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Anthony J. Colangelo
*Southern Methodist University*

Kristina A. Kiik

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Anthony J. Colangelo* and Kristina A. Kiik**



## INTRODUCTION

Framing the topic of this symposium as "Human Rights Litigation in State Courts and Under State Law" effectively orients the discussion around the rights of plaintiffs from the outset, the central question being whether they have enforceable rights in U.S. state courts under state law. Standing in the way are various legal doctrines. In broad strokes, the relevant questions become: Which doctrines do, or should, either facilitate or obstruct human rights litigation in U.S. state courts and under state law? How are courts applying these doctrines? How should courts apply these doctrines?

Many of the doctrines that potentially stand in the way of human rights claims in state court and under state law reflect the interests of states—including U.S. states, the United States, and foreign nations. State-centered doctrines like sovereign interference,[1] comity,[2] preemption,[3] governmental interest analysis,[4] the

* Associate Professor of Law, Southern Methodist University Dedman School of Law. The authors thank Bill Bridge for helpful comments.
** Law Clerk to the Honorable W. Royal Furgeson, Jr., U.S. District Court for the Northern District of Texas; B.A., Southern Methodist University, 2006; J.D., cum laude, Southern Methodist University Dedman School of Law, 2010.

1. *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 58 (D.C. Cir. 2011).
2. *See id.* at 63–65.
3. *See* Saleh v. Titan Corp., 580 F.3d 1, 2 (D.C. Cir. 2009).
4. *See Exxon Mobil Corp.*, 654 F.3d at 69–70.

political question doctrine,[5] and other doctrines deferential to the political branches[6] threaten to block human rights litigation in state courts and under state law. The discussion thus tends to boil down to human rights versus states—or, perhaps more accurately, plaintiffs' rights versus legal doctrines that capture some non-human rights interest of states.[7]

This contribution aims to add another rights dimension to this rapidly evolving doctrinal and normative puzzle by reorienting the discussion around the rights of defendants. More specifically, we ask whether there are defendants' rights that may counterbalance plaintiffs' rights in some situations. We believe there are, and that these rights can and should inform how courts decide human rights cases in state courts and under state law. Because our primary concern is choice of law as opposed to choice of forum, we focus principally on issues related to the application of state law rather than on issues related to state courts entertaining suit.

As to the choice of law, we use the concept of what we will refer to as "spatial legality" to identify and frame two main rights: the right to fair notice of the law, and the right to compliance with the law.[8] We then apply these rights through the Due Process Clause to show how they can and should influence human rights litigation under state law. First, we conclude that even if personal jurisdiction exists over a defendant, if the conduct giving rise to the suit exhibits no jurisdictional nexus to the United States, application of purely U.S. law—like state tort law—may violate defendants' rights to fair notice of the law. Second, we suggest that where purely U.S. law—like state tort law—prohibits or creates liability for conduct compelled or required under foreign law in the place where the conduct occurs, defendants may have a due process objection because compliance with the law is impossible. Finally, we argue that both of these objections largely vanish where the U.S. law sought to be applied to foreign conduct implements an international law that imposes liability.

This last point highlights the principal caution we would like to sound in this contribution: the main device for bringing human rights claims in federal court by foreigners against foreigners for conduct abroad thus far has been the Alien Tort Statute (ATS),[9] which to some degree incorporates international norms that

5. *See* Linder v. Portocarrero, 963 F.2d 332, 335 (11th Cir. 1992).

6. Although we've mentioned the political question doctrine already, there are other doctrines that also encourage more case-specific deference to the political branches. *See, e.g.*, *Exxon Mobil Corp.*, 654 F.3d at 58–64; Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 16–19 (D.D.C. 2005).

7. One could, of course, anthropomorphize the state to say that it, too, has "rights." Apart from other obvious distinguishing features, however, that does not reflect how courts describe state interests in these cases. *See, e.g.*, *Exxon Mobil Corp.*, 654 F.3d at 59–62 (evaluating the "interests of the United States").

8. *See* Anthony J. Colangelo, *Spatial Legality*, 107 NW. U. L. REV. 69, 72 (2012) .

9. The ATS gives federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006).

purport also to apply in the foreign territory where the torts occur.[10] However, when U.S. litigation relies on uniquely U.S. law—like state tort law—the potential for both unfair surprise and conflicts with foreign law grows, and may even grow so large as to present problems of a constitutional dimension, rendering application of U.S. law unfair under the Due Process Clause.

So far, courts have tended to avoid these constitutional problems through other doctrines like forum non conveniens or choice-of-law tests that point to the law of the place of the conduct and the harm.[11] But this does not always happen. In fact, as we will show, various stages in these characteristically long and complex cases may have already raised such issues. In any event, our purpose is to throw potential problems up on the radar screen before, rather than after, they arise.[12] Especially in areas like choice of law and extraterritorial jurisdiction, where courts have a great deal of discretion and the methodologies themselves tend to be quite flexible,[13] this is a worthwhile exercise. And because the barriers we erect are constitutional, they are exogenous to those methodologies and, we hope, may provide both useful outside constraints and discernable parameters in which courts may operate when making choice-of-law determinations.

