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# International Law in Domestic Courts: A Conflict of Laws Approach

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## THE CUTTING EDGE

This panel was convened at 10:45 a.m., Friday, March 27, by its moderator, Anthea Roberts of the London School of Economics, who introduced the panelists: Karen Knop of the University of Toronto, Ralf Michaels of Duke University School of Law, Gabriella Blum of Harvard Law School, and Katerina Linos of the Harvard Society of Fellows.

### INTRODUCTION

*By Anthea Roberts\**

The Cutting Edge panel was an idea developed by the 2009 ASIL Program Committee and, in particular, Oona Hathaway, who proposed and took the leading role in organizing this panel. Many programs at conferences draw on previously published work and thus lag one or two years behind some of the most innovative contemporary research in the field. As a step towards identifying and giving exposure to exciting current projects, we made a general call for proposals based on unpublished works-in-progress.

The response to this call was extremely positive. We received more than sixty submissions for just three spots on the Cutting Edge Panel. The following proposals were selected because they represent interesting and original work across a variety of fields and evidence a range of theoretical approaches. The first uses a conflicts-of-law approach to analyze clashes between international and domestic law; the second questions a basic assumption in the laws of war before proposing a significant reform; while the final one draws on empirical work to test claims about norm diffusion.

I hope that you enjoy these presentations. Given the competitive selection process, and the resulting quality of the contributions chosen, I am sure that it will not be long until full versions of all three papers are published elsewhere.

### INTERNATIONAL LAW IN DOMESTIC COURTS: A CONFLICT OF LAWS APPROACH

*By Karen Knop,<sup>†</sup> Ralf Michaels,<sup>‡</sup> and Annelise Riles<sup>§</sup>*

In international law textbooks, the question “is international law law?” is presented at the beginning as a matter of jurisprudence—Austin’s command theory of law and Hart’s discussion of why international law differs from morality. But it is neither in the preliminary nor in the abstract sense that the question now arises most acutely. It is in the treatment of international law by domestic courts—a concrete practical setting—and the question is contextual in form: *is a particular type of international law law for a particular purpose in a particular domestic legal system?* Accounts of how domestic courts do, or should, treat international law are not presented as answers to this question, but of course they are propositions about whether it counts as law and, if not, then what its nature is exactly.

In a recent article, Neil Walker draws up a list of very general and disparate concepts to describe the relationship between international and domestic law: institutional incorporation,

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system recognition, normative coordination, environmental overlap, and sympathetic consideration.<sup>1</sup> Strangely absent from his list of concepts—and from the debate more generally—is the discipline for which the nature of other legal systems and the nature of their jurisdiction, laws, and judgments vis-à-vis the domestic legal system, are precisely the bread-and-butter issues. This discipline is conflict of laws, or private international law as it is more often known outside the United States. Although scholars of international law in domestic courts occasionally borrow one or another idea from conflict of laws,<sup>2</sup> the parallel between the two has not been systematically explored.

Why the neglect of an obvious parallel? One reason may lie with the traditional scope of conflict of laws. Conflicts is often narrowly understood as a discipline with a certain method (in the United States, this is usually either interest analysis or the most significant relationship test) and a certain policy objective (comity). In our view, conflicts should be seen more broadly as the discipline developed to deal with conflicts between laws, without necessarily being committed to any particular method or any particular policy. In this light, its relevance for conflicts between international law and domestic law, and their interrelationship more generally, becomes apparent.

Other likely reasons why conflict of laws is overlooked concern the state of the field; for one, its high degree of technicality. Brainerd Currie spoke disparagingly of a “conflict-of-laws machine”: a court simply presses what it thinks are the proper levers and then sits back complacently while the machine grinds out the result.<sup>3</sup> Another reason relates to the field’s abundance of successive theories, critiques, and revisions, which continue to coexist in the courts and the literature: vested rights theory, local law theory, governmental interest analysis, the theory of the better law, and so on. Prosser notoriously described conflict of laws as a “dismal swamp ... inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.”<sup>4</sup> In contrast, we will suggest why both the machine-like quality of conflicts and the multitude of theories which Prosser deemed a swamp actually figure among the advantages of a conflict-of-laws approach to international law in domestic courts.

The promise of a conflicts perspective is threefold. First, it offers ways to respect the nature of international law as law, without simplifying that nature by characterizing it exactly as domestic law. Intriguingly, Joseph Weiler’s editorial on the *Kadi* decision all but makes this case for the parallel with conflicts.<sup>5</sup> In *Kadi*, the European Court of Justice partly annulled the European Community’s (EC) implementation of UN Security Council anti-terrorism resolutions requiring states to freeze the financial assets of individuals and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban, as designated by the Sanctions Committee of the Security Council. It held that the implementing measures violated fundamental human rights protected by the EC legal order. Weiler criticizes the Court for its “bold and unsophisticated assertion” that the EC measures would in reality not be treated any

<sup>1</sup> See Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT’L J. CONST. L. 373 (2008).

