SYMPOSIUM ON THE THIRD RESTATEMENT OF CONFLICT OF LAWS

TOWARD A NEW DIALOGUE BETWEEN CONFLICT OF LAWS AND INTERNATIONAL LAW

*Christopher A. Whytock**

International law, as it appears in the pages of the *American Journal of International Law*, is largely public international law. Conflict of laws is usually considered to be either outside international law or part of private international law. This symposium in AJIL Unbound, with its focus on the Restatement of the Law (Third) Conflict of Laws, is therefore noteworthy. It also is welcome, because there is much to gain from thinking about conflict of laws and international law together.[1]

Conflict of laws and international law were not always separated. The founders of conflict of laws initially viewed their subject as "part and parcel of international law, namely the part that deals with private entitlements and litigation"—and, for this reason, Joseph Story named it "private international law."[2] It was only later that the two fields moved apart. Conflict of laws scholars in the United States increasingly narrowed their focus to problems arising among U.S. states. Mathias Reimann blames the inward turn on the rise of Legal Realism and its "obsession with the process of appellate adjudication specifically in the United States."[3] Whatever the cause, "conflicts scholars no longer saw their discipline as part of international, but of domestic American, law."[4] Meanwhile, international law scholars in the United States focused on public international law—a focus reinforced by the field's growing interdisciplinary links with international relations theory, which traditionally had a state-centric, "high politics" orientation.

The new Restatement project offers an impetus for bringing conflict of laws and international law back into conversation with each other. One reason to be hopeful about renewed dialogue is that international law and conflict of laws share a common goal of contributing to global order in a world of territorially defined states with diverse laws. Their solutions have different styles.[5] International law's impulse is to transcend national legal

* *Professor of Law and Political Science, University of California, Irvine School of Law. Associate Reporter, Restatement of the Law (Third), Conflict of Laws. Adviser, Restatement of the Law (Fourth), The Foreign Relations Law of the United States.* *Thanks to Ralf Michaels and Carlos Vázquez for helpful suggestions. This essay does not necessarily reflect the views of the other Reporters or Advisers for these Restatement projects or the American Law Institute.*

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[1] *See, e.g.,* Ralf Michaels, *Public and Private International Law: German Views on Global Issues*, 4 J. PRIV. INT'L L. 121 (2008); ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW—JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW (2009).

[2] Mathias Reimann, *A New Restatement—For the International Age*, 75 IND. L. J. 575, 577 (2000).

[3] *Id.* at 577 n.17 (2000).

[4] *Id.* at 577 (2000).

[5] *See generally*, Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589 (2012); Christopher A. Whytock, *Conflict of Laws, Global Governance, and Transnational Legal Order*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L, & COMP. L. pt. II.B (forthcoming 2016).

systems and provide international rules to govern by. Conflict of laws embraces crossnational legal diversity and offers choice-of-law methods to help states allocate legal authority among themselves. Even if the styles are different, the common concern with global order is one reason for international law scholars and practitioners to be interested in the Restatement and in conflict of laws more generally.

This shared concern has naturally given rise to connections between international law and conflict of laws that could serve as focal points for a new dialogue. For example, both fields have rules that help answer a fundamental problem of governance: *Who governs?* International law provides principles limiting jurisdiction to prescribe, adjudicate, and enforce. The three main branches of conflict of laws are choice of law, personal jurisdiction, and the recognition and enforcement of foreign judgments. Both fields thus relate to three dimensions of the "who governs" question: whose law applies, whose courts adjudicate, and who enforces.[6]

But the role of international law's jurisdictional principles in conflict-of-laws methodology is unsettled. To use choice of law as an example, one possibility is that a two-step analysis is required. In the first step, international law is applied to determine which states have authority to prescribe. Only those states that do have authority to prescribe under international law are included in the second step, in which choice-of-law rules are applied to determine which state's law will provide the court's rule of decision. Another possibility is to design choice-of-law rules that, in practice, will not lead to an application of the law of a state when that state lacks jurisdiction to prescribe under international law. Under this approach, an explicit and separate international law step might be deemed unnecessary. This is the intended approach of the current draft of the new Conflicts Restatement.[7] Working together, international law scholars and conflict-of-laws scholars can help clarify the relationship between international law principles of jurisdiction and conflict-of-laws rules.

Another point of connection between conflict of laws and international law is apparent in two topics covered by the current draft of the new Restatement of the Law (Fourth), The Foreign Relations Law of the United States that are traditionally part of conflict of laws and outside the core of international law scholarship: *forum non conveniens* and the recognition and enforcement of foreign judgments. The inclusion of these topics in the foreign relations law Restatement is another indication of the blurred boundaries between international law and conflict of laws and an illustration of the two fields' mutual concerns.

