Limits to the Jurisdiction of States in Private Law Matters under International Law

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Abstract

For decades, public and private international law scholars have debated whether the customary international law on the jurisdiction of States applies to private law. In this article, I argue that it does. Subsequently, I analyse the content of the customary law on jurisdiction of States in different fields of private law with an emphasis on tort law.

Keywords

Jurisdiction of States – Private Law Jurisdiction – Customary International Law – Private International Law – Conflict of Laws

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I. Introduction

In continental Europe, the great scholars of private international law in the 19th century built the discipline on a grandiose hope: That the law of nations – public international law – will develop a comprehensive conflict of laws system.[1] This system would be applied by every State, ensuring uniform decisions in private law disputes all over the world, without regard to where the court seized is located.[2] Within this hope, the conflict rules of private international law were, as a whole, public international law.

This hope did not prevail. Today, private international law is considered municipal law insofar as it is not regulated by an international treaty.[3] The goal of global uniformity of decisions[4] and the universalist aspirations to root private international law in its public counterpart[5] received vehement criticism.

Probably that criticism led to the exact opposite view on the relationship between public and private international law.[6] In this view, the parts of public international law concerned with the delimitations of state power do not determine the content of municipal private international law at all. In other words: The customary international law on the jurisdiction of States does not apply to private law.[7]

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1 Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, Vol. VIII (Berlin: Veit 1849), 26-32; Pasquale Stanislao Mancini assumed these rules were already in place, cf. Erik Jayme, *Internationales Privatrecht und Völkerrecht: Studien, Vorträge, Berichte* (Heidelberg: C. F. Müller 2003), 10; on this debate Arthur Nussbaum, 'Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws', Colum. L. Rev. 42 (1942), 189-206 (191-197) with comprehensive further references.

2 Von Savigny (n. 1), 26-27.

3 PCIJ, *Payment of Various Serbian Loans Issued in France* (France v. Kingdom of the Serbs, Croats and Slovenes), judgement of 12 July 1929, PCIJ Ser. A. No. 20, 1 (41); Michael Bogdan, 'Private International Law as Component of the Law of the Forum', RdC 348 (2011), 1-252 (34).

4 Trevor C. Hartley, 'The Modern Approach to Private International Law', RdC 319 (2006), 1-324 (27) with further references.

5 Albert A. Ehrenzweig and Erik Jayme, *Private International Law (General Part)* (Leyden: A. W. Sijthoff 1972), 31-34, 49-51.

6 Cf. Jörg Menzel, *Internationales Öffentliches Recht* (Tübingen: Mohr Siebeck 2011), 254; cf. Ernest G. Lorenzen, 'The Theory of Qualifications and the Conflict of Laws', Colum. L. Rev. 20 (1920), 247-282 (268-270).

7 Bogdan (n. 3), 45-46; Heinz-Peter Mansel, 'Staatlichkeit des Internationalen Privatrechts und Völkerrecht' in: Stefan Leible and Matthias Ruffert (eds), *Völkerrecht und IPR* (Jena: Jenaer Wissenschaftliche Verlagsgesellschaft 2006), 89-130 (117-124); Michael Akehurst, 'Jurisdiction in International Law', BYIL 46 (1972), 145-257 (181-187); Kurt Lipstein, 'The General Principles of Private International Law', RdC 135 (1972), 97-229 (171-173); Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', RdC 92 (1957), 1-227 (218-221); the same Fitzmaurice later considered public international law to limit the jurisdiction of States regarding bankruptcy law in ICJ, *Barcelona Traction, Light and Power Company* (Belgium v. Spain), separate opinion Fitzmaurice (Second Phase), ICJ Reports 1970, 64 (paras 68-70); Lorenzen (n. 6), 269-270.

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This view presupposes a meaningful distinguishability between public and private law at the international level. The presupposition of this distinguishability is deeply rooted in some traditions of private international law. Modern legal scholarship, nevertheless, almost unanimously denies a meaningful analytical distinction between public and private law.[8]

The contrary view does not share this presupposition. Here, the customary international law on the jurisdiction of States applies to all law, including private law.[9] It does not, however, as the abovementioned continental European scholars in the 19th century hoped for, determine the choice of law rules entirely.[10] Instead, it only – as it does in all areas of law – defines outer limits for the lawful exercise of jurisdiction in private law.[11]

Some influential texts on the jurisdiction of States do not address this discussion at all.[12] Others mention it but do not pick sides.[13] Still others take it up but accredit it only little relevance.[14] In fact, the discussion is typically avoided by declaring any controversial cases a concern of public law, resulting in general agreement that the customary international law on the jurisdic-

8 See below, III., p. 340.

9 American Law Institute (ed.), *Restatement of the Law (Fourth) The Foreign Relations Law of the United States* (St. Paul: American Law Institute Publishers 2020), § 407 lit. f, Reporter's Note 5; Austen Parrish, 'Personal Jurisdiction: The Transnational Difference', Va. J. Int'l L. 59 (2019), 97-146 (125-127); Alex Mills, 'Connecting Public and Private International Law' in: Veronica Ruiz Abou-Nigm, Kasey McCall-Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Oxford: Hart Publishing 2018), 13-32 (21-24); Paul David Mora, 'Universal Civil Jurisdiction and Forum Necessitatis: The Confusion of Public and Private International Law in Naït-Liman v. Switzerland', NILR 65 (2018), 155-183 (160-161); Menzel (n. 6), 261; Bernard H. Oxman, 'Jurisdiction of States' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2007), para. 9; Frank Vischer, 'General Course on Private International Law', RdC 232 (1992), 1-255 (26); Frederick A. Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years', RdC 186 (1984), 1-115 (31-33); Frederick A. Mann, 'The Doctrine of Jurisdiction in International Law', RdC 111 (1964), 1-162 (73-75); some do not address this issue explicitly but subscribe implicitly to this view, cf. ICJ, *Arrest Warrant* (Democratic Republic of the Congo v. Belgium), joint separate opinion of judges Higgins, Kooijmans, and Buergenthal, ICJ Reports 2002, 63 (para. 48); cf. Cedric Ryngaert, 'The Restatement and the Law of Jurisdiction: A Commentary', EJIL 32 (2021), 1455-1469 (1463-1464); cf. Andreas F. Lowenfeld, 'Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction', RdC 163 (1979), 313-445 (326-328).

10 Mann, 'Jurisdiction Revisited (1984)' (n. 9), 31.

11 Mills (n. 9), 23-24; Menzel (n. 6), 259; Vischer (n. 9), 26; Mann, 'Jurisdiction Revisited (1984)' (n. 9), 31.

12 Cf. International Law Commission (Secretariat), 'Extraterritorial Jurisdiction', ILCYB 2006, (2006) UN Doc. A/CN.4/SER.A/2006/Add.1 II (2006), 229-239.

