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# A Brief Primer on the Rule of Law in Multistate Systems

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# A BRIEF PRIMER ON THE RULE OF LAW IN MULTISTATE SYSTEMS

*Anthony J. Colangelo\**

## I. INTRODUCTION

**D**OMESTIC legal systems traditionally hold dear certain criteria that, for many observers, law must obey for it to qualify as “law,” properly so called. Together, these criteria make up what is often referred to as “the rule of law,” which is geared toward “the enterprise of subjecting human conduct to the governance of rules.”<sup>1</sup> The criteria are not absolute, but are matters of degree. They typically urge that law be promulgated, publicized, prospective in application, intelligible, consonant (not contradictory), consistent, possible to comply with, and congruent between what it says and how it is administered.<sup>2</sup> Perhaps the most basic element underlying all of these criteria is that human actors can fairly comply with the law. If human actors cannot fairly comply with the law, not only does that particular law fail to obey the rule of law, but it also calls into question the entire enterprise of law as a set of rules that can and should govern human conduct. In other words, not only will a law that cannot fairly be complied with effectively fail to perform law’s essential task of shaping human conduct, but it will also undermine faith in the very idea of “law.”

Rule of law literature by and large casts these criteria as operating within a single sovereign or state.<sup>3</sup> Thus, the rule of law requirement of prospectivity or non-retroactivity of the law is typically illustrated by a single state legislature, acting in time. If the legislature enacts a law before activity occurs, the law is prospective.<sup>4</sup> If, on the other hand, the legislature enacts a law after activity occurs and seeks to project the law backward in time to that activity, the law looks retroactive.<sup>5</sup> Similarly,

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1. LON L. FULLER, *THE MORALITY OF LAW* 106 (rev. ed. 1969).

2. *Id.* at 39.

3. At least the many writings on the rule of law appear to use the single sovereign or single state to make and illustrate their arguments. *See generally id.*; ARISTOTLE, *POLITICS* 2.9–2.11 (Benjamin Jowett trans., Dover Publications 2000) available at <http://classics.mit.edu/Aristotle.politics.html> (analyzing the rule of law of three individual states: Sparta, Crete, and Carthage).

4. 16A C.J.S. *Constitutional Law* § 559 (2014).

5. *Id.*

contradictory laws are typically framed as laws coming from one sovereign but commanding contradictory actions.<sup>6</sup> Take for example a law or set of laws commanding people to sit and stand at the same time. The same goes for other rule of law criteria; our legal imaginations tend to cast these requirements as operating on law within a single state or sovereign.

What I would like to do in this brief symposium piece is start adapting these criteria to multistate systems and, in particular, to the international system.<sup>7</sup> I will try to show that not only do rule of law criteria extend to the current international multistate system in new and interesting ways, but also that the system is presently generating serious if largely unidentified and underappreciated rule of law problems for transnational actors. To take the examples just listed, the rule of law criterion of non-retroactivity of the law may be cast across space as well as time in multistate systems to prevent transnational actors from being unfairly subject to a law that existed in time when they acted, but that they had no reasonable expectation would govern their activity when and where they acted in geographic space. Suppose, for instance, that Jane acts in State A in compliance with State A law, but her activity violates the extant law of State B. At some later point, Jane finds herself in State B and subject to prosecution under State B law for her State A activity. If Jane had no reasonable expectation that her activity would be subject to State B law at the time she acted, there is a species of retroactivity problem with the application of State B law to her past State A conduct. Only here, the non-retroactivity criterion extends across space as well as time in the multistate system. Similarly, instead of one contradictory law emanating from one sovereign, imagine the far more likely scenario that a transnational actor is subject to multiple overlapping contradictory laws of different states. It so happens that this occurs all the time in the international system—whether it is a discovery order in one state to disclose information protected by another state's privacy laws, one state's antitrust law prohibiting activity required by another state's competition law, or one state's employment law imposing liability for employment decisions mandated by another state's law. The list goes on.

The result is that in many cases the law, broadly conceived, is difficult or impossible to fairly comply with, undermining its overall efficacy and legitimacy. This sort of failure to obey the rule of law is not just of academic or scholarly interest, but promises profound practical consequences as well: the less transnational actors are able to fairly comply with the law, the less transnational activity they may feel comfortable engaging in. Uncertainty about how law will treat their activity could very well chill that activity—activity that is generally considered beneficial to people, states, and the international system like communication, travel,

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6. FULLER, *supra* note 1, at 65.