One explanation for the separation of conflict of laws and international law is that conflict-of-laws rules are primarily found in national law (and, in the United States, primarily in U.S. state law), not international law. But international law increasingly addresses conflict-of-laws issues. A variety of Inter-American conventions deal with conflict-of-laws problems in contexts ranging from adoption to bills of exchange and promissory notes.[8] The Hague Conference on Private International Law has produced conventions on conflict-of-laws problems in the fields of family law and commercial law.[9] European Union regulations—whether they are characterized as regional international law or supranational law—are noteworthy for their expansive coverage of conflict-of-laws issues.[10] Conflict-of-laws scholars—including those involved in the new Conflicts Restatement project—

[6] *See* Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TULANE L. REV. 67, 74-83 (2009).

[7] *See* § 1.01, cmt. e (2016) ("The rules stated in this Restatement . . . conform to the requirements of public international law. Applying these rules will not, in the absence of a treaty provision to the contrary, violate the obligations states owe each other under public international law.").

[8] *See* Whytock, *supra* note 5, at pt. II.B.

[9] *Id.* at pt. III.A-B.

[10] *Id.* at pt. II.A.

should be attentive to the growing body of international conventional and supranational conflict-of-laws rules. Even conventions to which the United States is not a party may serve as useful comparative material.[11]

Intriguingly, conflict of laws is a potentially valuable source—so far largely untapped—of techniques for dealing with the fragmentation of international law and the role of international law in domestic courts. There is currently no plan for the new Conflicts Restatement to address such conflicts.[12] Some conflict-of-laws scholars and international law scholars have, however, started to explore how conflict-of-laws methods might be used for these purposes.[13] Perhaps the engagement of international law scholars with the new conflicts Restatement project can animate further creative thinking along these lines.[14]

Recent trends in international relations scholarship are also congenial to productive dialogue between conflict-of-laws scholars and international law scholars. Although, as already suggested, traditional international relations scholarship may have reinforced the tendency to focus on core public international law issues in interdisciplinary work, this appears to be changing. A growing number of international relations scholars are examining aspects of world politics other than relations between nations, including transgovernmental relations (cross-border relations between governmental subunits such as administrative agencies, courts, and legislatures) and transnational relations (cross-border relations among private actors).[15] This, in turn, is leading to more interdisciplinary work that extends beyond the core of public international law. In fact, there already is a trend—which I have elsewhere identified as a move from international law and international relations (IL/IR) to law and world politics (L/WP)[16]—toward interdisciplinary work on conflict of laws (including work on conflict of laws and global governance and the political determinants of international conflict-of-laws decision-making),[17] as well as on the extraterritorial application of national law,[18] "private" areas of international law (such as international family law),[19] and transnational and investor-state arbitration.[20] L/WP promises to be more receptive to interdisciplinary work on conflict of laws than IL/IR.

[11] For example, the work of the reporters on the current draft of the new Conflicts Restatement's concepts of "habitual residence" and "marital center" was significantly aided by analysis of international and supranational law. *See* § 2.02, Reporters' note 5; § 7.13, Reporters' note 4.

[12] *See* § 5.06, Reporters note 1 ("This Section's definition of foreign law does not include international law.").

[13] *See, e.g.,* Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 DUKE J. COMP. & INT'L L. 349-376 (2012); Karen Knop et al., *International Law in Domestic Courts: A Conflict of Laws Approach*, 103 ASIL PROCEEDINGS 269 (2009).

[14] *See also*, Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010) (arguing that the international comity doctrine is rooted in conflict-of-laws theory and that conflict-of-laws methodology can improve international comity analysis).

[15] *See, e.g.,* TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2011); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[16] Christopher A. Whytock, *From International Law and International Relations to Law and World Politics*, *in* OXFORD ENCYCLOPEDIA OF POLITICS (William Thompson ed., forthcoming 2016).

[17] *See, e.g.,* Edward S. Cohen, *Constructing Power Through Law: Private Law Pluralism and Harmonization in the Global Political Economy*, 15 REV. INT'L POL. ECON. 770 (2008); PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014); Whytock, *supra* note 6; Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719 (2009); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011).

[18] *See, e.g.,* Sarah C. Kaczmarek & Abraham L. Newman, *The Long Arm of the Law: Extraterritoriality and the National Implementation of Foreign Bribery Legislation*, 65 INT'L ORG. 745 (2011); TONYA L. PUTNAM, COURTS WITHOUT BORDERS: LAW, POLITICS, AND U.S. EXTRATERRITORIALITY (2016); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF EXTRATERRITORIALITY IN AMERICAN LAW (2009).

[19] *See, e.g.,* Asif Efrat & Abraham L. Newman, *Deciding to Defer: The Importance of Fairness in Resolving Transnational Jurisdictional Conflicts*, 70 INT'L ORG. 409 (2016).