13 Cf. James Crawford, *Brownlie's Principles of Public International Law* (9th edn, Oxford: Oxford University Press 2019), 456-460.

14 Cf. Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, Oxford: Oxford University Press 2015), 18-19.

tion of States applies. This happened, for example, in antitrust and securities law.[15]

This strategy avoids the highly relevant practical implications of the dispute. It might come to an end in the present and upcoming discussions around internet jurisdiction. State regulation on the internet with extraterritorial effects can take the form of public and private law. In this context, it is a significant question whether the customary international law on jurisdiction applies to private law regulations of the internet. States are confronted with conflicting regulations in private law. The debate in the United States (US) around libel tourism demonstrates this for private libel law.[16] As a consequence of this debate, the United States ceased to recognise foreign libel judgements if the forum employs weaker protection of free speech than the US constitution.[17] This does not, of course, hinder foreign courts to adjudicate over US newspapers with respect to their internet publications.[18]

International conflicts also appear in transnational tort legislation in the context of human rights violations. Tort liabilities might violate the customary law on the jurisdiction of States if they subject foreign companies for actions undertaken abroad;[19] in this constellation, some States argued that the customary international law on the jurisdiction of States applies.[20]

In this article, I side with the view that the customary international law in the jurisdiction of States applies to private law. This requires an analysis of the practice and *opinio juris* of States. I separate this analysis into prescriptive jurisdiction in tort law (V. 1.) and other parts of substantive private law (V. 2.), as the respective content of the customary international law differs as well. Finally, I analyse when States may apply their procedural law and whether international law imposes some absolute limits on adjudicative jurisdiction (V. 3.). Three steps are necessary to prepare this analysis: I describe the customary law on the jurisdiction of States as it indisputably applies to public law (II.). I argue that there is no viable distinction between public and private law at the international level (III.). Lastly, to prepare the

15 Cf. Akehurst (n. 7), 180-181, 190-192; generally on private enforcement of public regulation Hannah L. Buxbaum, 'Public Regulation and Private Enforcement in a Global Economy: Strategies for Managing Conflict', RdC 399 (2019), 267-442.

16 Cf. Darren J. Robinson, 'U.S. Enforcement of Foreign Judgments, Libel Tourism, and the SPEECH Act: Protecting Speech or Discouraging Foreign Legal Cooperation?', Transnat'l L. & Contemp. Probs. 21 (2013), 911-940.

17 SPEECH-Act, Pub. L. No. 111-223 (codified at 28 U. S. C. § 4102).

18 Cf., for example, German Federal Court of Justice (*Bundesgerichtshof*), judgement of 2 March 2010 – VI ZR 23/09, BGHZ 184, 313-323.

19 For an example cf. the claims in US Supreme Court, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U. S. 108 (2013).

20 See V.1.b), p. 348.

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analysis of state practice, I analyse how States generally limit the ambit of their legal order (IV.).

II. Jurisdiction

'Jurisdiction' has several meanings. One meaning refers to the lawful power of States under public international law.[21] In this article, I use the term only in this sense.

Another common meaning of 'jurisdiction' refers to the competence of courts or authorities.[22] This competence is also an important issue in this article. To avoid confusion, I refer to this concept only as 'competence' (of a court or an authority).

1. The Customary International Law on the Jurisdiction of States

Public international law denominates the lawful power of States to make and enforce rules.[23] The vast majority of this law on jurisdiction is customary law.[24] It aspires to limit the effect of one State's actions on other States;[25] in doing so, it reflects the principles of sovereign independence and sovereign equality of States.[26]

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21 Cf. Oxman (n. 9), para. 1.

22 Cf. Ralf Michaels, 'Jurisdiction, Foundations' in: Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro De Miguel Asensio (eds), *Encyclopedia of Private International Law* (Northampton: Edward Elgar Publishing Limited 2017), 1042-1051 (1042).

23 International Law Commission (Secretariat) (n. 12), para. 8; Oxman (n. 9), para. 1.

24 American Law Institute (n. 9), § 407 lit. b, § 432; Ryngaert (n. 14), 4; cf. International Law Commission (Secretariat) (n. 12), para. 3; one notable exception to this is tax law with its international agreements on double taxation, cf. Yoram Margalioth, 'Double Taxation' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2011), para. 5.

25 Oxman (n. 9), para. 1.

26 Oxman (n. 9), para. 1, 9; cf. International Law Commission (Secretariat) (n. 12), para. 2; cf. Austen Parrish, 'Adjudicatory Jurisdiction and Public International Law' in: Paul B. Stephan and Sarah H. Cleveland (eds), *The Restatement and Beyond: The Past, Present, and Future of U. S. Foreign Relations Law* (Oxford: Oxford University Press 2020), 303-317 (305) sometimes, especially in Germany, the law on jurisdiction is associated with the prohibition of intervention; i. e. regarding tax law cf. German Federal Constitutional Court (*Bundesverfassungsgericht*), decision of 22 March 1983, *Rechtshilfevertrag zwischen Deutschland und Österreich*, BVerfGE 63, 343 (369); regarding criminal law cf. Kai Ambos, *Internationales Strafrecht: Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht, Rechtshilfe* (5th edn, München: CH Beck 2018), 23-24.

Commonly, jurisdiction is subdivided into three categories: Prescriptive jurisdiction, adjudicative jurisdiction, and enforcement jurisdiction.[27] Prescriptive jurisdiction refers to the authority to create rules.[28] Adjudicative jurisdiction refers to the authority to apply law.[29] Enforcement jurisdiction refers to the exercise of state power via officials, especially with the use of physical force.[30] The jurisdiction to prescribe and the jurisdiction to enforce follow different rules.[31] The rules on adjudicative jurisdiction show a complex interplay with those on prescriptive and enforcement jurisdiction.

Enforcement within the territory of another State is strictly prohibited and constitutes an internationally wrongful act.[32] States may, on the other hand, prescribe rules that apply to actions and facts within the territory of other States.[33] This jurisdiction is also limited: A State requires a genuine connection between itself and the regulated subject to prescribe a rule.[34] Traditionally, a State's prescriptive jurisdiction was considered to be strictly limited to its territory and its citizens abroad.[35] The modern conception accepts much more connections to be satisfactorily close to justify a regulation. The specific requirements for a genuine connection differ between the different fields of law.[36] For example, the principles of jurisdiction in criminal law[37] cannot simply be transcribed to other fields. Nevertheless, the existence of a widely recognised genuine connection in one field of law might induce the acceptance of that connection in another field.[38] The customary international law on jurisdiction itself defines the boundaries between different fields of law in this sense. The

27 International Law Commission (Secretariat) (n. 12), para. 5; American Law Institute (n. 9), § 401.

28 American Law Institute (n. 9), § 402 lit. a.

29 Cf. American Law Institute (n. 9), Introductory Note Part IV, Chapter 2.

30 Cf. American Law Institute (n. 9), § 432 lit. a.

31 International Law Commission (Secretariat) (n. 12), para. 5; Oxman (n. 9), para. 5.

32 PCIJ, *S.S. Lotus* (France v. Turkey), judgement of 7 September 1927, PCIJ Ser. A. No. 10, 1 (18-19); International Law Commission (Secretariat) (n. 12), para. 32; American Law Institute (n. 9), § 432; Crawford (n. 13), 462.