In 1979 nobody could have envisioned the explosion of human rights litigation in federal court under federal law. And, in many ways, the law is still trying to catch up to address the myriad issues such cases have raised. It is presumably the aim of this symposium not only to discuss issues that have been addressed already in human rights litigation in state court and under state law, but also to identify and analyze some of the unique questions that may arise going forward.

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10. Though, of course, heated debate exists as to the scope and nature of this incorporation. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (defining the ATS as "a jurisdictional statute creating no new causes of action" because "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time"); Filártiga v. Peña-Irala, 630 F.2d 876, 889 (2d Cir. 1980) ("[T]he question of federal jurisdiction under the Alien Tort Statute . . . requires consideration of the law of nations."). For post-*Sosa* analysis of incorporating international norms, see *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 746 (9th Cir. 2011) (explaining that "ATS jurisdiction [i]s limited to claims in violation of universally accepted norms" under international law), and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 258 (2d Cir. 2009) (finding that the Court's decision in *Sosa v. Alvarez-Machain* established the "principle that the scope of liability for ATS violations should be derived from international law").

11. *See, e.g.*, Exxon Mobil Corp., 654 F.3d at 70 (holding that Indonesian, not U.S., law applied to alleged conduct and harms in Indonesia).

12. But see *Alomang v. Freeport-McMoran Inc.*, No. 96-2139, 1996 WL 601431, at *1 (E.D. La. Oct. 17, 1996), a suit brought on behalf of Indonesians against a U.S. mining corporation for alleged international human rights violations, foreign environmental damages, and personal injuries. The case was removed to federal court but later remanded. *Id.* at *10. The Louisiana Court of Appeals, however, found that the foreign plaintiffs failed to plead their claims with sufficient particularity and were unable to amend their pleadings. Alomang v. Freeport-McMoran Inc., 811 So. 2d 98, 102 (La. Ct. App. 2002).

13. *See* SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 7 (3d ed. 2012).

## I. SPATIAL LEGALITY: FAIR NOTICE

The concept of legality, or nonretroactivity of the law, is fundamental to any sophisticated legal system. It stands for the basic rule-of-law principle that actors must have fair notice of the law at the time they act.[14] Framed as a right, legality thus ensures fair notice of the applicable law by disfavoring the legal prohibition of activity after it occurs. In this respect, the principle is generally thought of in terms of time: if the law prohibiting an activity did not exist when the activity occurred, the law cannot reach back in time and apply to that activity. This requirement that law exist in time before it can apply—what we might call "temporal legality"—is captured in U.S. law in the Constitution's Ex Post Facto Clause when it comes to legislative enactment of criminal laws[15] and in the Due Process Clause when it comes to judicial scrutiny of both criminal and civil statutes.[16] The principle also exists in international law.[17] And it is generally how legality works within a single sovereign's jurisdiction: actors are deemed on notice of the law at the time they act, but it is unfair to subject their activity to a legal prohibition that comes into existence after the activity takes place.

Spatial legality seeks to cast this fair notice right across space as well as time. In particular, the concept has important purchase in systems comprising multiple sovereigns with multiple jurisdictions. Unless every state's law applies everywhere, spatial legality will have some traction because situations will invariably arise in which an existing law (in time) does not apply to activity (in space). The concept of spatial legality has been more fully explicated and its contours and implications explored in greater detail elsewhere,[18] but its essence can be captured in a simple hypothetical scenario.

Posit a system of more than one state—say, a system comprising State *A* and State *B*. Now suppose that State *A* law does not apply to everything that happens in State *B*, and vice versa. If Jane acts in State *A*, and at the time she acts State *B* law does not apply to her activity, it would violate the principle of spatial legality if

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14. *See* LON L. FULLER, THE MORALITY OF LAW 39, 53 (rev. ed. 1969); Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* GETTING TO THE RULE OF LAW, 4 (James E. Fleming ed., 2011). The Latin expression, "*nullum crimen sine lege, nulla poena sine lege*," is probably as well known as the English version, "no crime without law, nor punishment without law." Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 336 (2005).

15. "Ex post facto" translates to "from a thing done afterward," or "[a]fter the fact; retroactively." BLACK'S LAW DICTIONARY 661 (9th ed. 2009); *see, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 390–92 (1798).

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

17. International Covenant on Civil and Political Rights art. 15, ¶ 1, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221.

18. *See* Colangelo, *supra* note 8, at 77–82.

