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Essay: International Law in U.S. State Courts: Extraterritoriality and False Conflicts of Law

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Essay: International Law in U.S. State Courts: Extraterritoriality and “False Conflicts” of Law

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I. Introduction

When can plaintiffs bring international law claims arising abroad in U.S. courts? The answer to this question is far from simple; indeed, it is intriguingly multilayered and entangles diverse fields ranging from constitutional law to foreign relations law to statutory construction to conflict of laws and international law. Yet these types of cases have proliferated and show no signs of slowing down. With the Supreme Court recently cutting back the reach of federal jurisdiction over causes of action arising abroad for violations of international law,¹ questions instantly have arisen about the ability of U.S. state law to provide the vessel through which plaintiffs may bring suits alleging such violations.² Here litigants and courts must address two key questions: First, to what extent may state law implement or incorporate international law as a rule of decision? And second, to what

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1. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

2. See generally Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *Foreword: After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 5 (2013).

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extent may state law incorporating international law authorize suits for causes of action arising abroad?³

The second question is both especially urgent because it involves a potential alternative avenue for litigating foreign human rights abuses in U.S. courts, and especially vexing because it juxtaposes different doctrinal and jurisprudential conceptualizations of the ability of forum law to reach inside foreign territory.⁴ On the one hand, the question can be framed as whether forum law applies extraterritorially, or outside the United States; on the other, it can be framed as a choice of law among multiple laws, of which forum law is one.⁵ These different ways of framing the question are not necessarily mutually exclusive, yet they can lead to radically different results. Namely, Supreme Court jurisprudence stringently applying what is called a “presumption against extraterritoriality” to knock out claims with foreign elements stands in stark contrast to a flexible cadre of state choice-of-law methodologies that liberally apply state law whenever the forum has any interest in the dispute.⁶

The result is a counterintuitive disparity: state law enjoys potentially greater extraterritorial reach than federal law.⁷ The disparity is counterintuitive because the federal government, not the states, is generally considered the primary actor in foreign affairs.⁸ Indeed, the presumption against extraterritoriality springs directly from foreign affairs concerns.⁹ Its main purpose is to avoid unintended discord with other nations that might result from extraterritorial applications of U.S. law.¹⁰ If the federal government is the primary actor in foreign affairs, and if the presumption operates to limit the reach of federal law on a foreign affairs rationale, it follows that state law should have no more extraterritorial reach than federal law. Yet at the same time, there is a long and robust history stretching back to the founding of state law providing relief in suits with foreign elements through choice-of-law analysis.¹¹ Hence, not only does the disparity between the reach of federal and state law bring into conflict federal versus state capacities to apply law abroad (or entertain suits arising abroad), it also brings into conflict the broader fields that delineate those respective capacities: foreign affairs and federal supremacy on the one hand, which argue in favor of narrowing the reach of state law to U.S. territory, and private international law and conflict of laws on the other, which argue in favor of allowing suits with foreign elements to proceed in state court under state law.¹²

Against this backdrop, I want to make a few points. First, there is nothing wrong as a general matter with state law incorporating international law. Second, the idea of state

3. *Id.*

4. For a thoughtful account of the methodological differences between federal and state extraterritoriality, see Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROB. 11 (1987).

5. Katherine Florey, State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation, 84 NOTRE DAME L. REV. 1057, 1064 (2009).

6. *Morrison v. Nat'l Austl. Bank Limited*, 561 U.S. 247, 265 (2010).

7. See generally Whytock et al., *supra* note 2, at 5-6.

8. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000) (invalidating Massachusetts statute for obstructing the foreign policy objectives of the federal government).

9. *Morrison*, 561 U.S. at 255.

10. *Id.*

11. Cf. Florey, *supra* note 4, at 1061, 1068-69.

12. See *Crosby*, 520 U.S. at 373, 381.

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law having broader extraterritorial reach than federal law is nonetheless in tension with federal foreign affairs preemption.¹³ And third, this tension basically disappears when the state law incorporating international law presents what's called a "false conflict" of laws among the relevant jurisdictions' laws.¹⁴ Here the fields of private international law and conflict of laws gain salience and supply a doctrinally and historically grounded mechanism for entertaining claims arising abroad in U.S. courts. More concretely, if state law incorporating international law is fundamentally the same law as that operative in the foreign jurisdiction, there is no conflict of laws and the sole applicable law applies.¹⁵

Taking into account the myriad conflict methodologies, we can posit a variety of false conflicts along these lines:

One type of false conflict might latch on to the international law character of the norm at issue, particularly if it is a *jus cogens* or peremptory international law norm—say, the prohibition on torture—to argue that by force of international law that norm applies everywhere, and therefore necessarily presents a false conflict of laws.¹⁶ A weakness with this type of false conflict argument is that while *jus cogens* clearly contain prohibitions on certain violations of international law, they do not clearly contain private rights of action to enforce those norms via civil litigation.¹⁷ In other words, while *jus cogens* clearly prohibit torture, they don't clearly say that anyone who has been tortured has a private right of action and is entitled to relief through civil litigation. In turn, there may not, in fact, be a false conflict of laws if the foreign law does not also provide a private right of action.¹⁸