33 PCIJ, *S.S. Lotus* (n. 32), 19.

34 American Law Institute (n. 9), § 407; Crawford (n. 13), 441; Oxman (n. 9), para. 10; this differs from the principles in PCIJ, *S.S. Lotus* (n. 32), 19, but the judgement is insofar usually considered to be outdated, i. e. ICJ, *Arrest Warrant* (separate opinion Higgins, Kooijmans, and Buergenthal) (n. 9), para. 51; on this discussion Ryngaert (n. 14), 34-39.

35 International Law Commission (Secretariat) (n. 12), para. 1; cf. Joseph Story, *Commentaries on the Conflict of Laws* (Boston: Hilliard, Gray, and Company 1834), 20-27.

36 Ryngaert (n. 14), 46.

37 Cf. Ilias Bantakes, 'Criminal Jurisdiction of States under International Law' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2011).

38 Cf. Ryngaert (n. 14), 46.

definition of a municipal legal system is irrelevant (insofar its definition did not contribute to the formation of the customary law on jurisdiction).

Often more than one State will be genuinely connected to a specific situation. All those States may then exercise their prescriptive jurisdiction.[39] In principle, customary international law does not offer a hierarchy of genuine links to resolve this concurrent jurisdiction.[40] According to a contested view, States must, in extraordinary cases, refrain from the exercise of their jurisdiction to favour a much closer connected State.[41]

The jurisdiction to prescribe and the jurisdiction to enforce are linked: It constitutes an internationally wrongful act if a State enforces a rule which it enacted in excess of its jurisdiction to prescribe.[42] Whether the internationally wrongful act is already completed with the mere prescription of the rule is far less clear.[43] In most cases, this appears unlikely: Frequently, the international ambit of a municipal law is only determined by courts in proceedings long after the enactment of the law in question.

2. The Solely Prohibiting Nature of the Customary Law on the Jurisdiction of States

The customary law on jurisdiction only limits the exercise of state power.[44] Therefore, it is only relevant when a State burdens somebody with an obligation to do, omit, or tolerate something. Hereafter, I call those rules 'primary

39 International Law Commission (Secretariat) (n. 12), para. 29; Oxman (n. 9), para. 10.

40 American Law Institute (n. 9), lit. d, Reporter's Note 3, 4; Bruno Simma and Andreas Th. Müller, 'Exercise and Limits of Jurisdiction' in: James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press 2012), 134-157 (151).

41 ICJ, *Barcelona Traction* (separate opinion Fitzmaurice) (n. 7), para. 70; American Law Institute (ed.), *Restatement of the Law (Third) The Foreign Relations Law of the United States* (St. Paul: American Law Institute Publishers 1987), § 403; disagreeing: American Law Institute (n. 9), § 407 lit. d, Reporter's Note 3; Ryngaert (n. 14), 180-188.

42 American Law Institute (n. 9), § 432 lit. c, Reporter's Note 5, 6; cf. International Law Commission (Secretariat) (n. 12), para. 5.

43 Crawford (n. 13), 461; Andrea Bianchi, 'Jurisdictional Rules in Customary International Law' in: Karl M. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice* (London: Kluwer Law International 1996), 74-101 (78); Akehurst (n. 7), 187-188; cf. Kimberly N. Trapp, 'Jurisdiction and State Responsibility' in: Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, Paul Gragl and Edward Guntrip (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press 2019), 355-380 (360-361); cf. Mann, 'Jurisdiction (1964)' (n. 9), 14.

44 Mann, 'Jurisdiction Revisited (1984)' (n. 9), 31; cf. Menzel (n. 6), 259.

rules', following H. L. A. Hart.[45] If a State applies its law, but as a result, no one must do, omit, or tolerate something – for example, when the requirements for such an obligation under municipal law are not met – the customary law on jurisdiction cannot be violated.

This has the consequence that isolated questions *about* status do not concern the customary law on jurisdiction.[46] The customary law on jurisdiction is only relevant for obligations *resulting from* status.

Take the following example: A couple are citizens of State A, where they lived and celebrated their marriage. Later, they emigrate to State B. Now, one spouse sues the other before the courts of State B for matrimonial maintenance. If State B, according to its municipal conflicts law, does not recognise the marriage concluded in State A, its courts will dismiss the case. This cannot violate the customary law on jurisdiction, because nobody is subject to an obligation to do, omit, or tolerate something (it is, of course, possible that such a non-recognition violates other rules of public international law, i. e. human rights law).[47]

If, on the other hand, State B recognised the marriage and its courts consequently sentenced the sued spouse to pay matrimonial maintenance, the customary law on jurisdiction applies if it is applicable to private law: The sued spouse is subject to an obligation to do something, namely, to pay the maintenance. Under the customary law on jurisdiction, State B must justify why it burdens a foreigner for an action undertaken abroad – getting married – with an obligation under its law. In this case, this is justified, as the recognition of the marriage in State A does not infringe A's sovereignty. On the contrary, the recognition of foreign law and status created abroad usually improves the effectiveness of the recognised legal order and avoids conflicts between States.[48]

III. The Public/Private Distinction in Private International Law

Legal scholarship, at least in the English and German-speaking sphere, agrees almost unanimously that public and private law cannot be distin-

45 Cf. Herbert L. A. Hart, *The Concept of Law* (3rd edn, Oxford: Oxford University Press 2012), 81.

46 Some scholars disagree with this, cf. Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn, Berlin: Duncker & Humblot 1984), para. 1021; cf. Mann, 'Jurisdiction (1964)' (n. 9), 56-57.

47 Cf. Alex Mills, 'Rethinking Jurisdiction in International Law', BYIL 84 (2014), 187-293 (209-230); cf. Bogdan (n. 3), 46.