<sup>2</sup> See, e.g., Paul Schiff Berman, *Federalism and International Law through the Lens of Legal Pluralism*, 73 MO. L. REV. 1151, 1178-9 (2008); Ralf Michaels, *Public and Private Law in the Global Adjudication System: Three Questions to the Panelists*, 18 DUKE J. COMP. & INT’L L. 253 (2008); Beth Van Schaack, *Boumediene and Choice of Law* (June 13, 2008), available at <<http://opiniojuris.org/2008/06/13/boumediene-and-choice-of-law/>>; Arthur Weisburd, *State Courts, Federal Courts and International Cases*, 20 YALE J. INT’L L. 1 (1995); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365 (2002).

<sup>3</sup> Brainerd Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 727 (1961).

<sup>4</sup> William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).

<sup>5</sup> Joseph H.H. Weiler, *Editorial*, 19 EUR. J. INT’L L. 895, 896 (2008).

differently than had they been autonomous measures adopted by the EC Council of Ministers rather than measures originating from the Security Council. Although Weiler does not propose a better approach, he specifies that such an approach would require a hermeneutic that recognizes what he calls the “double jurisdiction situation.” Our point is that conflict of laws provides such a hermeneutic. In other words, conflicts is not simply one more solution to a well-known problem—yet another concept to be added to Walker’s list. Rather, conflict of laws is a better formulation of the problem.

Seeing the parallel with conflict of laws brings a second advantage to the international law in domestic courts debate: namely, a wealth of experience that can enrich and refine the debate. The “dismal swamp” proves to be a productive biosphere. Indeed, the theories, critiques, and revisions that mark the field of conflicts have already played out much of the debate that is now occurring in the context of international law in domestic courts, giving it an altogether familiar ring.

Finally, the parallel with conflicts changes international law in domestic courts from a specific problem addressed by international and constitutional lawyers into a general problem of relativism—which, we argue, conflict of laws is uniquely positioned to address. Here, the technicality of conflict of laws is not a shortcoming but a strength. The “conflict-of-laws machine,” we argue, is a way to reach a result without yielding to arbitrariness in the face of otherwise insurmountable complexity. Accordingly, we describe our larger project<sup>6</sup> as “theory through technique.” This project will use private international law as a way of thinking through problems of legal, political, and cultural relativism,<sup>7</sup> including multiculturalism and transitional justice, as well as international law in domestic courts.

What exactly does it mean to say that there is a parallel between conflict of laws and international law in domestic courts? Like conflicts, international law in domestic courts concerns relations between laws. Moreover, although not ordinarily described in this way, international law and national law each have what we might call their own conflicts rules: rules that determine whether a case with links to more than one jurisdiction is governed by the law of the forum or the law of one of those other jurisdictions. Thus, international law has rules that determine when it will take account of domestic law. For example, Article 27 of the Vienna Convention on the Law of Treaties, which says that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,” is recognizable as a negative conflicts rule determining non-applicability of domestic law. And Article 46, which makes an exception to Article 27 when a state’s consent to be bound amounts to a manifest violation of a rule of its internal law of fundamental importance, is identifiable as a conflicts rule triggered by the state’s manifestly greater interest. States, by contrast, have their own constitutional, statutory, and judge-made rules that determine the effect given to international law. The Supremacy Clause in Article VI, paragraph 2, of the U.S. Constitution, for instance, can be understood as a choice-of-law provision: its decision to treat treaties as (supreme) domestic law parallels the local law theory of conflict of laws, which posits that judges always apply domestic rules of law, but sometimes create these in accordance with foreign law.

<sup>6</sup> See thus far Karen Knop, *Citizenship, Public and Private*, 71 *LAW & CONTEMP. PROBS.* 309 (2008); Annelise Riles, *Cultural Conflicts*, 71 *LAW & CONTEMP. PROBS.* 273 (2008); Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 *BUFF. L. REV.* 973 (2005).

<sup>7</sup> See Annelise Riles, *The Empty Place: Legal Formalities and the Cultural State*, in *THE PLACE OF LAW* 43 (Austin Sarat et al. eds. 2003).