A second variety of false conflict might look to the result that application of foreign law would produce and conclude that if the defendant would also be liable under foreign law, there is no conflict with forum law.¹⁹ This type of false conflict could open up the possibility that U.S. law incorporating international law wouldn't need to match up exactly with foreign law; so long as some foreign law would impose liability, there is no real conflict of laws.²⁰ For example, if foreign tort law would hold the defendant liable for, say, battery, a U.S. suit seeking liability for torture would not create a true conflict of laws because the result is the same: the defendant is liable. A self-evident weakness with this type of false conflict reasoning, of course, is that battery and torture are not the same, even though the laws against both would impose liability.²¹ While plaintiffs may wish to pursue claims for torture as opposed to battery for important symbolic reasons, defendants and foreign governments may resist such classifications for mirror-image reasons of stigma. In this connection, it is worth mentioning that any weakness deriving from the

13. *Id.* at 372, 387.

14. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 838 n. 20 (1985).

15. See *id.*

16. E.g., Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 218.

17. Cf. Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, in *THE HAGUE*, 19, n. 98 (2001) available at <http://www.iccnw.org/documents/WritingColombiaEng.pdf>; Brief in Opposition to Petition for Writ of Certiorari at 7, *Patrick Dain v. Cnty. of Ventura*, 1999 WL 33632663, (No. 99-833), (U.S. petition for cert. filed 1999).

18. See Anthony J. Colangelo, *Universal Jurisdiction As an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881, 892 (2009).

19. Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1771 (2014).

20. *Id.*

21. *People v. Lemus*, D042549, 2005 WL 2436305, at *6 (Cal. Ct. App. Oct. 4, 2005).

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different symbolic and stigma characteristics of serious international law violations vanishes where plaintiffs are content to classify their claims as garden-variety torts—again, let’s say battery—under a forum law that matches up with foreign law.²² That would constitute a classic false conflict in the private international law sense, and there is no problem with forum law imposing liability for a tort where foreign law also would impose liability for that same tort.²³

A third variety of false conflict, and the one that I’ll spend the most time on, is where forum law and foreign law incorporate norms of international law.²⁴ For example, suppose both forum law and foreign law would hold the defendant liable for torture. This is the strongest false conflict scenario. To be sure, it is even stronger than the classic false conflict mentioned above where forum law and foreign law are separate laws but match up. Here forum law and foreign law are vehicles for application of fundamentally the same law—international law—as far as the conduct-regulating aspect of the rules go.²⁵ If the involved jurisdictions also both provide a private right of action, we are back to the classic false conflict scenario for that aspect of the suit. And because procedures and remedies are generally deemed creatures of forum law, there would be few, if any, aspects of the suit left to generate a true conflict of laws among jurisdictions.

In sum, there is at least one surefire false conflict scenario that should enable foreign claims alleging international law violations to move forward under U.S. state law: forum law and foreign law both incorporate international law prohibiting the conduct and afford private rights of action.²⁶ Plaintiffs have other routes too, particularly if they are willing to abandon dressing their claims in international law garb and instead classify them as garden-variety torts.²⁷ Torture may, for instance, become battery in order to obtain relief where forum and foreign law both impose liability for that tort.

How do these false conflict variations interact with recent Supreme Court jurisprudence? *Kiobel v. Royal Dutch Petroleum* held that a presumption against extraterritoriality applies to claims authorized by the Alien Tort Statute (ATS), and therefore claims arising in Nigeria were not actionable under the statute.²⁸ In the process, the Court brushed aside with barely any analysis the longstanding and widely held transitory tort doctrine of conflict of laws, observing only that “[u]nder the transitory torts doctrine, however, ‘the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place.’”²⁹ This remarkably question-begging statement quotes Justice Holmes’ opinion in *Cuba R. Co. v. Crosby*.³⁰ There, the Court explained that when dealing with torts that “are likely to

22. See, e.g. Joel Slawotsky, *The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act*, 17 *DUKE J. COMP. & INT’L L.* 131, 157 (2006).

23. See e.g., William M. Richman, *A New Breed of Smart Empirically Derived Conflicts Rules: Better Law Than “Better Law” in the Post-Tort Reform Era: Reviewing Symeon C. Symeonides, the American Choice-of-Law Revolution: Past, Present and Future* (2006), 82 *TUL. L. REV.* 2181, 2189 n. 51 (2008).

24. Alford, *supra* note 18, at 1772.

25. Anthony J. Colangelo, *Spatial Legality*, 107 *Nw. U. L. REV.* 69, 76, 120 (2012).

26. See Alford, *supra* note 18, at 1772.

27. E.g., Slawotsky, *supra* note 21, at 157.

28. *Kiobel*, 133 S. Ct. at 1665, 1669.