48 Cf. Mills (n. 47), 208-209.

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guished in an analytically meaningful – categorial – way.[49] At best, the distinction can be understood as a gradual one.[50] Most municipal legal orders still distinguish between public and private law.[51] All States, however, handle the distinction somewhat differently.[52]

The public/private distinction also appears in many municipal private international law systems. For example, it is deeply rooted in the theoretical framework of the Savigny tradition of private international law. This tradition employs the view that private law is, contrary to public law, apolitical.[53] Therefore, States do not have a specific interest in applying their own private law; it is understood to serve only individuals and not the State.[54] From this point of view – assuming private law only concerns conflicts between individuals and not conflicts between States –[55] it almost goes without saying that the customary international law on the jurisdiction of States does not apply to private law. Why should it if States have no interest in what private law applies? Savigny himself, interestingly, drew the opposite conclusion: He expected customary international law to develop a comprehensive conflict of law system for private law.[56]

Other traditions do not include this distinction in their theoretical framework.[57] The public/private distinction, however, appears in most private international law systems in form of the 'public law taboo'. This term describes the observation that States are often willing to recognise, apply, and

49 Alexander Somek, 'Kategoriale Unterscheidung von Öffentlichem Recht und Privatrecht?', VVDStRL 79 (2020), 7-42 (7-19); Julian Krüper, 'Kategoriale Unterscheidung von Öffentlichem Recht und Privatrecht?', VVDStRL 79 (2020), 43-99 (48-61), both with comprehensive further references; Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction', U. Pa. L. Rev. 130 (1982), 1349; on the history of the criticism of the public/private distinction in the context of private international law Symeon C. Symeonides, 'General Course on Private International Law', RdC 384 (2016), 1-385 (100-103).

50 Somek (n. 49), 18; Krüper (n. 49), 51; sceptically Kennedy (n. 49), 1352-1353.

51 On civil law jurisdictions Hasso Hofmann, 'Die Unterscheidung von Öffentlichem und Privatem Recht', Der Staat 57 (2018), 5-33 (5); on common and civil law jurisdictions Michel Rosenfeld, 'Rethinking the Boundaries between Public Law and Private Law for the Twenty First Century: An Introduction, Symposium: The Boundaries of Public Law', I.CON 11 (2013), 125-128 (125); cf. Frederick A. Mann, 'Conflict of Laws and Public Law', RdC 132 (1971), 107-196 (116).

52 Cf. American Law Institute (n. 9), § 407 Reporter's Note 5.

53 Gisela Rühl, 'Unilateralism' in: Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann and Andreas Stier (eds), *The Max Planck Encyclopedia of European Private Law*, Vol. II (Oxford: Oxford University Press 2012), 1735-1739 (1735-1736); cf. Symeonides (n. 49), 100-101.

54 Gerhard Kegel, 'The Crisis of Conflict of Laws', RdC 112 (1964), 91-268 (184-185).

55 Rühl (n. 53), 1735.

56 Von Savigny (n. 1).

57 For example, Brainerd Currie's governmental interest analysis, cf. Herma Hill Kay, 'A Defense of Currie's Governmental Interest Analysis', RdC 215 (1989), 1-204 (79-85).

enforce foreign private law but are reluctant to do the same with foreign public law.[58] In recent decades, the non-recognition of foreign public law has become less strict: Today, most States apply foreign law insofar as it influences private law relationships they are willing to recognise, but still refuse to enforce, for example, a foreign tax or penal sanction.[59] This refusal is an almost universal phenomenon.[60]

As States differ in what they consider to be public or private law, the public law taboo carries a different content within each jurisdiction. For example, the United States does not apply foreign law damage claims in antitrust violations.[61] The European Union (EU) member states, on the other hand, do exactly this (Art. 6 EU Rome II Regulation).[62] Most States do not apply and enforce foreign tax law;[63] Québec (Canada) does this under the condition of reciprocity.[64]

For the purposes of an international analysis, the distinction between public and private law is therefore difficult to maintain. It appears that States decide politically where to open their legal order for foreign law, and it is impossible to identify an overarching pattern.

IV. Mechanisms Limiting the Reach of Legislation in Municipal Law

In order to conduct a proper analysis of the customary international law on prescriptive jurisdiction, it is necessary to understand how States define – and limit – the spatial reach of their legislation. These limitations are the relevant state practice forming the customary law.

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58 The term was coined by Lowenfeld (n. 9), 322-326; the public law taboo goes by different names in different jurisdictions, for example in the United Kingdom 'Dicey Rule 3', Lawrence Collins and John Humphrey Carlile Morris, *Dicey, Morris and Collins on the Conflict of Laws*, Vol. 1 (Lawrence Collins ed.), (15th edn, London: Sweet & Maxwell 2012), 5R-016 and in Germany 'Nichtdurchsetzungsgrundsatz', Anatol Dutta, *Die Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte* (Tübingen: Mohr Siebeck 2006), 17.

59 Vischer (n. 9), 151.

60 Dutta (n. 58), 17-28; cf. Vischer (n. 9), 186-198.

61 Cf. Jürgen Basedow, 'Competition Law (Antitrust)' in: Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro De Miguel Asensio (eds), *Encyclopedia of Private International Law* (Northampton: Edward Elgar Publishing Limited 2017), 425-432 (430).

62 Jürgen Basedow, 'Antitrust or Competition Law, International' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2014), para. 31.

63 Cf. Dutta (n. 58), 17-27.

64 Art. 3162 Civil Code (Québec); cf. Dutta (n. 58), 23.

States limit the reach of their legal order with three mechanisms: They limit the competence of courts and authorities entrusted with the enforcement of the law, they limit the ambit of the legislation itself via unilateral conflict rules, and they apply foreign law.

The customary law on the jurisdiction of States is only concerned with enforceable obligations.[65] Therefore, all three mechanisms must be considered in analysing state practice to determine the content of this law.[66] Prescriptive and adjudicative jurisdiction is, in the light of this, sometimes difficult to distinguish. An excessive ambit of legislation can be fixed by strong limits on the competence of courts or authorities.

In exemplary fields of public law, analyses of state practice often confine themselves to the analysis of the conflict rules and ignore the municipal rules on the competence of courts and authorities.[67] In these fields, this usually works because for every possible application of the substantive municipal law as defined by the municipal conflict rules, a competent court or a competent authority exists under municipal law.

1. Municipal Rules on the Competence of Courts and Authorities

This is, of course, not necessary. Take, as a hypothetical example,[68] a State whose municipal law assigns criminal court competence only according to the place where the crime was committed. A criminal court is solely competent under municipal law if the crime was committed in its district. If municipal law does not set up courts whose districts cover the area beyond the State's territory, the spatial ambit of that State's criminal law is effectively limited to its territory. This State would not need any conflict rules in its criminal law to comply with the customary international law on prescriptive jurisdiction. The limitation of the reach of its legislation is accomplished by its municipal rules on court competence alone.

In private law, this is usually relevant. A private law obligation can typically only be enforced via a judgement of a competent court. Furthermore, States typically do not offer a competent court for all possible applications of their private law under their conflict rules. Therefore, the municipal rules on court competence form a key element in a municipal legal system's compli-

65 Cf. above II. 2., p. 339.

66 Cf. Mills (n. 47), 196; cf. Mann, 'Jurisdiction Revisited (1984)' (n. 9), 67.

67 Cf., for example, American Law Institute (n. 9), § 410 Reporter's Note 2, 3, 4; § 411 Reporter's Note 1, 2; § 412 Reporter's Note 2.

