Chapter restate the domestic law of the United States governing state immunity rather than international law').

61 See Dodge, 'International Comity in the Fourth Restatement', in Stephan and Cleveland, *supra* note 32, 319.

62 See generally Dodge, 'International Comity in American Law', 115 *Columbia Law Review* (2015) 2071.

63 *Restatement (Fourth)*, *supra* note 1, § 404. The geographic scope of US state law is determined by state rules of statutory interpretation. *Ibid.*, § 404, Comment *a*, Reporters' Note 5. Some states have presumptions against extraterritoriality, but others do not. See Dodge, 'Presumptions against Extraterritoriality in State Law', 53 *University of California Davis Law Review* (2020) 1389.

64 See *Restatement (Fourth)*, *supra* note 1, § 404, Comments *b*, *c*. The current version of the federal presumption, which dates from 2010, is more flexible than older versions because it does not turn exclusively on where the conduct occurred. See Dodge, 'The New Presumption Against Extraterritoriality', 133 *Harvard Law Review* (2020) 1582, at 1613.

'reasonableness in interpretation', allowing courts to impose additional comity limitations on federal statutes in limited circumstances.[65] This principle of reasonableness is very different from old section 403 because it is based on the US Supreme Court's decision in *Empagran*, which specifically rejected case-by-case balancing of interests as 'too complex to prove workable'.[66] With respect to adjudicative jurisdiction, the principal limitations are rules of personal jurisdiction developed by the US Supreme Court under the Due Process Clauses of the US Constitution.[67] The Supreme Court has also developed a discretionary doctrine of *forum non conveniens*, allowing federal courts to dismiss cases over which they have jurisdiction if there is an available and adequate alternative forum and the balance of private and public interests favours dismissal.[68]

Ryngaert writes that '[t]he presumption against extraterritoriality certainly limits jurisdictional overreach'.[69] He says much the same thing about US limits on personal jurisdiction.[70] So why, then, does he wish for rules of customary international law to cover the same ground? With respect to adjudicative jurisdiction, Ryngaert fears that other states may not act with similar restraint.[71] But, as a practical matter, states that engage in jurisdictional overreach will find it difficult to enforce their judgments abroad.[72] Today, only China, the EU and the US are large enough to act with jurisdictional impunity. Ryngaert also fears that the US might change its practice and exhibit less restraint: 'External, international law-based constraints may then have to supplant domestic constraints to limit jurisdictional overreach.'[73]

It is true, of course, that the US could change its practice in the future. But other states could then change their practices in response. They could begin to protest exorbitant exercises of personal jurisdiction as violations of customary international law rather than simply declining to recognize the resulting judgments. They could begin to weigh other states' interests in considering the extraterritorial application of their own laws rather than simply looking to see whether they themselves have genuine connections with the subjects of the regulation. But, at the moment, states are not doing these things and appear relatively content with the customary international law rules that they have.

65 *Restatement (Fourth)*, *supra* note 1, § 405.

66 *Empagran*, *supra* note 26. For further discussion of differences, see Dodge, 'Reasonableness in the Restatement (Fourth) of Foreign Relations Law', 55 *Willamette Law Review* (2019) 521, at 530–533.

67 See *Restatement (Fourth)*, *supra* note 1, § 422 (restating US rules on personal jurisdiction). The US allocates jurisdiction between federal and state courts with rules of subject matter jurisdiction, which are restated in § 421.

68 See *ibid.*, § 424 (restating federal doctrine of *forum non conveniens*). State courts apply their own doctrines of *forum non conveniens*, which generally follow the federal doctrine but not always. See *ibid.*, § 424, Reporters' Note 2.

69 Ryngaert, *supra* note 3, at 1458.

70 *Ibid.*, at 1465 (noting that limits on personal jurisdiction 'under domestic law will go a long way to limiting jurisdictional overreach').

71 *Ibid.*

72 See Mills, *supra* note 32, at 346 ('[t]he effectiveness of exercises of civil jurisdiction thus remains constrained by public international law limits on enforcement jurisdiction').

73 Ryngaert, *supra* note 3, at 1465.

In the meantime, there is the danger of another kind of 'overreach' – assertions that customary international law requires things of states that are not supported by state practice and *opinio juris*. Such overreach tends to discredit customary international law generally, calling into question even those rules for which state practice and *opinio juris* exist. That is the kind of overreach that the *Restatement (Third)* sometimes engaged in. It is the kind of overreach that the *Restatement (Fourth)* sought to avoid.