7. In this connection, this piece cobbles together various arguments I've made and am making in previous articles, forthcoming pieces, and works in progress.

and trade. In short, our increasingly shrinking world is calling out for a better understanding and resolution of how rule of law criteria can and should translate to the multistate international system. Such a project should aim not only to creatively adapt rule of law criteria to the multistate international system but also to construct conceptual and doctrinal mechanisms through which the law may strive to meet and satisfy those criteria. In what follows, I will try to roughly sketch how I think that can be done. For some criteria, like the prospectivity and consonance elements already mentioned, I have more developed ideas, particularly when it comes to how existing law in the United States can develop to better capture and protect the rule of law in the international system.<sup>8</sup> For others, like consistency and congruence, my ideas will be more embryonic and therefore necessarily more tentative.

Before doing so, I would like to acknowledge a foundational and possibly contentious axiom of the essay—namely, that the rule of law can apply to the multistate international system in the first place. I have defended this view elsewhere in more detail,<sup>9</sup> but the gist of it is that there is nothing inherent in the decentralized and composite international multistate system that would necessarily deny the rule of law criteria described above as being applicable, albeit in new and interesting ways. The point of the present essay is merely to introduce some suggestions about how those new and interesting ways can play out.

## II. TRANSLATING THE RULE OF LAW TO MULTISTATE SYSTEMS

### A. PROSPECTIVITY

The criterion of prospectivity or non-retroactivity of the law, or “legality” for short, is fundamental to any sophisticated legal system. It stands for the basic rule of law principle that legal actors must have fair notice of the law at the time they act.<sup>10</sup> Framed as a right, legality ensures fair notice of the applicable law by disfavoring the legal prohibition of activity after it occurs.<sup>11</sup> In this respect, the principle is generally thought of in terms of time: if the law prohibiting an activity did not exist when the activity occurred, the law cannot reach back in time and apply to that activity.<sup>12</sup> This requirement that law exist in time before it can apply—or

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8. See Anthony J. Colangelo, *Spatial Legality*, 107 Nw. U. L. REV. 69, 71–72 (2012) (addressing prospectivity in the multi-state system); Anthony J. Colangelo, *Universal Jurisdiction as an International “False Conflict” of Laws*, 30 MICH. J. INT’L L. 881, 892 (2009) (addressing consonance in international law as a byproduct of jus cogens norms).

9. See Anthony J. Colangelo, *Absolute Conflicts of Law*, at 49–52 (draft on file).

10. See FULLER, *supra* note 1, at 53; JEREMY WALDRON, *The Rule of Law and the Importance of Procedure*, in GETTING TO THE RULE OF LAW: NOMOS L, 4, 6 (James E. Fleming ed., 2011). Its Latin expression, “*nullum crimen sine lege, nulla poena sine lege*,” is probably as well-known as its English version, “no crime without law, nor punishment without law.” Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005).

11. Robinson, *supra* note 10, at 343.

12. *Id.*

what we might call “temporal legality”—is captured in U.S. law in the Constitution’s *Ex Post Facto* Clauses when it comes to the legislative enactment of criminal laws,<sup>13</sup> and in the Due Process Clause when it comes to judicial evaluation of both criminal and civil statutes.<sup>14</sup> It is also evident in international law.<sup>15</sup> And it is generally how the legality principle works within a single state: actors are deemed on notice of the law at the time they act, but it is unfair to subject their conduct to a legal prohibition that comes into existence after the conduct occurs.<sup>16</sup>

The concept of what I have called “spatial legality” casts this fair notice right across space as well as time in systems comprised of multiple states with multiple jurisdictions.<sup>17</sup> Unless every state’s law applies everywhere, spatial legality will have traction because there invariably will be situations in which an existing law (in time) does not apply to conduct (in space).<sup>18</sup> The spatial legality concept has been fully explicated elsewhere,<sup>19</sup> but its essence can be captured in the simple hypothetical scenario introduced earlier and elaborated below.