68 Cf. the English medieval system, Ryngaert (n. 14), 62.

ance with the customary international law on the jurisdiction of States:[69] If a State's courts lack competence under municipal law, it is impossible that this State will burden anyone with an obligation to do, omit, or tolerate something.

2. Unilateral Conflict Rules

Aside from limits on the competence of courts and authorities, States limit the reach of their legislation via conflict rules. The most straightforward conflict rule is the unilateral ('one-sided') conflict rule: A unilateral conflict rule only defines the scope of application of the rule it refers to.[70] If its requirements are satisfied, the material rule applies; if not, it does not apply.

In exemplary fields of public law – for example, tax law or criminal law – unilateral conflict rules are predominant. Legislation in these fields often pronounces its ambit (i. e. Art. 3 EU General Data Protection Regulation or §§ 3-7 German Penal Code [*Strafgesetzbuch*]). Where this is not the case, courts still usually determine the ambit according to the unilateral approach if they consider a rule to be public law. Municipal private international law systems also determine the application of some rules according to unilateral conflict rules (i. e. Art. 9 EU Rome I Regulation; Art. 16 EU Rome II Regulation).[71]

3. The Application of Foreign Law

Finally, States limit the reach of their legislation by applying foreign law. This thought presupposes that, if a forum applies foreign law, the exercise of prescriptive jurisdiction is attributed to the foreign State and not to the forum.[72]

Some theories argue that, if a State applies foreign law, the applied rules are duplicated within the municipal legal order of the forum.[73] The forum then

69 Mills (n. 47), 196, 203-204; Mann, 'Jurisdiction Revisited (1984)' (n. 9), 73-81.

70 Vischer (n. 9), 36-37.

71 Cf. Jürgen Basedow, 'The Law of Open Societies – Private Ordering and Public Regulation of International Relations', RdC 360 (2012), 1-515 (429-443); Vischer (n. 9), 32.

72 Cf. Ryngaert (n. 9), 1463-1464; cf. Alex Mills, 'Private Interests and Private Law Regulation in Public International Law Jurisdiction' in: Stephen Allen, Daniel Costelloe, Malgosia Fitzmaurice, Paul Gragl and Edward Guntrip (eds), *The Oxford Handbook of Jurisdiction in International Law* (Oxford: Oxford University Press 2019), 330-354 (347).

73 Cf. the presentation at Boris Schinkels, *Normsatzstruktur des IPR* (Tübingen: Mohr Siebeck 2007), 19-24.

does not apply the foreign law as foreign law but the duplicated municipal rule with identical content to the foreign law. From this theoretical perspective, it might appear implausible to attribute the exercise of prescriptive jurisdiction not to the forum.

At least for the purposes of the customary international law on the jurisdiction of States, however, this is justified:[74] The customary international law on the jurisdiction of States seeks to protect state sovereignty.[75] It does this by requiring States to limit the reach of their laws. One State applying the law of another can hardly be considered an infringement of the sovereignty of the State whose law was applied. On the contrary, the application of foreign law increases the efficacy of the applied legal order. The State applying foreign law opens its legal order and jurisdiction to enforce to the applied law.[76] This mechanism is most obvious if a State recognises and enforces a foreign judgement but is also in place when a court applies foreign law.

Therefore, for the purposes of the international law on jurisdiction, a State limits the reach of its own law when it applies foreign law. Private international law systems worldwide employ different mechanisms to determine when to apply foreign law. A widespread mechanism[77] is Savigny's bilateral ('two-sided') conflict rule: Its idea is to apply the legal system which is best suited to govern the legal relationship in question.[78] This is typically the legal system most closely connected to the legal relationship,[79] even though some municipal private international law systems employ different approaches.[80]

There are other mechanisms to determine when to apply foreign law.[81] All these mechanisms have in common that they limit the reach of obligations

74 Cf. Mills (n. 47), 209; the European Court of Human Rights appears to disagree with this: In ECtHR (Grand Chamber), *Naït-Liman v. Switzerland*, judgement of 15 March 2018, no. 51357/07, the applicant sought compensation for torture suffered in Tunisia before Swiss courts from an individual under private law (paras 15, 23). Even though he asked the Swiss courts to apply Tunisian law (para. 23), the ECtHR considered that 'in substance, his arguments come very close to' universal jurisdiction (para. 176). In the view I put forward here, this is not a question of (prescriptive) universal jurisdiction but a question only of adjudicative jurisdiction, cf. Mora (n. 9), 167-168.

75 Oxman (n. 9), para. 9.

76 Cf. Mora (n. 9), 164, 165; cf. Mills (n. 47), 209.

77 Cf. Giesela Rühl, 'Private International Law, Foundations' in: Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro De Miguel Asensio (eds), *Encyclopedia of Private International Law* (Northampton: Edward Elgar Publishing Limited 2017), 1380-1390 (1387).

78 Vischer (n. 9), 33.

79 Cf. Vischer (n. 9), 35-36.

80 Cf. Bogdan (n. 3), 72 with further references.

81 Cf., for example, for the United States Linda Silberman, 'USA' in: Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro De Miguel Asensio (eds), *Encyclopedia of Private International Law* (Northampton: Edward Elgar Publishing Limited 2017), 2637-2647.

under the municipal law: If a State applies foreign law, it does not burden anyone with an obligation to do, omit, or tolerate something under its own law. Consequently, prescriptive jurisdiction in substantive law and adjudicative jurisdiction follow different rules: In some situations, a State lacking prescriptive jurisdiction for the substantive law may still adjudicate a case if its courts apply foreign law.

V. The Customary International Law on the Jurisdiction of States in Private Law Matters

As mentioned above, the rules for the exercise of prescriptive jurisdiction differ between different legal fields.[82] As different parts of private law pursue different purposes and employ different regulatory concepts, private law does not constitute a uniform field in this sense. Thus, different areas of private law might follow different rules.