[20] *See, e.g.,* CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003); THOMAS HALE, BETWEEN INTERESTS AND LAW: THE POLITICS OF TRANSNATIONAL COMMERCIAL DISPUTES (2015);

Some scholars have criticized the Restatement of the Law (Second), Conflict of Laws for neglecting the international context. Mathias Reimann has shown how "[t]he Second Restatement is largely blind to international concerns."[21] Friedrich Juenger argued that "[t]he fact that [conflict of laws] has been preoccupied with domestic phenomena ought to be of some concern to law teachers now that 'globalization' has become the cliché of choice."[22] One *raison d'être* of the new Conflicts Restatement project is to do a better job addressing the international context.[23] International law can play a supporting role in this endeavor. Perhaps international law scholarship in the United States is not a perfect model, as it has not escaped parochialism, either.[24] Nevertheless, conflict of laws scholarship can certainly benefit from international law's attentiveness to international *problems*, even if from a largely U.S. perspective.

This implies another potentially fruitful topic of dialogue between conflict of laws and international law: to what extent should the rules governing domestic conflict-of-laws problems (conflict-of-laws problems among U.S. states) be different from the rules governing international conflict-of-laws problems (conflict-of-laws problems among nations)? There has been a long debate about this in conflict-of-laws scholarship.[25] Section 1.04 of the current draft of the new Conflicts Restatement provides as follows: "Some rules in this Restatement limit their application to States of the United States or to nations. Rules that contain no such limitation are generally applicable, although it remains possible that factors in a particular international case will call for a result different from that which would be reached in an interstate case." The Reporters' current view is that in general the policies underlying solutions to both types of conflict-of-laws problems are similar, although there are some clear differences between the two contexts (such as the applicability of the Full Faith and Credit Clause in domestic interstate but not international situations, and the applicability of international law limits in the latter but not the former).[26] Working together, conflict-of-laws scholars and international law scholars can clarify the circumstances in which different approaches are needed.

WALTER MATTLI & THOMAS DIETZ, INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE (2014).

[21] Reimann, *supra* note 2, at 576 (2000).

[22] Friedrich K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems*, 73 TULANE L. REV. 1309, 1329 (1999).

[23] *See* Letter Dated September 24, 2014 from Kermit Roosevelt to Ricky Revesz (on file with the author) (noting that a new Restatement "would provide an opportunity to pay greater attention to the international context than the Second Restatement did. Conflicts issues—whether choice of law, recognition of judgments, or domestic relations—now frequently involve not two U.S. states but a state and a foreign country. It would be valuable to reassess Second Restatement rules in light of the increased presence of international factors, and also to consider attempts to learn from or harmonize with foreign approaches.").

[24] *See* Diane P. Wood, *Diffusion and Focus in International Law Scholarship*, 1 CHI. J. INT'L L. 141, 141, 147-48 (2000) (commenting that "[e]ven if parochialism can be forgiven in some areas (though it is hard to say which ones), surely it has no place in a field devoted to reaching across national boundaries"; noting "the parochial approach to international legal matters that characterized much of the twentieth-century"; and calling on international law scholars in the United States to "abandon parochialism in method, in thought, and in outcome").

[25] *See, e.g.,* Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717 (1957) (arguing for separate conflict-of-laws rules for the domestic and international contexts); Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CAL. L. REV. 1599 (1966); Peter Hay, *International versus Interstate Conflicts Law in the United States: A Summary of the Case Law*, 35 RABEL J. COMP. & INT'L PRIV. L. 429 (1971) (showing that separate approaches are not always necessary); (showing that U.S. courts in practice do not tend to use different approaches).

[26] *See* § 1.04, cmt. c. ("For the purposes of conflict of laws, the interstate and international contexts are broadly similar. The rules in this Restatement are also usually applicable to cases with contacts to one or more foreign nations. This is properly so since similar values and considerations are involved in both interstate and international cases. When a rule should be limited in its application to one or the other context, that limit is noted explicitly."). *See also*, Ralf Michaels, *The Conflicts Restatement and the World*, 110 AJIL UNBOUND 155, 157 (2016) ("[I]nterstate transactions are importantly different from international transactions. Differences between state and foreign nation laws are greater than differences between sister state laws. The Constitution applies only in part to such conflicts. On the other hand, only international transactions are influenced by international law and by foreign relations and foreign commerce considerations.").

For all of these reasons—many of which are directly relevant to the new Restatement of the Law (Third), Conflict of Laws project—renewed dialogue between conflict of laws and international law would be fruitful for scholars and practitioners in both fields. If the new Conflicts Restatement project provides an impetus for this dialogue, that in itself will be a significant and positive contribution.