Posit a system of more than one state, say, State A and State B. Now suppose that State A law does not apply to everything that happens in State B and vice versa. If Jane acts in State A, and at the time she acts State B law does not apply to her activity, it would violate the principle of spatial legality if State B later applied its law to Jane for her act in State A. This is so even if State B law existed in time when Jane acted. Here it is the reach of the law in space as opposed to its existence in time that catches Jane by surprise. Although spatial legality focuses on law’s reach in space rather than its existence in time, the fair notice problem is basically the same: someone is being subjected to a law she could not reasonably have expected would govern her conduct when she engaged in it.

This type of spatial legality problem arises most frequently in multistate systems when a state gains personal jurisdiction over a defendant and seeks to use that personal jurisdiction to justify applying the state’s substantive laws to the defendant’s prior extraterritorial activity. Thus in the scenario above, if State B courts gain personal jurisdiction over Jane—suppose she finds herself in State B via extradition, abduction, or just goes there on vacation—State B may claim personal, or adjudicative, ju-

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13. *Ex post facto* translates to “from a thing done afterward,” or “[a]fter the fact; retroactively.” BLACK’S LAW DICTIONARY 601 (7th ed. 1999); see, e.g., *Calder v. Bull*, 3 U.S. 386, 390–92 (1798).

14. While the Supreme Court has construed the Constitution’s express prohibitions on *ex post facto* laws to apply only to criminal statutes; see *Calder*, 3 U.S. at 390–91, due process places limits on retroactive civil statutes as well. See, e.g., *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728–30 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).

15. International Covenant on Civil and Political Rights art. 15(1), Dec. 19, 1966, 999 U.N.T.S. 171; see also Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 7(1), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221.

16. Robinson, *supra* note 10, at 343.

17. COLANGELO, *Spatial Legality*, *supra* note 8, at 69.

18. *Id.* at 124.

19. See *id.* at 69.

jurisdiction over her. State B cannot, however, use this personal jurisdiction over Jane to apply State B substantive law, or prescriptive jurisdiction, to her activity in State A if State B could not have regulated the activity when and where it occurred. The spatial legality concept argues that to do so not only would be inconsistent with jurisdictional rules of international law (though both U.S. and international courts sometimes get this wrong<sup>20</sup>), it would also violate Jane's right to fair notice of the applicable law. What spatial legality does then is it takes extant prescriptive jurisdiction rules among states at the time of conduct and transforms them into an individual right for Jane to fair notice of the applicable law at the time she acts.

As I have argued, defendants can avail themselves of this fair notice right in U.S. courts.<sup>21</sup> The U.S. Supreme Court has used the Due Process Clause to invalidate retroactive application of the law in both the criminal and the civil contexts.<sup>22</sup> And the Court has done so in a spatial legality sense by imposing constitutional limits on a U.S. state's ability to choose its law to govern activity outside its borders, even where the state has personal jurisdiction over the parties.<sup>23</sup> This jurisprudence holds powerful analogical value for litigants contesting the application of U.S. law to their foreign conduct. The Court has held "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>24</sup> The "touchstone"<sup>25</sup> of this due process test is, according to the Court, protecting parties from "unfair surprise or frustration of legitimate expectations" resulting from the choice of a law they could not have expected would govern their conduct when they engaged in it.<sup>26</sup> On this basis, the Court has refused in the interstate context to credit a party's post-conduct move to a forum as a contact sufficient for the state constitutionally to apply its law to the out-of-state conduct at issue in the suit.<sup>27</sup> In the Court's words, "a postoccurrence change of residence to the forum State [i]s insufficient in and of itself to confer power on the forum State to choose its law."<sup>28</sup> Moreover, the interstate cases suggest that just because a state has general jurisdiction over a defendant, that does not mean the state can automatically apply its laws to the defendant's out-of-state conduct.<sup>29</sup> Analogically, these cases supply strong ar-

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20. *See id.*

21. *Id.*

22. *Supra* note 14 and accompanying text.

23. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

24. *Id.* (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

25. *Hague*, 449 U.S. at 333 (Powell, J., dissenting) (agreeing with the plurality's test, but not the application of the test to the facts).

26. *Id.* at 318 n.24 (majority opinion).

27. *Id.* at 319.

28. *Id.*

29. *See generally id.*; *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936); *Home Ins. Co. v. Dick*, 281 U.S. 397, 408 (1930).

guments for foreign defendants against the application of U.S. laws to their conduct abroad if the only contact with the U.S. forum is either a post-conduct move to the United States or the forum's general personal jurisdiction over the defendant unrelated to the foreign conduct at issue in the case.