1. Prescriptive Jurisdiction in Tort Law

I will begin my analysis with tort law. Even though tort law is typically considered to be a subject matter of private international law, it is characterised by a certain proximity to public law.[83] In tort law – similar to fields of public law like criminal law –, States directly prescribe primary rules (obligations).[84] If somebody violates these primary rules, they owe damages to injured others. This proximity to public law was early noted; for example, Savigny wanted to always apply the law of the forum to torts because he considered tort law to be similar to public law.[85] The proximity is specifically visible in damage claims for antitrust violations. Private cartel damage claims are regularly referred to as public law due to the purposes of antitrust law.[86]

For these reasons, tort law appears to be the easiest target to show that the customary international law on the jurisdiction of States applies to a field of private law. Furthermore, tort law is by far the practically most relevant area for the law on the jurisdiction of States in private law.[87]

82 Ryngaert (n. 14).

83 Cf. Donal Nolan, 'Tort and Public Law: Overlapping Categories?', L. Q. R. 135 (2019), 272-293.

84 On primary rules see above n. 45.

85 Cf. von Savigny (n. 1), 276-280.

86 Cf. n. 15.

87 Cf. above I., p. 334 ff.

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The determination of the content of a rule of customary international law requires proof of respective state practice and *opinio juris*.[88] With regard to tort law, States show both in favour of an application of the customary international law of the jurisdiction of States.

a) State Practice

The conflict rules States are using to determine the scope of their own substantive tort law are quite similar to some of the rules States use to determine the reach of their criminal law. There is, of course, an important difference: In criminal law, States limit the reach of their substantive law with unilateral conflict rules. In tort law, States frequently use bilateral conflict rules. As argued above, however, both schemes limit the ambit of the substantive municipal law.[89]

Almost every State applies, as a basic principle, the *lex loci delicti*, the law of the place where the tort was committed.[90] States also apply the law of the place where the harm occurred.[91] Under some circumstances, States do not apply the *lex loci delicti* but the law of the common nationality or common domicile of perpetrator and victim.[92]

Applying the *lex loci delicti* or the law where the harm occurred mirrors the territoriality principle known from criminal jurisdiction. According to this principle, States may exercise criminal jurisdiction over actions undertaken in their territory or affecting it.[93] The application of the law of the common nationality or common domicile mirrors the nationality principle. According to this principle, States may exercise criminal jurisdiction over their citizens all over the world.[94] Apparently, the practice of States in tort law is wider than in criminal law: They apply tort law not only based on the citizenship of the defendant but also on domicile.

Insofar States do not employ conflict rules, they usually limit the ambit of their tort law by limitations on the competence of their courts.

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88 International Law Commission, 'Draft Conclusions on the Identification of Customary International Law', *Report of the International Law Commission, Seventieth Session (2018), UN Doc. A/73/10*, 117-156, Conclusion 2 with further references.

89 IV., p. 342 ff.

90 Cf. with extensive proof of municipal conflict rules Thomas Kadner Graziano, 'Torts' in: Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro De Miguel Asensio (eds), *Encyclopedia of Private International Law* (Northampton: Edward Elgar Publishing Limited 2017), 1709-1717 (1710).

91 Graziano (n. 90), 1714-1716.

92 Graziano (n. 90), 1711-1712.

93 Bantakes (n. 37), paras 4-5.

94 Bantakes (n. 37), paras 13-16.

b) Opinio Juris

Regarding tort law, States are of the opinion that these limitations on the reach of their legislation are mandated by international law.[95] An example of this are *amicus curiae* briefs that several governments sent to the US Supreme Court in proceedings determining the reach of US antitrust law and the US Alien Tort Statute.

US antitrust law grants cartel victims damage claims against the cartel members.[96] Contrary to most other States, under US antitrust law, victims can claim treble damage.[97] These punitive damages aim not merely to compensate the victim but also to police the unlawful conduct and avoid its repetition.[98] This is still a typical tort claim by structure: The United States prescribed certain prohibitions, for example, not to form cartels. If these prohibitions are violated, the victims are granted a damage claim against the perpetrators. The US Alien Tort Statute shows the same structure: It grants victims of certain violations of public international law – for example, of certain human rights law – damages against non-state perpetrators.[99] As public international law does not contain this legal consequence, the United States prescribed additional rules, requiring prescriptive jurisdiction under international law. For both, antitrust law[100] and the Alien Tort Statute[101],

95 Cf. International Law Commission (n. 88), Conclusion 9.

96 15 U.S. C. § 15 (2021); cf. US Supreme Court, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*, 429 U.S. 477, 485-86 (1977).

97 15 U.S. C. § 15 (2021); US Supreme Court, *F. Hoffmann-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 167-68.

98 Buxbaum (n. 15), 363.

99 Anja Seibert-Fohr, 'United States Alien Tort Statute' in: Rüdiger Wolfrum (ed.), *MPEPIL* (online edn, Oxford: Oxford University Press 2019) , paras 5, 7.

100 US Supreme Court, Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amicus Curiae in Support of Petitioners at 18, *F. Hoffmann-La Roche v. Empagran*, No. 03-724 (U.S. Feb. 3, 2004); Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 7, *F. Hoffmann-La Roche v. Empagran*, No. 03-724 (U.S. Feb. 3, 2004); Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 11, *F. Hoffmann-La Roche v. Empagran*, No. 03-724 (U.S. Feb. 3, 2004); Brief of the Government of Japan as Amicus Curiae in Support of Petitioners at 6, *F. Hoffmann-La Roche v. Empagran*, No. 03-724 (U.S. Feb. 3, 2004).

101 US Supreme Court, Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 11, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Jun 13, 2002); accepting universal tort jurisdiction but applying the customary law on the jurisdiction of States to the case: Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party at 8, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Jun 13, 2002); cf. Mills (n. 9), 22.

States argued an application of US law to situations not linked in any way to the United States would constitute a violation of international law.

The protests in the case of the Alien Tort Statute indicate a difference between the jurisdictional rules for criminal law and tort law: States, contrary to criminal law, appear to have rejected the exercise of universal jurisdiction in tort law for certain offences.[102]

2. Prescriptive Jurisdiction in Other Private Law

In tort law, States directly prescribe the content of the obligation. This is different in other fields of private law: Take, for example, contract law: Without a contract, contract law does not oblige anyone to do, omit, or tolerate something. Individuals can create those obligations towards themselves by entering a contract. However, the law does not require anyone to do so.

If States do not directly prescribe primary rules – obligations – but prescribe a system enabling individuals to create and modify primary rules at will, the customary international law on the jurisdiction of States still applies. The genuine link States required to regulate such rules, however, is much weaker than in tort law. A brief look, for example, at European practice reveals that in the field of contract law several links are sufficiently close to justify the exercise of prescriptive jurisdiction. A link to one of the parties of a contract appears to be sufficient to exercise jurisdiction over the whole contract (cf. Arts 4, 6 EU Rome I Regulation). Above all, the parties' consent to apply a specific State's law enables that State to exercise prescriptive jurisdiction over the contract (cf. Art. 3 EU Rome I Regulation).

Given how weak a genuine link may be here to justify regulation, it is hard to find plausible examples of how States could exceed their jurisdiction. I think, however, the following qualifies:

A couple lives in State A, whose citizenship they both hold and where they married according to a religious rite. Under the law of State A, this rite does not create a legally valid marriage. One of the spouses holds assets in State B but has no further connection to that State. Now, the other spouse sues before the courts of State B for matrimonial maintenance. Under the law of State B, the religious rite the couple performed creates a legally valid marriage. The courts in State B apply that law to the wedding ceremony and, therefore, order the spouse to pay the matrimonial maintenance. Later, this judgement is enforced into the assets in State B.

