Jurisdiction to Adjudicate Under Customary International Law

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In a recent post, Dean Austen Parrish questions whether the soon-to-be-published Restatement (Fourth) of Foreign Relations Law is “remaking international law” when it says that “[w]ith the significant exception of various forms of immunity, modern customary international law generally does not impose limits on jurisdiction to adjudicate.” As reporters for Restatement (Fourth), we thought it might be useful to explain why this statement fairly reflects customary international law today.

We recognize that, once one gets past first principles, some controversy exists over the correct methodology for ascertaining international legal obligations. Two of us have written about the phenomenon of “comparative international law,” although we are not prepared to say that our disagreement with Dean Parrish is evidence for this. In our work as reporters for the Restatement (Fourth), we followed the approach for identifying customary international law articulated by the International Court of Justice (ICJ) and adopted by the International Law Commission (ILC).

Customary international law results from a general and consistent practice of states followed out of a sense of international legal right or obligation. This is the approach the ICJ has repeatedly applied in areas ranging from the law of the sea (North Sea Continental Shelf) to the jurisdictional immunities of states (Jurisdictional Immunities of the State). It is also the approach that the International Law Commission has adopted in its project on the Identification of Customary International Law. States often limit their jurisdiction to a greater extent than international law requires. But unless such limits result from a sense of international legal obligation, they reflect international comity rather than customary international law.

One of the objectives of the Restatement (Fourth) is to clarify distinctions among different kinds of jurisdiction under international law. Customary international law imposes different limits on a state’s exercise of jurisdiction, depending on what kind of jurisdiction is at issue. State practice today distinguishes among jurisdiction to
prescribe, jurisdiction to adjudicate, and jurisdiction to enforce. Dean Parrish seems to resist this basic point, arguing that “[p]ublic international law constrains state action, regardless of the form in which the power is exercised.” But the distinctions among different categories of jurisdiction are not new. In *The Lotus* (pp. 18-19), the Permanent Court of International Justice recognized that jurisdiction to enforce was strictly territorial but that the same was not true of jurisdiction to prescribe and jurisdiction to adjudicate. The rules of customary international law depend on state practice and *opinio juris* with respect to each category of jurisdiction.

Customary international law evolves as state practice and *opinio juris* change. Today, state practice and *opinio juris* demonstrate that jurisdiction to enforce remains strictly territorial, a rule restated in Section 432 of the Restatement (Fourth). With respect to jurisdiction to prescribe, state practice and *opinio juris* have evolved (contrary to what *The Lotus* suggested) to require a “genuine connection” with the state seeking to regulate, a rule restated in Section 407 of the Restatement (Fourth). Typically, this genuine connection is found in one or more of the recognized bases for prescriptive jurisdiction—territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction (Sections 408-413).

But state practice and *opinio juris* today do not treat jurisdiction to adjudicate the same as jurisdiction to prescribe or jurisdiction to enforce. Preliminarily, we should make clear that customary international law *does* impose some limits on jurisdiction to adjudicate in the form of various immunities from suit. In *Jurisdictional Immunities*, for example, the ICJ held that states are immune from suit in the courts of another state from claims based on the activities of armed forces during armed combat. (Parenthetically, we note that the ICJ applied different rules with respect to immunity from jurisdiction to enforce, again demonstrating that customary international law treats different kinds of jurisdiction differently.)

But the question that concerns Dean Parrish is whether customary international law limits states in the exercise of personal jurisdiction, apart from questions of immunity. To be clear, this is separate question from whether a state has jurisdiction to prescribe rules to govern a particular dispute and from whether a state may exercise measures to compel compliance with judicial orders.