29. *Id.* at 1666 (quoting *Cuba R. Co. v. Crosby*, 222 U. S. 473, 479 (1912)).

30. *Crosby*, 222 U.S. at 479.

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impose an obligation in all civilized countries . . . [U.S.] courts would assume a liability to exist if nothing to the contrary appeared.”³¹ If nothing else, one would think that universal international legal prohibitions on offenses like torture stand for the proposition that its commission “impose[s] an obligation in all civilized countries.”³²

But even if one is not willing to make the assumption *Crosby* seems to command, *Kiobel* has now squarely raised the issues it failed to address: Is there in fact a cause of action for torture, extrajudicial killing, and arbitrary arrest in the foreign jurisdiction? How about battery, wrongful death, and false imprisonment? If so, we have a false conflict of laws and a clear avenue for relief under either U.S. or foreign law in domestic courts.

II. State Law May Incorporate International Law

As a general proposition, there is no problem with state law incorporating international law and using it as a rule of decision. State courts have been doing so since the founding.³³ As the New York Court of Appeals unambiguously explained, “[i]t is settled that, where there is neither a treaty, statute nor controlling judicial precedent, all domestic courts must give effect to customary international law.”³⁴ And to quote Judge Hand writing for the Second Circuit Court of Appeals in a federal diversity suit initiated in New York state court under New York state law, “the law of New York determines [the outcome], and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves.”³⁵ Regardless of how one views the conceptualization of international law by federal courts in diversity suits,³⁶ it seems fairly clear that state law and state courts may use international law for rules of decision.

III. Obstacles to the Extraterritorial Application of State Law

Yet acknowledging that state law may incorporate international law does not resolve more pressing and difficult questions of whether and when state law incorporating international law may afford relief for claims arising abroad. As noted, the Supreme Court recently held that a presumption against extraterritoriality applies to claims allowed under the federal ATS.³⁷ According to the Court, “[t]he presumption ‘serves to protect against

31. *Id.* at 478.

32. *Id.*; see also *Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992) (“All of the authorities agree that torture and summary execution—the torture and killing of wounded non-combatant civilians—are acts that are viewed with universal abhorrence.”).

33. See, e.g., *Hill v. Baker*, 32 Iowa 302, 310 (1871); *Kershaw v. Kelsey*, 100 Mass. 561, 562–63 (1868); *State v. Brewster*, 7 Vt. 118, 121 (1835); *Hoare v. Allen*, 2 U.S. 102, 103–04 (Pa. 1789).

34. *Republic of Argentina v. New York*, 25 N.Y. 2d 252, 259 (1969).

35. *Bergman v. De Sieyes*, 170 F.2d 360, 361 (2d Cir. 1948).

36. I take no position on this issue here. For a sampling of key articles, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997); Harold Hongju Koh, *Commentary, Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371–72 (1997). For a nice summary of the main lines of debate, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 3 (2009).

37. *Kiobel*, 133 S. Ct. at 1665, 1669 (2013).

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unintended clashes between our laws and those of other nations which could result in international discord.”³⁸ That is, it seeks to obviate judicial interference in foreign relations that could trigger unintended discord from the perspective of the political branches.³⁹ As such, it functions as a separation of powers mechanism at the federal level by divesting the judiciary of discretion to apply laws extraterritorially absent a clear congressional directive to do so.⁴⁰

Moreover, at the same time separation of powers saps courts of discretion, federal preemption saps states of power in the international arena in order to avoid state interference with federal control over foreign affairs.⁴¹ State courts are thus in quite a bind when it comes to claims alleging international law violations abroad: they are horizontally hamstrung vis-à-vis the political branches by separation of powers and vertically hamstrung vis-à-vis the federal government by preemption. As to the latter, whether one adopts a broader “field” or narrower “conflict” view of foreign affairs preemption,⁴² a federal stance holding specifically that U.S. laws allowing claims for violations of international law do not reach claims arising in foreign territory absent clear congressional direction is in fairly brazen tension with state law purporting to do exactly that.⁴³

Now, I do not mean to suggest that foreign affairs preemption is necessarily a slam-dunk for defendants in this context either. There are distinguishing features that may set state relief for foreign violations of international law apart from other contexts in which the Supreme Court has previously found state action preempted.⁴⁴ For one, the context we are talking about raises a clash between policies articulated by the federal and state judiciaries, as opposed to between the federal political branches and the states.⁴⁵ Returning to the separation of powers framework above, the political branches—not the courts—wield primary authority over foreign affairs.⁴⁶ But the presumption against extraterritoriality is a thoroughly judicial invention. It follows that it should not enjoy the same preemptive force as, say, a treaty or executive agreement. Furthermore, as any student of conflict of laws knows, states have been entertaining causes of action arising abroad since

38. *Id.* at 1664 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1994)).

39. *Kiobel*, 133 S. Ct. at 1665, 1669 (2013).