102 ICJ, *Arrest Warrant* (separate opinion Higgins, Kooijmans, and Buergenthal) (n. 9), para. 48; Mora (n. 9), 174-175.

In this scenario, State B violated the customary international law on the jurisdiction of States: State B burdened a foreigner for an action undertaken abroad (performing the religious marriage rite) with an obligation under its law without any connection either to the foreigner, the couple, or the actions.

3. Prescriptive Jurisdiction in Procedural Law and Adjudicative Jurisdiction

The scholars agreeing that the customary law on the jurisdiction of States applies to private law are engaged in a fierce debate on whether this law places absolute limits on the adjudicative jurisdiction of States.[103] This would require States to restrain the competence of their courts and authorities according to these limits.

This question can only be answered by a look at procedural law. Most, if not all, municipal legal systems apply the *lex fori* to procedural matters.[104] Hence, the municipal rules on the competence of courts and authorities determine the ambit of the corresponding municipal procedural law.[105] Procedural law necessarily must somehow sanction the defendant's non-participation in the proceedings. Otherwise, the defendant could simply ignore the claim. These sanctions can appear quite mild. In German civil procedural law, for example, a defendant is technically not obliged to participate in the proceedings; the defendant only forfeits the opportunity to object to the facts and legal opinions brought forward by the applicant.[106] These rules, nevertheless, can effectively compel individuals to participate in the proceedings, as participation is required to secure legal positions. Other legal systems employ much harsher sanctions: A defendant in a US court operating under the US Federal Rules of Civil Procedure, for example, might find herself in contempt of court – and flowing from this subject to significant fines or even

103 Affirmative: Parrish (n. 26); Reinhold Geimer, *Internationales Zivilprozessrecht* (8th edn, Köln: Verlag Dr. Otto Schmidt 2020), para. 392; negating: William S. Dodge, 'A Modest Approach to the Customary International Law of Jurisdiction', EJIL 32 (2021), 1471-1481 (1476-1479); American Law Institute (n. 9), Introductory Note Part IV, Chapter 2; Mora (n. 9), 162, 165; undecided: Ryngaert (n. 9), 1466-1468; Mills (n. 72), 344-349; Donald Earl Childress III, 'Jurisdiction, Limits Under International Law' in: Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro De Miguel Asensio (eds), *Encyclopedia of Private International Law* (Northampton: Edward Elgar Publishing Limited 2017), 1051-1056 (1052-1053).

104 Wolfgang Hau, 'Proceedings, Law Governing' in: Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro De Miguel Asensio (eds), *Encyclopedia of Private International Law* (Northampton: Edward Elgar Publishing Limited 2017), 1407-1413 (1407-1409).

105 Cf. Basedow (n. 71), 112.

106 Cf. Christoph G. Paulus, *Zivilprozessrecht: Erkenntnisverfahren, Zwangsvollstreckung und Europäisches Zivilprozessrecht* (6th edn, Berlin: Springer 2017), 185, 187.

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imprisonment – when she does not comply with the procedures on pre-trail discovery.[107]

The question when a State may exercise adjudicatory jurisdiction can, therefore, be rephrased: When may a State oblige an individual to participate in proceedings before its courts or authorities? This obligation is the decisive point in ascertaining the limits of adjudicatory jurisdiction: When a defendant participates voluntarily in – and submits to – the proceedings, the exercise of adjudicative jurisdiction by the forum is, without any doubt, legal under the customary international law on the jurisdiction of States. Hence, the question to adjudicative jurisdiction is this: When may a State oblige a defendant to participate in and submit to its proceedings against her will?

This question, however, is a question of *prescriptive* jurisdiction.[108] Firstly, the defendant must actively do something to participate. If the defendant remains inactive, she will somehow be sanctioned. This setup alone qualifies as an obligation requiring prescriptive jurisdiction.[109] Secondly, the procedural law of the forum determines several issues which might decisively influence the outcome of the proceedings, for example, the rules on evidence.[110] Consequently, following from the general rules on prescriptive jurisdiction, States require some kind of genuine link to oblige individuals to participate in proceedings in their courts and under their procedural law.

The analysis on what qualifies as a sufficient genuine link to justify an obligation to participate in proceedings is complicated by the double-hatted function of the municipal rules on the competence of courts and authorities.[111] On the one hand, these rules determine when an individual is obliged to participate in the proceedings and when the procedural law applies. On the other hand, these rules limit the ambit of the substantive law.[112] Therefore, it remains often unclear whether such rules implement customary rules requiring limitations on the scope of the procedural law, the substantive law, or both. The same can be said when States protest an excessive exercise of jurisdiction; again, it is often unclear whether these protests are directed against the obligation to participate in proceedings or against the application of substantive law.

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107 Cf. Rule 37(b)(2)(vii); cf. Manuela F. Doughan, *Deutsche Unternehmen und die US-amerikanische Discovery: Fragen zur Teilnahmepflicht und Kostenerstattung* (Baden-Baden: Nomos 2019), 124.

108 Disagreeing: Ryngaert (n. 9), 1463-1464; Mora (n. 9), 162.

109 Cf. above II. 2., p. 339.

110 Hartley (n. 4), 27-28.

111 This might explain disagreements on the interpretation of state practice, cf., for example, Parrish (n. 26), 311-312; Dodge (n. 103), 1477.

112 Cf. above IV. 1., p. 343.

Consequently, it is somewhat unclear what qualifies as a genuine link allowing States to oblige individuals to participate in proceedings before their courts or authorities. Nevertheless, some outlines can be described:

Firstly, the reference point for the genuine link with regard to that obligation can only be what the applicant claims to have happened and not what has actually happened: One purpose of adjudicatory procedures is to establish the facts of the case. A court or an authority can only do this when it presumes its competence, at least until it is established that the case is outside its competence. Secondly, when a State enjoys prescriptive jurisdiction over the substantial law, it may also oblige individuals to participate in proceedings on the application of this substantive law. Adjudicative jurisdiction is wider than the prescriptive jurisdiction on substantive law.