It is well established that the Due Process Clause protects foreign defendants in U.S. courts.<sup>30</sup> When it comes to the extraterritorial application of U.S. substantive law, the question is how?<sup>31</sup> In my view, the Clause should shore up the rule of law criterion of legality by protecting against retroactive application of the law in space as well as time by rejecting U.S. extraterritorial jurisdictional assertions that defeat reasonable party expectations.

#### B. CONSONANCE (NON-CONTRADICTORY LAWS)

The Introduction also touched upon the consonance criterion of the law, or avoidance of contradictory laws. An intuitive and seemingly simple requirement in a single state system, avoidance of contradictory laws can take on massively complex dimensions in multistate systems comprised of concurrent overlapping regulatory regimes. The reality that legal actors may be subject to multiple jurisdictions' laws has existed since before the modern advent of the nation state, as the venerable field of conflict of laws or private international law attests.<sup>32</sup> Yet the phenomenon of directly conflicting overlapping laws has gained salience more recently and has not been the subject of sustained study. The majority of conflicts of law cases deal with what the field calls "true conflicts of law," or situations in which one state's law prohibits or imposes liability for what another state's law permits.<sup>33</sup> Under this formulation of true conflict, it is possible to comply with both states' laws at once. What poses more severe problems from a rule of law perspective is what I have called "absolute conflicts of law," or situations in which one state's law prohibits or imposes liability for what another state's law compels.<sup>34</sup> Here it is impossible to simultaneously comply with both states' laws. Legal actors subject to both states' jurisdictions are effectively subject to the multistate equivalent of a contradictory law, only here the law emanates from multiple sovereigns instead of one sovereign.

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30. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 108 (1987).

31. See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 751-52 (2012) ("[W]hat the Fourteenth Amendment requires in the international context is less than clear.").

32. SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL CASES AND MATERIALS* 9-17 (3d ed. 2012) (providing a brief history of choice-of-law doctrine).

33. See, e.g., *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 232 (3d Cir. 2007) (finding a true conflict between Pennsylvania and New York law); *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 736 (8th Cir. 1995) (between Minnesota and Nebraska law); *Sandefur Oil & Gas, Inc. v. AIG Oil Rig of Tex. Inc.*, 846 F.2d 319, 321 (5th Cir. 1988) (between Louisiana and Texas law). The list goes on.

34. Absolute Conflicts of Law is the subject of a forthcoming article tentatively titled, appropriately, "Absolute Conflicts of Law."

The key question from a rule of law perspective is how best to resolve absolute conflicts of law so as to promote predictability and mitigate uncertainty for transnational actors. Unfortunately, prevailing absolute conflict methodologies in U.S. law look a lot like conflict of laws analyses and use balancing approaches that weigh most heavily state interests and thus, in practice, marginalize party rights. Yet from a rule of law perspective, party rights should not only be included but should also hold a paramount place in the analysis and resolution of absolute conflicts. This is not to say state interests should have no place in absolute conflict analysis; I would not discount concepts like sovereignty and comity. Rather, my argument is that by preferencing party rights in absolute conflict analyses, state interests are actually furthered in the long run and at the macro level of systemic rule of law coherence. Thus, instead of viewing state interests parochially as advancing one or another discrete substantive or procedural policy in isolation on a case-by-case basis, we can recast state interests as enhancing general fairness and predictability so as to facilitate trade, travel, and communication among transnational actors and, in turn, states, thereby increasing the robustness of the international system at large.

Take, for instance, the most common absolute conflict: a domestic discovery order to produce information protected by foreign privacy law. Prevailing absolute conflict analysis classifies this scenario under the “foreign sovereign compulsion”<sup>35</sup> doctrine in U.S. law, described by the Supreme Court as a situation in which defendants claim “[foreign] law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible.”<sup>36</sup> To resolve the absolute conflict, the most recent version of the Restatement of Foreign Relations Law sets out a balancing approach that considers a number of litigation-related factors like the importance of the requested information to the proceedings and the specificity of the request, as well as “the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.”<sup>37</sup> A majority of courts rely on the

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35. The foreign sovereign compulsion doctrine is a defense for the defendant subject to conflicting legal obligations under two sovereign states: conduct that is compelled by a foreign sovereign is protected from liability. See *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 211 (1958); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 606 (9th Cir. 1976).

36. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993) (internal citations and quotation marks omitted); see also *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 403 cmt. e, § 415 cmt. J (1987). It is worth pointing out that the Supreme Court in *Hartford Fire* called this type of situation a “true conflict,” which is in my view clearly wrong from a conflict-of-laws perspective. See Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1042 (2011). The Court also felt that because the foreign conduct was permitted but not compelled by foreign law in that case, the foreign defendant had failed to meet this threshold. *Hartford Fire*, 509 U.S. at 788–89.

37. *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 442(1)(c) (1987).



Restatement,<sup>38</sup> and, after what is often a perfunctory rehearsal of the other factors, emphasize the competing state interests at stake.<sup>39</sup> Unsurprisingly to students of conflicts of law, the forum state's interests tend to take priority and tilt the absolute conflict in favor of forum law—here, U.S. law compelling discovery.<sup>40</sup> Indeed, this result is almost predetermined when one considers that courts routinely find not one but two U.S. interests at stake: the procedural “concept of full and liberal discovery . . . [as] a means to achieve a larger goal: the just adjudication of disputes,”<sup>41</sup> plus whatever substantive U.S. policy is at issue, whether it be antifraud,<sup>42</sup> antitrust,<sup>43</sup> antidiscrimination,<sup>44</sup> or antiterrorism.<sup>45</sup>

Missing from the current Restatement's balancing approach, however, is fairness to parties subject to the absolute conflict of laws (though good faith in attempting to comply with the order does factor in at the sanctions stage).<sup>46</sup> Yet a previous version of the Restatement included party interests like the hardship parties would face as a result of complying with U.S. law.<sup>47</sup> Furthermore, a number of courts have added their own fairness factors to the calculus, including, most prominently: the hardship factor; good faith; and the fairness inherent in bearing burdens reciprocal to the benefits that attend a degree of U.S. presence, whether business or otherwise.<sup>48</sup> Implicit and sometimes explicit in the latter consideration is whether the party could have anticipated, or was fairly on notice, that it

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38. See, e.g., *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n.28 (1987) (endorsing the factors recognized in a draft of what is now § 442 of the Restatement (Third) of Foreign Relations Law of the United States); *Linde v. Arab Bank, PLC*, 706 F.3d 92, 110 (2d Cir. 2013) (citing § 442), *cert. denied*, 134 S. Ct. 2869 (U.S. 2014); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992) (same); *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat (Admin. of State Ins.)*, 902 F.2d 1275, 1282 (7th Cir. 1990) (same).

39. *Richmark*, 959 F.2d at 1476 (finding balance of national interests to be the most important factor).

40. *Id.* at 1478 (“The United States has a strong interest in enforcing its judgments which outweighs the [People's Republic of China's] interest in confidentiality in this case.”); see also *Linde*, 706 F.3d at 111–12.

41. *Dexia Credit Local v. Rogan*, 231 F.R.D. 538, 549 (N.D. Ill. 2004).

42. *Id.* at 548; see also *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979).

43. *In re Air Cargo Shipping Servs. Antitrust Litig.*, 278 F.R.D. 51, 54 (E.D.N.Y. 2010); *In re Rubber Chemicals Antitrust Litig.*, 486 F. Supp. 2d 1078, 1084 (N.D. Cal. 2007).

44. *Abrams v. Baylor Coll. of Med.*, 805 F.2d 528, 530 (5th Cir. 1986).

45. *Linde*, 706 F.3d at 110; *Strauss v. Credit Lyonnais, S.A.*, 249 F.R.D. 429, 438 (E.D.N.Y. 2008). And the substantive argument is further strengthened where foreign substantive law has the same underlying policy as the U.S. law. See *In Re Air Cargo Shipping*, 278 F.R.D. at 54. This same rationale applies to harmonized international substantive law. See *Anti-Terrorism Act*, 18 U.S.C. § 2333 (2012).

46. *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 208 (1958) (“[G]ood faith . . . can hardly affect the fact of noncompliance and [is] relevant only to the path which the District Court might follow in dealing with petitioner's failure to comply.”).

47. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 39–40 (1965).

48. *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 116 F.R.D. 517, 522 (S.D.N.Y. 1987) (hardship); *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 563 F.2d 992, 998 (10th Cir. 1977) (good faith); *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613 (9th Cir. 1976) (fairness).

would be subject to the U.S. law in question.<sup>49</sup> In my view, these types of fairness factors should be the touchstone of absolute conflict of laws analysis. Such an approach is also more faithful to the Supreme Court decision that originated the foreign sovereign compulsion doctrine in U.S. law, *Societe Internationale v. Rogers*,<sup>50</sup> than the current balancing approaches. Indeed, because the factors focus on fairness to parties, I would contend that absolute conflicts that create severe unfairness can generate due process violations under the Constitution, and that this too is consistent with *Rogers*.

In sum, and as with the prospectivity criterion, the international system is generating rule of law problems regarding the consonance criterion in new and complex ways. And also like the prospectivity norm, the law should strive to resolve these problems in ways that shore up party expectations, fairness, and predictability so as to facilitate, or at least not chill, beneficent transnational activity.

### C. CONSISTENCY AND CONGRUENCE

Other rule of law elements like consistency and congruence tend to go hand in hand when it comes to implementation and application of a singular law across jurisdictions in multistate systems. The single law may be national or international, or may pull from both. In private international law or conflict of laws cases, for example, one state routinely applies another state's substantive law.<sup>51</sup> And domestic courts generally try hard to faithfully apply foreign law as foreign courts would,<sup>52</sup> thereby protecting, or at least trying to protect, consistency and congruence of the law across jurisdictions.

Somewhat more complicated and controversial at this stage of development of the international legal system is different states purporting to implement and apply the same substantive international law. As an aside, one might wonder why. If we have been willing to accept the implementation and application of foreign law for so long, why should implementation and application of international law, and the inevitable variations that attend it, be uncomfortable? Nevertheless, the last decade or so has seen intensified interest in the so-called "fragmentation" of international law.<sup>53</sup> Harlan Cohen adeptly describes the situation:

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49. See, e.g., *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 40 (E.D.N.Y. 2007).

50. 357 U.S. 197 (1958).

51. See, e.g., *Haag v. Barnes*, 175 N.E.2d 441, 444 (N.Y. 1961) (applying Illinois law).

52. *Voda v. Cordis Corp.*, 476 F.3d 887, 906–09 (Fed. Cir. 2007) (surveying federal courts applying foreign law).

53. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Rep. of the Int'l Law Comm'n, 58th Sess., July 3–Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 [hereinafter *Fragmentation*] (finalized by Martti Koskeniemi). See also, e.g., Symposium, *The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems*, 41 N.Y.U. J. INT'L L. & POL. 755 (2009) [hereinafter *The Normalizing of Adjudication*]; Symposium, *Diversity or Cacophony: New Sources of Norms in International Law*, 25 MICH. J. INT'L L. 845 (2004)

These [international judicial bodies] have joined an already large number of state courts capable of hearing international claims and pronouncing judgments on international rules. Almost inevitably, the combination of increasing specialization and choices of law announcing fora has led to divergent views on what international law requires and what international rules actually mean. Without a single hierarchy of courts that might sort out these differences, fragmentation of international doctrine is the likely result.<sup>54</sup>

In short, the more bodies that purport to apply this same international law, the more fragmented that international law is bound to become. This fragmentation stands in stark tension with the rule of law criteria of consistency and congruence between what the law says and how it is administered.

And yet, the fact that different courts may apply the same law differently cannot in itself delegitimize that law, since this also happens to be an inevitable feature of any legal system in which law is administered by more than one court. Look at the United States. Even within highly interconnected and formalized judicial systems, we still have all sorts of splits up and down the judiciary on the same law. And while it is true that we also have a Supreme Court to resolve the most severe of those splits, there are nonetheless many that go unresolved for very long periods of time or even forever. Yet nobody would say that just because a law is the subject of a circuit split it does not count, and function, as law.

