Colangelo on International Law and False Conflicts

Anthony Colangelo (Southern Methodist University – Dedman School of Law) has posted International Law in U.S. State Courts: Extraterritoriality and "False Conflicts" of Law on SSRN.

> *With the U.S. Supreme Court recently cutting back the reach of federal jurisdiction over causes of action arising abroad for violations of international law, questions have arisen about the ability of state law to provide the vessel through which plaintiffs may bring suits alleging such violations. 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 extent may state law incorporating international law authorize suits for causes of action arising abroad? 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.*
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> *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 law having broader extraterritorial reach than federal law is nonetheless in tension with federal foreign affairs preemption. 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. 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.*
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> *In sum, ever-tightening constraints on federal extraterritoriality have generated multilayered tensions with 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.

The paper will be presented in the joint American Society of International Law Annual Meeting and International Law Association Biennial Meeting, and will be published in the *American Society of International Law Proceedings*.