40. *Id.*

41. *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) (finding that the Constitution entrusts “state involvement in foreign affairs and international relations . . . solely to the Federal Government.”).

42. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 419 (2003).

43. *See id.*; *see also Crosby*, 530 U.S. at 363; *Zschernig*, 389 U.S. at 429; *Beatty v. Republic of Iraq*, 480 F. Supp. 2d 60, 87 (D.D.C. 2007) (“even assuming that the ‘conflict’ framework applies, there are numerous and critical distinctions between the present case and *Garamendi*. For one thing, at issue in *Garamendi* was the validity of a state legislative enactment specifically intended to reach sensitive foreign-policy matters. Here, conversely, the only state ‘action’ implicated is the Florida and Oklahoma common law of tort; the existence of such court-created common law evinces no effort on the part of either of those state governments to weigh in on knotty issues of international consequence.”). *But see Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1187–88 (D. Cal. 2005) (observing that “[p]laintiffs’ remaining claims are for wrongful death, intentional infliction of emotional distress, and negligent infliction of emotional distress. As a threshold matter, the Court believes these claims involve an area of ‘traditional’ competence’ for state regulation” but nonetheless finding a “‘more than incidental’ . . . conflict with foreign policy” and dismissing the claims).

44. *See Beatty*, 480 F. Supp. 2d at 85–86.

45. *See Jeffrey A. Meyer*, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 *GEO. L.J.* 301, 350 (2014).

46. *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005).

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the founding.⁴⁷ In this respect, at least as far as garden-variety torts go, state law providing relief for causes of action arising abroad easily falls within states' "traditional competence"⁴⁸ for preemption purposes.⁴⁹

On the other hand, traditional state competence does not embrace elevating torts arising abroad to serious violations of international law that carry weighty legal—not to mention social and political—stigmas capable of upsetting and provoking foreign nations.⁵⁰ In addition, the fact that state action has traditionally fallen within an area of state competence may not, on its own, insulate that action from preemption if there is an overriding federal policy to the contrary.⁵¹ And neither is a treaty dignifying that federal policy required to override the state action, because "even in absence of a treaty, a State's policy may disturb foreign relations."⁵²

All of this is to say that, as things stand, a potent combination of separation of powers and preemption concerns may lead courts to conclude that state law may reach no farther inside foreign territory than federal law.⁵³ That said, my principal aim in this essay is not

47. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 542 (Little, Brown and Co., 5th ed. 1857) (explaining that "[i]n England and America . . . suits are maintainable, and are constantly maintained, between foreigners, where either of them is within the territory of the State in which the suit is brought."). See also *id.* § 554 ("It has already been stated, that by the common law personal actions, being transitory, may be brought in any place where the party defendant can be found."). In fact, according to Story:

"All that any nation can, therefore, *be justly required to do*, is to open its own tribunals to foreigners, in the same manner and to the same extent, as they are open to its own subjects; and to *give them the same redress*, as to rights and wrongs, which it deems fit to acknowledge in its own municipal code for natives and residents."

Id. § 557 (emphasis added). See also Chimène I. Keitner, State Courts and Transitory Torts in Transnational Human Rights Cases, 3 U.C. IRVINE L. REV. 81, 84 (2013) (carefully documenting and explaining that "Records have survived from at least four cases that were brought in state court in the 1790s by U.S. plaintiffs against foreigners for conduct that occurred outside of the United States, including *Waters v. Collot* (Pennsylvania, 1794), *Rose v. Cochrane* (New York, 1794), *Dunant v. Perroud* (Pennsylvania, 1796), and *Parnell & Stewart v. Sinclair* (Virginia, 1797). Two of the suits (*Collot* and *Perroud*) involved conduct in French colonies by French colonial officials, one (*Cochrane*) involved conduct by a British captain on board a British ship during the evacuation of Charleston, and one (*Sinclair*) involved conduct by a British privateer on the high seas. In each of these cases, the state court had jurisdiction by virtue of the foreign defendant's transitory presence in the United States at the time of the suit.") (internal citation omitted).

48. *Garamendi*, 539 U.S. at 418 (quoting *Zschernig*, 389 U.S. at 459 (Harlan, J., and White, J., concurring in result)).

49. See *Beaty*, 480 F. Supp. 2d at 87.

50. See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 29 (1987).

51. *Zschernig*, 389 U.S. at 440 ("The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy.").

52. *Id.* at 441.

53. Some have suggested that the presumption against extraterritoriality ought not to apply to the common law because the presumption is a canon of statutory, not common law, construction. See Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 304 (2014). In my view, while such a suggestion holds a certain intuitive appeal, it fails to appreciate

why there is a presumption in the first place. It didn't originate in a vacuum. Rather, it developed because courts were worried about judicial interference with foreign affairs by extending U.S. laws extraterritorially in a way that legislatures didn't intend. If that's right, and it is, then courts are on even shakier ground extending the common law extraterritorially than they are extending

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to assess all angles of foreign affairs preemption. It is enough for my purposes to demonstrate that tension exists if state law were to enjoy potentially broader extraterritorial reach than federal law. What I would like to focus on instead in the remainder of the essay is whether some manifestations of state law providing relief for violations of international law or domestic tort law can avoid these obstacles entirely. I think they can.