Another important feature of international law is that it is, in fact, quite clear and specific in many respects, particularly when it comes to conduct-regulating rules prohibiting serious offenses—precisely the kinds of rules we agonize over when we talk of fragmentation of international law.<sup>55</sup> The vast majority of these rules can be found in widely ratified treaties that set out in pretty strong detail the relevant rules and elements of the rules they contain. These treaties are so specific that often U.S. laws implementing them in domestic legislation simply incorporate the treaty offense definition by reference.<sup>56</sup> The substantive rules set out in the treaties can also be used in civil suits with transnational elements if

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[hereinafter *Diversity or Cacophony?*]; Symposium, *The Proliferation of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999).

54. Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 N.Y.U. J. INT'L L. & POL. 1049, 1091 (2012) (arguing for an even deeper fragmentation in international law than doctrinal fragmentation based on the fragmenting of different international legal communities).

55. See *supra* notes 53 & 54 and accompanying text. International law itself doesn't really contain procedural rules—certainly insofar as domestic court proceedings are concerned. And in any case, in that scenario procedures have always been a matter of forum, not foreign (or international), law. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 5, 556 (5th ed. 1857); see also, e.g., *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 41 (1961) (Desmond, J.) (“As to conflict of law rules it is of course settled that the law of the forum is usually in control as to procedures including remedies.”).

56. To take one example of U.S. law drawing from the treaty definition, the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178, directs states to create jurisdiction over anyone who “unlawfully and intentionally”:

the pertinent jurisdictions' laws provide a civil cause of action. While private claims alleging serious violations of international law obviously do not proceed under criminal laws implementing treaties outlawing that conduct, treaties nonetheless make up excellent evidence of what the content of international law is. That is, treaties evidence how international law defines, for example, torture, genocide, or any other grave violation that may be the basis of a civil claim. The fact that international law itself does not provide a civil right of action is beside the point; under long-standing conflict of laws principles, if the pertinent jurisdictions' domestic laws do, all we are concerned with is whether the conduct amounts to a violation of substantive international law. And for that, all we need to do is look to a treaty that has been ratified by something like 190 out of the world's 195 nations.

A final way to aid the consistency and congruence of international law is for domestic courts to apply it in a conservative or restrictive fashion. Thus courts using international law as rules of decision should use only

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places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight.

The U.S. implementing legislation, codified at 18 U.S.C. § 32(b)(3) (2000), similarly provides for jurisdiction over "Whoever willfully":

. . . places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight.

For an example of U.S. law incorporating the treaties by reference, see 18 U.S.C. 2339C (2012):

(1) In general—Whoever, in a circumstance described in subsection (b), by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out—

(A) an act which constitutes an offense within the scope of a treaty specified in subsection (e)(7), as implemented by the United States . . . [the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on December 16, 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on September 23, 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973; the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979; the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on March 3, 1980; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on February 24, 1988; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on March 10, 1988; or the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997].

well-established, extant norms and resist stretching international law in new ways and directions. As with any law, there are going to be ambiguities and gaps to fill. But because international law is a fundamentally empirical law deriving from state practice and *opinio juris*, courts should not feel free to extend it by analogy or logical equivalence.<sup>57</sup> And because the context most likely to generate rule of law problems involves transnational claims, domestic courts should be extra careful to apply international law restrictively since foreign actors may not have adequate notice of idiosyncratically creative or expansive domestic interpretations of international law, leading to potential due process problems.<sup>58</sup>

### III. CONCLUSION

The present international system faces a simple but urgent question. If we take seriously rule of law criteria in a single state, should we also take seriously these criteria in multistate systems? I believe we should, and for fundamentally the same reasons we take these criteria seriously in a single state. Criteria that law be promulgated, publicized, prospective, intelligible, consonant (not contradictory), consistent, possible to comply with, and congruent between what it says and how it is administered, not only seek to ensure legal actors can fairly comply with the law but also uphold the legitimacy and efficacy of law itself. The practical consequence is that legal actors, and transnational actors in particular, are better able to predict how law will treat their activity and, in turn, will feel more comfortable engaging in that activity—activity considered beneficial to overall welfare like communication, travel, and trade. The central challenge is understanding how rule of law criteria migrate from a single state system to multistate systems. Different characteristics of different systems can lead to different types of rule of law dilemmas. Only by understanding the nature of these different dilemmas can we begin to craft rules to accommodate and resolve them.

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57. See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 274 (2009) (“[A]rguments by analogy are, however, misconceived to the extent they seek to identify existing customary international law.”).

58. See Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1323-35 (2014).