This leaves mostly one question: Under which circumstances may a State, lacking prescriptive jurisdiction for the substantive law, oblige a defendant to participate in proceedings before its courts or authorities and adjudicate the case under its procedural law? Of course, this State would have to apply foreign substantive law in these adjudications. Some connections are widely regarded constituting a genuine link allowing the exercise of adjudicative jurisdiction, for example, the domicile of the defendant or the place where a legal person is incorporated or organised.[113]

A decisive question in this context is whether a State may exercise adjudicative jurisdiction over a defendant keeping assets within it for disputes unrelated to these assets.[114] In my view, this constitutes a genuine link justifying the exercise of adjudicative jurisdiction. When a State adjudicates a case and applies foreign law, from the perspective of the State whose law is applied, two effects come to work: On the one hand, this improves the efficacy of its legal order.[115] The reach of its legal order is enhanced, as claims originating from it can also be satisfied with the assets within the forum; the forum will enforce its own judgement. On the other hand, the State whose

113 Earl Childress III (n. 103), 1053.

114 Cf. Mills (n. 72), 346; this question is specifically debated in Germany because German civil procedural law – when not restrained by the EU Brussels Ia regulation, cf. Hendrik Schultzky, '§ 23' in: Richard Zöller (founder), *Zivilprozessordnung* (32nd edn, Köln: Verlag Dr. Otto Schmidt 2020), 1033, para. 4 – declares German courts competent if the defendant keeps assets within Germany (§ 23 German Civil Procedure Code [*Zivilprozessordnung*]): The German Federal Constitutional Court (*Bundesverfassungsgericht*) left the question open, decision of 12 April 1983, *National Iranian Oil Company*, BVerfGE 64, 1 (18-19) with further references on the German debate; the German Federal Court of Justice *(Bundesgerichtshof)* holds the view that such an exercise of adjudicative jurisdiction is legal under international law but nevertheless requires for reasons of German law an additional connection of the dispute to Germany to constitute the competence of German courts, judgement of 2 July 1991, NJW 44 (1991), 3092, 3093.

115 See above IV. 3., p. 344.

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law is applied can neither determine the forum nor the applicable procedural law. The positive effects of the first, however, outweigh the negative effects of the latter: When the defendant has assets within the forum, she must expect anyway to be subject of the adjudicative jurisdiction of the forum with regard to these assets. The latter effect has, therefore, only little weight.

This mitigates the practical relevance of the rules on adjudicative jurisdiction. As in matters of public law, enforcement jurisdiction in civil matters is strictly territorial.[116] A forum is, therefore, only able to enforce a judgement when a defendant holds assets within its territory.[117] It is, however, as it is with the mere enactment of legislation,[118] unclear whether the mere issuance of a judgement short of enforcement can constitute an internationally wrongful act for the violation of the customary international law on the jurisdiction of States. Either the defendant has assets within the forum; then this justifies the exercise of adjudicative jurisdiction. Or the defendant has no assets within the forum; then an exercise of excessive adjudicatory jurisdiction has only little relevance because the judgement cannot be enforced. Such an excessive use of adjudicatory jurisdiction renders it also unlikely that other States will enforce the judgement.[119]

VI. Conclusion

The customary international law on the jurisdiction of States applies to private law. If States directly prescribe rules containing an obligation to do, omit, or tolerate something, as they do in tort law, the requirements of the customary law on the jurisdiction of States are quite strict and similar (though not identical) to those in criminal law. This practically limits regulations, for example, towards the internet or in transnational human rights litigation. If States lack the jurisdiction to prescribe, however, they may adjudicate a case and apply the foreign law of a competent State.

In other areas of private law, for example in contract law, the customary international law on the jurisdiction of States also applies. However, the genuine link requirements in these other fields are so weak that it is difficult to find practically relevant cases showing States exceeding their jurisdiction.

The direct consequences for private international law are limited. Municipal private international law systems will generally comply with the custom-

116 Mills (n. 72), 346; n. 32.
117 Mills (n. 72), 346.
118 Cf. n. 43 and accompanying text.
119 Mills (n. 72), 346; cf. Basedow, (n. 71), 268-269.

ary law on jurisdiction, as exactly those systems constitute the state practice for the customary rules.[120]

States must, however, observe the customary rules on jurisdiction in the rapidly developing fields of internet regulation and transnational human rights litigation. For example, regulation of speech can either be implemented by criminal law or by tort law, granting individuals damages for certain expressions. In the case of libel law, States directly prescribe an obligation to omit something: To publish the respective content. The customary international law on the jurisdiction of States is indifferent whether these prohibitions are implemented with measures of criminal law or tort law. It applies in both cases.[121]

States might violate the customary law on the jurisdiction of States if they prescribe tort liabilities for human rights violations abroad committed by foreign companies. The customary law on jurisdiction allows, nevertheless, two simple options to hold companies responsible for human rights violations abroad: Firstly, States may directly prescribe extraterritorial obligations for companies incorporated under their law or maintaining the seat within their territory.[122] Thus, States can use tort law to offer victims compensation for the human rights violations of their own companies committed abroad. States can improve this practice by obliging their multinational companies to supervise subsidiary companies incorporated and acting abroad. If such a subsidiary company commits certain offences abroad, the parent company might then be liable under its home tort law for a violation of these supervisory duties.[123] Secondly, States hosting assets of multinational companies may adjudicate cases against the company and apply the law of the place where the human rights violations were committed, regardless of where the company is incorporated or seated.

If States adjudicate cases outside their prescriptive jurisdiction (and only then – often States apply foreign law even though they were allowed under

120 See above V., p. 346.

121 Some scholars consider tort law in analyses on the customary international law on internet jurisdiction, cf. Stefanie Schmahl, 'Zwischenstaatliche Kompetenzabgrenzung im Cyberspace', AVR 47 (2009), 284-327 (291), others do not, cf. Uta Kohl, *Jurisdiction and the Internet* (Cambridge: Cambridge University Press 2007), 14-17; apparently also Julia Hörnle, *Internet Jurisdiction Law and Practice* (Oxford: Oxford University Press 2021), 81-114, 289-330, 369-405.

122 American Law Institute (n. 9), § 410 Reporter's Note 2; for criminal law Kilian Wegner, *Transnationale Sanktionsverfahren gegen Verbände* (Baden-Baden: Nomos 2021), 67-89.

123 Cf., for example, the British practice Ekaterina Aristova, 'Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction', Utrecht Law Review 14 (2018), 6-21; this practice's fate after Brexit is unclear cf. Ekaterina Aristova, 'The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?', Business and Human Rights Journal 6 (2021), 399-422.

the customary law on jurisdiction to apply their own substantive law), the limits imposed by the customary law on jurisdiction offer a new answer to the old question why States apply foreign law at all:[124] In that specific situation, they do so to be able to adjudicate the case for which they lack prescriptive jurisdiction.

In public international law, the findings affect the customary law on jurisdiction itself. In private law, domicile[125] and consent are widely accepted genuine connections establishing prescriptive jurisdiction.[126] Especially consent is probably a viable genuine connection in all fields of law. Of course, in the typical fields of public law, consent will only rarely be expressed in the form of a contract. In some municipal private international law systems, the court will apply the *lex fori* if the defendant does not object.[127] Therefore, in all fields of law, broadly interpreted consent might constitute a genuine link allowing the exercise of prescriptive jurisdiction. Individuals might consent in this sense by participating in court or administrative proceedings without objecting to the application of the *lex fori*.

124 Cf. Bogdan (n. 3), 49-70; cf. Vischer (n. 9), 23-32.
125 Cf. American Law Institute (n. 9), § 410 Reporter's Note 3.
126 Mills (n. 72), 349-51; cf. Basedow, (n. 71), 164-182.
127 Cf. Bogdan (n. 3), 92-95.