IV. Erasing the Obstacles: False Conflicts of Law

The notion of a “false conflict” of laws can take a number of forms in the field of conflict of laws or private international law. The term originated out of Brainerd Currie’s governmental interest analysis to describe situations in which only one state in a multijurisdictional dispute has an interest in applying its law.⁵⁴ But courts also routinely and, in my view, intuitively use the term to describe situations in which “the laws relevant to the set of facts are the same, or would produce the same decision in the lawsuit,” that is, “when the potentially applicable laws do not differ.”⁵⁵ In these situations courts generally feel free to⁵⁶—indeed their choice-of-law methodologies may even compel them to⁵⁷—simply apply forum law.⁵⁸

Such an approach comes backed by prevailing conflict-of-laws principles. As courts have noted, all else being equal, forum law “enjoys the additional virtues of being more streamlined and less time-consuming, since only one body of law need be employed to

statutes silent on geographic scope. At least in the latter scenario a court has some democratically enacted text from the political branches whose plain meaning encompasses the foreign activity in question; in the former scenario, we’re just talking about a judge-made decision to extend a judge-made law in a way that may interfere with the political branches’ preferences. In this light, extraterritoriality of the common law looks even more suspect than extraterritoriality of statutory law from a separation of powers standpoint.

Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1351 (2014).

54. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958).

55. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 839 n.20 (Stevens, J., concurring). *See also, e.g.*, *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 229 (3d Cir. 2007) (“One line of cases provides that a false conflict exists if there are no relevant differences between the laws of the two states, or the laws would produce the same result.”).

56. *See Seizer v. Sessions*, 940 P.2d 261, 264 (Wash. 1997) (en banc).

57. *See Int’l Bus. Mach. Corp. v. Liberty Mut. Ins. Co.*, 362 F.3d 137, 143 (2d Cir. 2004).

58. *See Fowler v. A & A Co.*, 262 A.2d 344, 348 (D.C. Cir. 1970); *Greaves v. State Farm Ins. Co.*, 984 F. Supp. 12, 15 (D.D.C. 1997) (finding that “[b]oth Maryland and the District of Columbia” laws contain the same instructions, and “[t]he absence of a true conflict compels the application of District of Columbia law by default.”); *Baird v. Bell Helicopter Textron*, 491 F.Supp. 1129, 149 (1980) (“A cursory comparison of the principles outlined above indicates that there is no real conflict between the laws of Canada and Texas with regard to the recoverability and calculation of ‘tangible’ damages, that is, items of recovery involving expenses, loss of earnings and the like. Because there is no significant difference between the two jurisdictions on this point, this Court will apply the law of the forum to the classes of damages discussed above.”). *Accord*, *Brilmayer, Extraterritorial Application of American Law*, *supra* note 4 at 17 (explaining that “the content of these assumptions about the proper reach of legislative policy [in state choice-of-law cases] is very different from the content of the comparable presumptions in international law. For example, any notion that legislatures intend their rules to be applied territorially is completely lacking. Rather, the assumption is that legislatures act to protect their citizens *wherever* they go, a ‘passive personality’ principle that has far fewer admirers in the international context.”).

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resolve the dispute.⁵⁹ Or to quote the Restatement (Second) of Conflict of Laws, using forum law fosters “ease in the determination and application of the law to be applied.”⁶⁰ Again, because the laws being applied are essentially the same, applying forum law captures other key conflict principles as well, including “the relevant policies of the forum, the relevant policies of other interested states [,] . . . the protection of justified expectations, the basic policies underlying the particular field of law, [and] certainty, predictability and uniformity of result.”⁶¹

A word of caution here, however: because both choice-of-law methodologies and procedures are generally considered creatures of forum law, the combination of these two sets of rules may lead courts to conclude via legal fiction that there is no difference between forum law and foreign law when, in fact, there is. For example, suppose a defendant bears a very high (procedural) burden to displace a very strong (choice-of-law) presumption in favor of forum law, and the failure to meet this burden leads to the fictional legal conclusion that forum law and foreign law are the same.⁶² In my view, if courts use the false conflict approaches presented here, the central legal and factual inquiry should be whether the pertinent laws actually are alike. That is, methodological presumptions and procedural burdens ought to give way to bona fide inquiries into the content of the laws at issue. The exposition of false conflicts below insists that only if laws are in fact alike in their incorporation of international law or provision of domestic tort liability should courts find a false conflict within the scope of this argument.