Given the complex debate that has developed on international law in domestic courts, we cannot give more than a quick snapshot of our approach here. In our larger work in progress, we analyze a broad range of the scholarship and case law. By way of a snapshot, we offer a comparison of our approach with a far-reaching constitutionalist framework developed by Mattias Kumm,<sup>8</sup> which lends itself especially well to a comparison because it is comprehensive and detailed, as well as bold.

Kumm rejects an all or nothing approach to international law in domestic courts in favor of a more complex rule/exception or presumption/rebuttal framework. In his view, a formal principle of international legality requires that international law *prima facie* be applicable domestically. This presumption is subject to rebuttal based on three other principles: the jurisdictional principle of subsidiarity, the procedural principle of adequate participation and accountability, and the substantive principle of achieving reasonable outcomes.

While Kumm's proposal makes an important contribution to the international law debate, his arguments have long been recognized, debated, and refined in conflict of laws. The impetus for Kumm's framework—the reality of overlapping jurisdictions—has been the very *raison-d'être* of conflicts doctrine since the inception of the field. The elements of his framework also echo conflicts. For example, the arguments Kumm gives for the presumption that international law applies domestically are familiar ones in the battery of modern conflicts analysis: the “needs of the international system” and the “protection of justified expectations” both appear in the core provision of the Second Restatement of Conflict of Laws, its § 6. Perhaps most interestingly, his argument that a strong international system bolsters, rather than compromises, democratic legitimacy at the local level because it protects the interests of local minorities, resembles the so-called “false conflicts” analysis—the situation in which no real conflict of laws exists because both jurisdictions share a common interest in seeing the law applied.

From a conflicts perspective, Kumm's argument that the presumption in favor of applying international law can be rebutted if the outcome is sufficiently unacceptable is also familiar. Kumm maintains that this exception should be narrowly tailored although he provides no specific criteria. In conflicts, this is the “public policy exception,” in which otherwise locally applicable foreign law is nevertheless not enforced because to do so would violate local public policy. For international lawyers confronted with Security Council anti-terrorism resolutions such as those at issue in *Kadi*, the public policy exception may feel like a progressive step. In conflict of laws, however, the public policy exception is perceived as a throw-back to an older, more formalist doctrinal era that has thankfully been whittled down over the years as the field has developed more technically sophisticated ways of handling the problem of political and cultural conflict caused by the domestic application of foreign law that differs in substantial ways from the forum's laws and norms.

The core of Kumm's argument is a cost-benefit analysis focusing on the value of international law in overcoming collective action problems that impede localities from doing domestically what is in all of their interests. Global administrative governance is not actually so disturbing from a democratic legitimacy point of view, Kumm argues, if we realize that domestic law has also become far more technocratic and bureaucratically attenuated from the democratic process. The parallel experience of twentieth century conflicts doctrine in

<sup>8</sup> See Mattias Kumm, *The Legitimacy of International Law: A Constitutional Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004).

the United States with technocratic approaches to problems of overlapping jurisdiction suggests why the approach Kumm advocates here looks appealing. Kumm casts aside “unhelpful” questions of legal doctrine and of politics such as sovereignty and, instead, forcefully redeploys the legal realist image of the judge as a kind of super-administrator, who has already proven her ability to handle a myriad details of politics and policy, that was at the heart of the twentieth century conflicts revolution in the United States.

But if this move feels like a leap forward, the twentieth century experience in conflicts also suggests the limits of such an approach. Kumm’s turn to cost-benefit analysis is, in fact, a version of the balancing of governmental interests often used to resolve conflicts of laws. The problem with such technocratic analysis in conflicts has been that efforts to open the analysis up to bureaucratic balancing quickly took on a rigidity of their own. A laudable attempt to broaden questions of which law should apply to an inquiry into the underlying interests involved, for example, rapidly devolved into “counting contacts” between a jurisdiction and a given dispute.

Thus, the twentieth century conflicts experience suggests that the technocratic approach is not ultimately smart or humble enough. It satisfies no one in the end because it exposes, in too stark a way, the politics of judicial decision-making. There seems to be no basis for bureaucratic judgment and hence consumers of the decision are left feeling that the decision to apply or not to apply international law domestically is arbitrary and politically motivated.

Our larger suggestion, then, is that perhaps the mishaps, the bumps in the road faced by American conflicts doctrine, may help to identify—in advance—the difficulties some of the proposals currently floated in the international law in domestic courts debate may face. The strength of conflicts, ironically, is that its starting assumption about overlapping jurisdictions and conflicts between political interests and cultural viewpoints demands that the doctrine face the arbitrariness of its own underlying assumptions head on. Most of the numerous methods and critiques proceed from an honest appraisal of the problem of cultural or political relativism at the core of the act of judging. The complexity of conflict of laws is a consequence of the complexity of the problems it sets out to resolve. A domestic court applying international law is *not* objective in its determination of whether or not international law should apply, conflicts tells us: it represents the views of the domestic polity first. What one should make of this reality, then, is a separate matter.