State practice and *opinio juris* indicate that customary international law does not limit personal jurisdiction. Many states exercise personal jurisdiction on bases that other states consider exorbitant. The examples typically cited are the French practice of exercising personal jurisdiction based on the nationality of the plaintiff, the German practice of exercising personal jurisdiction based on property unrelated to the suit, and the U.S. practice—followed in some other common-law countries as well—of exercising personal jurisdiction based on service of process while the defendant is temporarily present (“tag” jurisdiction). States have not, however, protested such exercises of personal jurisdiction as violations of customary
international law. Instead, states have simply refused to recognize and enforce the judgments rendered in such cases. In other words, they have treated exorbitant jurisdiction as a reason not to extend international comity rather than as a violation of international law.

The practice of the European Union is particularly revealing on this point. Under the Brussels I Regulation (Recast), member states are prohibited from exercising personal jurisdiction on exorbitant bases over persons domiciled in other member states (Article 5(2)). But member states are expressly permitted to use such exorbitant bases against defendants domiciled elsewhere (Article 6(2)). What is more, member states are required to recognize and enforce the judgments of other members states, including those rendered on exorbitant bases of jurisdiction against non-EU defendants (Article 36(1)). If it were true that the exercise of exorbitant jurisdiction violates customary international law, one would have to read the Brussels Regulation as an authorization to EU member states to violate that law and as a commitment by other EU member states to assist in such violations. This is certainly not how the EU member states see it.

To be sure, states generally do not exercise personal jurisdiction without a basis for doing so that is widely recognized by other states. But the fact that many states maintain the right to exercise jurisdiction on other bases, and the fact that other states do not protest such exercises as violations of customary international law, forecloses the conclusion that the limits generally observed are followed out of a sense of legal obligation. In other words, states limit adjudicative jurisdiction as a matter of international comity, not customary international law.

Dean Parrish also asserts that Restatement (Fourth)’s position on adjudicative jurisdiction under customary international law is a departure from the past positions of the American Law Institute. First, the Principles of Transnational Civil Procedure that Dean Parrish invokes are not on point. They are standards recommended to national legal systems, not restatements of customary international law. Second, Dean Parrish is mistaken that the Restatement (Second) of Foreign Relations Law took the position that customary international law limited adjudicative jurisdiction. In fact, the Restatement (Second) recognized only two categories of jurisdiction—jurisdiction to prescribe and jurisdiction to enforce (see Section 6)—and thus did not separately treat jurisdiction to adjudicate. Third, while the Restatement (Third) did set forth “international rules and guidelines” for adjudicative jurisdiction, it also conceded that “it is not always clear whether the principles governing jurisdiction to adjudicate are applied as requirements of public international law or as principles of national law.” Restatement (Third), Part IV, Chapter 2, Introductory Note.

The Restatement (Third) did identify one particular state practice, the exercise of "trans" jurisdiction based on the service of process to a person with only a transitory
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.” Section 421 comment e. Yet the U.S. Supreme Court rejected a constitutional challenge to this practice three years later in *Burnham v. Superior Court of California*. In light of this additional practice by the United States, the practice of the EU member states already mentioned, and the absence of protests from other states, we concluded that “tag” jurisdiction—like other exorbitant bases of personal jurisdiction—does not violate customary international law. As this example illustrates, we looked at the general question again in light of current state practice and *opinio juris*.

Finally, Dean Parrish suggests that what the Restatement (Fourth) says concerning customary international law and adjudicative jurisdiction may be “controversial.” Certainly there were a number of questions that arose during the drafting of the Restatement (Fourth) that generated controversy. But the question whether customary international law places limits on adjudicative jurisdiction (other than immunity) was not one of them.

One of us has previously described on this blog the exacting process for restatements in general and for the Restatement (Fourth) of Foreign Relations Law in particular. We had the benefit of counsel from a wide range of advisers (including foreign advisers) with deep experience in customary international law and of vigorous debates on many issues. The resulting product does not simply reflect the views of the reporters about the content of customary international law governing jurisdiction. It reflects the best judgment of the American Law Institute based on an evaluation of state practice and *opinio juris* today.