Finally, turning directly to false conflicts for violations of substantive international law, “[p]robably the most important function of choice-of-law rules” is satisfying the “needs of the interstate and international systems.”⁶³ In this respect, false conflicts involving claims of serious international law violations present unique opportunities to advance the rule of international law itself. Here the false-conflict concept can transition to the public international law realm. For instance, I’ve argued that application of universal substantive international law norms by domestic courts yield false conflicts because, simply put, there is no exercise of extraterritorial jurisdiction by states and thus no possibility of conflicting, overlapping laws. Rather, a single “comprehensive territorial jurisdiction, originating in a universally-applicable international law . . . covers the globe. Individual states may apply and enforce that law in domestic courts, to be sure, but its prescriptive scope encompasses all territory subject to international law, i.e. the entire world.”⁶⁴

What follows begins by defending this false-conflict view and exploring how it might play out in state courts employing choice-of-law techniques like *dépeçage*, which divides up

59. *Fioretti v. Massachusetts Gen. Life Ins. Co.*, 53 F.3d 1228, 1234 (11th Cir. 1995). *See also* *McNall v. Tatham*, 676 F. Supp. 987, 995 n. 10 (C.D.Cal.1987).

60. Restatement (Second) of Conflict of Laws § 6 (1971).

61. *Id.*

62. One can imagine this occurring under California choice-of-law rules, *see* *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455761 at *7-9 (Aug. 22, 2006) (“The choice of law analysis includes a presumption that California law applies; the proponent of foreign law therefore bears the burden of showing that there is a compelling reason to displace California law.”).

63. *Id.* at cmt. d.

64. Anthony J. Colangelo, Universal Jurisdiction as an International “False Conflict” of Laws, 30 MICH. J. INT’L L. 881, 883 (2009).

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cases on an issue-by-issue basis to discern the appropriate law applicable to each issue.⁶⁵ I will then attempt to work through and evaluate strengths and weaknesses of other varieties of false conflict such as those requiring that forum and foreign law be substantially the same or that, if they are different, they produce the same result.

A. THE SAME INTERNATIONAL LAW

As soon as one starts talking about a universally applicable international law the objection immediately will be made that different courts invariably will apply that law differently. The notion of a singular international law applying the world over therefore may sound nice in academic theory, but in the real world it is nothing more than a deceptive, and perhaps even dangerous, illusion. Rather than operating on power as a consistent and constraining rule of law, international law just enables political actors to shape toward their own agendas a hopelessly fragmented hodgepodge of abstractions under a false imprimatur of “law.”

For my false-conflict view to attract courts and litigants, it will probably be necessary to first allay some of this criticism. I’ll start by noting that merely because 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’s 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 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 that may not be very familiar to non-international lawyers is that it is, in fact, quite clear and specific in many respects, particularly when it comes to conduct-regulating rules prohibiting serious offenses. The vast majority of these rules can be found in widely ratified multilateral 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.⁶⁶ What the non-international lawyer should therefore understand is that while civil human rights claims alleging serious

65. See, e.g. Willis L. M. Reese, *Dépeçage: A Common Phenomenon in Choice of Law*, 73 COLUM. L. REV. 58 (1973).

66. 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”:

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.

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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 torture, genocide, or any other grave violation that may be the basis of a civil claim. To be clear, the fact that international law itself does not provide a private right of action is beside the point; if the law where the conduct occurred does, all we are concerned with is whether it 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 one hundred and ninety out of the world's one hundred and ninety five nations.

A final way to aid the consistency and fairness 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 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.⁶⁷ And because the context under discussion is claims arising abroad, 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.⁶⁸

Some state courts applying international law have already begun to adopt (or stumble into) this approach. For example, a recent Delaware state court decision found that foreign plaintiffs' claims of international human rights abuses stemming from toxic waste

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

(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]

67. See Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L. J. 271, 274 (2009) (explaining that "arguments by analogy are, however, misconceived to the extent they seek to identify existing customary international law")(emphasis omitted).

68. See Colangelo, *What is Extraterritorial Jurisdiction?*, *supra* note 53 at Part IV.A.2; *see generally*, Lea Brilmayer and Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217 (1992).

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dumping abroad were not actionable because the rights were not sufficiently established under international law.⁶⁹ In analyzing the issue, the court unreflectively adopted the Supreme Court's test for what constitutes an actionable violation of the law of nations under the ATS.⁷⁰ As a purely legal matter, that move was inapposite. The test for what constitutes an actionable violation of the law of nations under the ATS addresses what violations *the statute* deems actionable, not what constitutes a violation of international law generally. The U.S. ATS test—which requires that the claim “rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms”⁷¹—delimits a certain subset of very clear, very specific, and very established international norms, not the entire universe of international law. Yet for the reasons mentioned above, it may not be a bad idea for domestic courts to require something along these lines for international law violations to be actionable. Such a requirement would go far toward ensuring both that other nations in fact accept the international norm in question and that defendants are not unfairly surprised by idiosyncratic or expansive domestic interpretations of international law.⁷² That is, it would go far toward ensuring a “false conflict” of laws.