So, how to address this reality? Does conflicts offer us an alternative way to think about the problem? We want to avoid two positions: on the one hand, that of the formalist doctrinalist who denies or avoids the problem of relativism and, on the other hand, that of the political or cultural theorist who, depending on her theoretical commitments, either contends that the conflict can be “resolved” through some rational set of political commitments (always suspiciously close to her own) or who abandons any hope of resolution in favor of endless circles of critique.

The alternative that conflict of laws offers, we suggest, is “theory through technique.” Conflicts allows us to turn a large political conflict into a narrowly tailored and technically specific one—not to avoid or deny it but, to the contrary, to be able to address it. We do not resolve the question of whether international law applies in all circumstances, or even whether *this* international law applies in all circumstances. We seek to answer only the question of whether *this* international law applies to *these* litigants with respect to *these* specific legal rights and this particular dispute. For example, whereas countless scholars ask whether international law is democratically legitimate, we ask whether its application in the particular context is justified. This does not make the question small; it makes it concrete.

This submission to what we might call the constraint of legal form<sup>9</sup> is, of course, always partial. But are we merely advocating a return to formalism? Don't you *know*, critics will say, that the issues cannot be cordoned off in this way, that they are all interrelated? Don't you *know* that the technical doctrines of conflicts are in fact highly manipulable? Our answer is that we wish to deploy these doctrines in what, following Lon Fuller and before him Hans Vaihinger,<sup>10</sup> we call an "as if" mentality—a device for overcoming political conflict even as it is always understood to be nothing but a device. "As if" refers to knowledge that is consciously false and hence, precisely for this reason, irrefutable. The construct of the line is indispensable to mathematics, for example, but a line in the mathematical sense is clearly imaginary because it exists in only one dimension and is thus infinitely thin, unlike a hypothesis which can be disproven or a presumption which can be rebutted. Yet this imaginary construct, understood by all sophisticated users to be imaginary, allows entire fields of mathematics and geometry to proliferate.

This is precisely the opposite of blind formalism, then. Between the *Scylla* of blind formalism and the *Charybdis* of open policy balancing, between the utopia of systemic integration and the dystopia of head-on political collision, a machine like the conflict-of-laws machine might well lead the way.

### THE LAWS OF WAR AND THE "LESSER EVIL"

*By Gabriella Blum\**

Why is it that the laws of war or as they are otherwise known, international humanitarian law (IHL), allow no justification for breaking the law even when such conduct would actually produce less humanitarian harm than following the law? Why would a defendant who violated IHL in order to save lives be convicted of war crimes?

My interest in this puzzle arose as the Israeli Supreme Court handed down its judgment on the "Early Warning Procedure" that was employed by the Israel Defense Forces (IDF) in the West Bank. Under the Procedure, the IDF would approach a neighbor of a suspected Palestinian militant and ask him to request the suspect to surrender quietly to the security forces. If the suspect refused, the neighbor would then attempt to clear the suspect's residence from its other inhabitants. The stated goal of the Procedure was to reduce potential casualties, among both the security forces and nearby civilians, in case the arrest operation turned violent. Despite some evidence that the Procedure was in fact effective in reducing civilian casualties, the Supreme Court ruled the Procedure unlawful under international law. The Court reasoned that IHL imposed a strict prohibition on the reliance on local civilians by an Occupying Power for security operations, for which there was no exception.

The prohibition cited by the Israeli Supreme Court is but one instance of IHL's absolutist stance. Others include the prohibitions on mercy killings, assassination of rogue leaders, the use of non-lethal chemical weapons, or the intentional killing of any civilian—even where such actions are taken with the attempt to minimize humanitarian harm. The claim that certain acts, now considered war crimes, might actually lead to the saving of innocent lives—

<sup>9</sup> See MARILYN STRATHERN, *THE GENDER OF THE GIFT: PROBLEMS WITH WOMEN AND PROBLEMS WITH SOCIETY IN MELANESIA* 180-82 (1988).

<sup>10</sup> LON L. FULLER, *LEGAL FICTIONS* (1967); HANS VAHINGER, *THE PHILOSOPHY OF "AS IF": A SYSTEM OF THE THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND* (1924). See also, e.g., Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 *HARV. INT'L L. J.* 223, 227 (2006).

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