If we accept that international law provides the conduct-regulating rule and both forum and foreign law provide a cause of action making it permissible to use forum law within a false-conflict framework, the remaining questions are what laws govern procedures and remedies. Under longstanding conflicts principles, forum law regulates these aspects of the suit as well.⁷³ Thus, to divide up a suit alleging violations of international law using the conflict technique of *dépeçage*, or issue-by-issue analysis, international law provides the

69. Pallano v. AES Corp., Nos. N09C-11-021 JRJ, N10C-04-054 JRJ, 2011 Del. Super. LEXIS 313 at *48-50 (Del. Sup. Ct. July 15, 2011).

70. *Id.*

71. *Id.*

72. *Acord Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (“The requirement that a rule command the ‘general assent of civilized nations’ to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.”).

73. Justice Story could not have been clearer in his famous *Commentaries on the Conflict of Laws*:

It is universally admitted and established, that the forms of remedies, and the modes of proceeding, and the execution of judgments, are to be regulated solely and exclusively by the laws of the place where the action is instituted; or, as the civilians uniformly express it, according to the *Lex fori*.

JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 556 (Little, Brown and Co. 5th Ed. 1857); see also e.g., *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 41 (1961) (“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.”) (Desmond, J.). To be sure, “the forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, *without any regard to the domicil of the parties, the origin of the right, or the country of the act.*” STORY, COMMENTARIES at § 558 (emphasis added). Though as Patrick Borchers observes, the line between procedure and substance is often difficult to discern and may cut against plaintiffs under current law:

Conflicts law regarding damages is notoriously byzantine and unstable, with the murky boundary between “procedure” and “substance” continuing to shape much of the debate. The traditional rule has been that so-called “heads”—or types—of damages allowed are a matter of substance, and thus potentially governed by foreign law, while the quantification of damages within those heads is a matter of procedure and thus governed by forum law. The Second Conflict of Laws Restatement endorses this view in a roundabout way, stating that damages law should be chosen

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conduct-regulating rule, forum law reflecting foreign law provides the cause of action, and forum law provides procedures and remedies. To illustrate how this might work in an actual case, Roger Alford has cogently shown that under a false-conflict view, the claims at issue in *Kiobel* ought to have been allowed. As Professor Alford explains, “it is quite plausible that a federal district court in *Kiobel* could have applied federal common law claims alleging violations of the law of nations—not because they governed the dispute—but because there was no conflict between the international law incorporated in domestic law and the international law incorporated in Nigerian law.”⁷⁴ The same goes for state law that incorporates international law and allows a private right of action. As noted, here forum law would also govern procedures for bringing a claim and remedies.⁷⁵

B. SEPARATE BUT SIMILAR DOMESTIC LAWS

Another variety of false conflict occurs when forum law and the foreign law at the place where the cause of action arose are separate laws but look the same or substantially similar.⁷⁶ While jurisprudentially this species of false conflict is not as strong as the scenario in which forum law and foreign law are both vessels for a single underlying international law, functionally the false conflict is more or less the same. Because the laws match up, concerns about forum law conflicting with foreign law and unfairness to foreign actors disappear. Though unlike the false conflict in which forum and foreign law both incorporate the same substantive international law against serious human rights abuses, this false conflict presents itself where plaintiffs allege more garden-variety torts—such as assault and battery, wrongful death, and false imprisonment.⁷⁷

Like many human rights cases alleging harms abroad, the ATS case that catalyzed modern international human rights litigation, *Filártiga v. Peña-Irala*, would have been amenable to this approach.⁷⁸ In what is now fashionably called a “foreign cubed” suit—foreign plaintiff, foreign defendant, foreign harm—plaintiffs sued defendants for torture in Para-

by the same principles that apply to substantive tort issues, except as to excessiveness of the award, which it regards as a matter of procedure.

The great risk, then, that plaintiffs bringing state court actions would run is that state courts would hold themselves bound to apply the damage law of the foreign country. In practical terms, this risks making actions unsustainable in U.S. courts. African customary law, for instance, emphasizes non-monetary damages—such as apologies—and minimizes the importance of money damages.

Patrick J. Borchers, Conflict-of-Laws Considerations in State Court Human Rights Actions, 3 U.C. IRVINE L. REV. 45, 52 (2013).

74. Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749.

75. See *supra* note 73.

76. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 839 n.20 (Stevens, J., concurring). See also, e.g., *Hammersmith v. TIG Ins. Co.*, 480 F.3d 220, 229 (3d Cir. 2007); *Biscoe v. Arlington County*, 738 F.2d 1352, 1360 (D.C. Cir. 1984); *In re Complaint of Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1984); *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1149 (N.D. Tex. 1980).

77. See e.g., *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455761, at *7-9 (N.D. Cal. Aug. 22, 2006) (evaluating whether a false conflict exists between California and Nigeria law as to wrongful death, intentional infliction of emotional distress, loss of consortium, civil conspiracy, assault, battery, and negligence).

78. *Filártiga v. Peña-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). For a nice summary of the choice-of-law questions raised by *Filártiga* and discussed in its immediate wake, see William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577 (2014).

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guay in violation of the law of nations, but also included claims for wrongful death arising out of that torture.⁷⁹ The Second Circuit Court of Appeals, *en route* to upholding the ATS claims for torture, also observed that: “Here, where *in personam* jurisdiction has been obtained over the defendant, the parties agree that the acts alleged would violate Paraguayan law, and the policies of the forum are consistent with the foreign law, state court jurisdiction would be proper.”⁸⁰ Employing a false-conflict approach, if New York law resembled Paraguayan law a false conflict of laws would exist and forum law could apply.

Moreover, none of this is to say that the false-conflict approaches presented so far cannot mix. *Linder v. Portocarrero* in a sense straddled the two false-conflict views outlined above by using international law to generate the false conflict so that forum tort law could overcome a supposed “civil war exception” to liability.⁸¹ The Eleventh Circuit rejected the lower court’s finding that “domestic tort actions are not appropriate remedies for injuries to non-combatants occurring outside the United States during conflicts” and concluded that the “complaint alleges a claim under Florida tort liability upon which relief may be granted” for the torture and murder of the plaintiff’s decedent in Nicaragua during a civil war there.⁸² Because the tort claims for wrongful death and battery grew out of torture and murder, the court strongly hinted at a form of a false-conflict reasoning if not using that exact terminology, noting that “torture and summary execution—the torture and killing of non-combatant civilians—are acts that are viewed with universal abhorrence” that “violat[ed] the fundamental norms of the customary laws of war.”⁸³ As such, the claims were actionable under state tort law.⁸⁴ While such mixing can be illuminating and even instrumental in certain cases—*Linder* again used it to overcome a “civil war exception” to liability⁸⁵—I would still urge courts employing these false-conflict rationales to inquire into whether foreign law and forum law actually are alike.

C. SEPARATE BUT DIFFERENT DOMESTIC LAWS

A third variety of false conflict courts have identified is where forum law and foreign law look different but would produce the same result in the suit.⁸⁶ I am less sanguine that this scenario properly should qualify as a false conflict, at least within the scope of this essay. As noted at the outset, this rationale could potentially allow for the application of forum law supplying a cause of action for, say, torture, on the basis that foreign law where the cause of action arose permits a cause of action for battery. Although the laws differ, they produce the same result in that the defendant is liable. But again, there may be serious conflicts in the way the laws classify the tortious conduct—torture and battery are

79. *Filártiga*, 630 F.2d at 879.

80. *Id.* at 885.

81. 963 F.2d 332, 336-37 (11th Cir. 1992).

82. *Id.*

83. *Id.* at 336.

84. *Id.* at 336-37. I am generally less concerned about due process problems in this context than in the false conflict context presented in Part IV(C) because liability for a garden-variety tort is likely going to be of lesser magnitude than liability for a grave violation of international law; at the same time, the issue ought to invite more particularized inquiry in specific cases.

85. *Id.* at 336.

86. *Gulf Grp. Holdings, Inc. v. Coast Asset Mgmt. Corp.*, 516 F. Supp. 2d 1253, 1271 (S.D. Fla. 2007); *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53, 67 n.7 (D.D.C. 2006) on reconsideration in part, 242 F.R.D. 125 (D.D.C. 2007).

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not equivalent, and they carry vastly different symbolic and stigma characteristics. These differences could cause frictions with foreign nations sensitive to their nationals being classified as torturers instead of tortfeasors (especially when one considers the state action integral to the offense definition of torture).⁸⁷ The gravity of being labeled a torturer as opposed to a tortfeasor also may be a weighty enough distinction to introduce due process problems if the defendant did not have a reasonable expectation that he could be labeled a torturer on a preponderance of the evidence standard via private litigation.⁸⁸ In sum, I am less favorably inclined toward this version of false conflict.

V. Conclusion

Ever-tightening constraints on federal extraterritoriality have generated multilayered tensions with both traditional and contemporary fields of conflict of laws and private international law. At present, the flashpoint for these tensions promises to be claims alleging international human rights violations abroad in state court. The concept of “false conflicts” of law can remove the flashpoint’s ignition source. False conflicts hold immense jurisprudential, doctrinal, and practical potential to handle these multilayered tensions with an equally multilayered concept capable of capturing principles not only of conflict of laws but also of federal extraterritoriality, foreign affairs, and due process. False conflicts should be the starting point for any evaluation of international human rights claims in state court under state law.

87. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 113. See also 18 U.S.C. § 2340(1) (2012).

88. *But see id.* at art. 14 (“Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.”). While this provision may create a reasonable expectation for victim plaintiffs that they are entitled to compensation, whether it creates a reasonable expectation for individual defendants that they may be subject to civil liability seems to me a somewhat more difficult question. For instance, the plaintiff’s right may be against the state, or may be the subject of administrative relief, or may take some other alternative form. I would need to research more state practice and *opinio juris* to reach a conclusion in this regard.

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