State *B* later applied its law to Jane for her act in State *A*. This is so even if State *B* law existed in time when Jane acted. Here it is the reach of the law in space as opposed to its existence in time that catches Jane by surprise. Although spatial legality focuses on law's reach in space rather than its existence in time, the fair notice problem is basically the same: someone is being subjected to a law she could not reasonably have expected would govern her conduct when she engaged in it.

This type of spatial legality problem arises in multistate systems when a state gains personal jurisdiction over a defendant and then seeks to use that personal jurisdiction to justify applying the state's laws to the defendant's prior extraterritorial activity. Thus, in the scenario above, if State *B* courts gain personal jurisdiction over Jane—suppose she finds herself in State *B* via extradition, abduction, or just travels there on vacation—State *B* may claim personal, or adjudicative, jurisdiction over her. State *B* cannot, however, use this personal jurisdiction over Jane to apply State *B* law, or prescriptive jurisdiction, to her activity in State *A* if State *B* could not have regulated the activity when it occurred. The concept of spatial legality argues that to apply State *B* law in this situation not only would be inconsistent with existing jurisdictional rules of international law (though both U.S. and international courts sometimes get this wrong),[19] but it would also violate Jane's right to fair notice of the applicable law. In other words, spatial legality takes extant prescriptive jurisdiction rules among states at the time of Jane's conduct and transforms them into an individual right for Jane to fair notice of the applicable law when she acts, where she acts.

Having now set out the concept of spatial legality, the important doctrinal and practical question for present purposes is whether defendants can avail themselves of this fair notice right in U.S. courts in civil cases involving state law. They can.

As noted above, the Supreme Court has used the Due Process Clause to invalidate retroactive application of the law in both the criminal and the civil context.[20] Moreover, the Court has done so in a spatial legality sense by imposing limits under the Constitution on a state's ability to choose its law to govern activity outside its borders, even where the state has personal jurisdiction over the parties. This Supreme Court jurisprudence holds powerful analogical value for litigants contesting the application of U.S. state law to their foreign conduct. The Court has held "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[21] The "touchstone"[22] of this due

19. *See id.*

20. *See supra* note 16.

21. Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981) (plurality opinion)).

process test is, according to the Court, protecting parties from "unfair surprise or frustration of legitimate expectations" resulting from the application of a law they could not have reasonably expected would govern their conduct when they engaged in it.[23]

On this basis, the Supreme Court has refused in the interstate context to credit a party's postconduct move to a forum state as a contact sufficient for the state to constitutionally apply its law to out-of-state conduct at issue in the suit.[24] In the Court's words, "a postoccurence change of residence to the forum State [i]s insufficient in and of itself to confer power on the forum State to choose its law."[25] Moreover, the interstate cases suggest that just because a forum state has general personal jurisdiction over a defendant, that does not mean the state can automatically apply its laws to the defendant's out-of-state conduct.[26] Analogically, these cases supply strong arguments for foreign defendants against the application of U.S. laws—and, we shall argue, especially uniquely U.S. state laws—to their conduct abroad if the only contact with the U.S. forum is either: (a) a postconduct move to the United States, or (b) the forum's general personal jurisdiction over the defendant unrelated to the foreign conduct at issue in the case. It is well established that the Due Process Clause protects foreign defendants in U.S. courts.[27] The crucial question in this context is how.[28]

### *A. Postconduct Presence*

As we have seen, the principle of spatial legality holds that just because a state has adjudicative jurisdiction to subject parties to judicial process does not mean that state necessarily has prescriptive jurisdiction to apply its laws to the parties' conduct, especially conduct that occurred outside the state. Thus parties' presence in the United States may authorize U.S. courts with personal jurisdiction to subject those parties to judicial process. But such presence does not, in and of itself, authorize U.S. courts to apply U.S. law, including state law, to the parties' prior activity outside the U.S. forum in ways that defeat the parties' reasonable expectations or fair notice of the applicable law.

Recent human rights cases are raising precisely this choice-of-law issue. For instance, in *Mamani v. Berzaín*, Bolivian plaintiffs sued former Bolivian president

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

23. *Id.* at 318 n.24 (plurality opinion).

24. *Id.* at 319.

25. *Id.* (citing John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936)).

26. *See generally id.*; *John Hancock Mut.*, 299 U.S. at 182; Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930).

27. *See* Asahi Metal Indus. Co. v. Super. Ct., 480 U.S. 102, 108 (1987).

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

Sánchez de Lozada and former minister of defense Sánchez Berzaín in federal court in Florida.[29] Plaintiffs alleged that defendants were involved in targeted killings of Bolivian civilians in 2003 that violated, among other things, international norms against extrajudicial killing and crimes against humanity.[30] Although ATS claims predominated the complaint, plaintiffs also argued that supplemental jurisdiction existed pursuant to 28 U.S.C. § 1367 over Florida state law claims of intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence, and also alleged wrongful death without specifying the applicable law.[31] Personal jurisdiction over both defendants existed because they had moved to the United States after the alleged conduct.[32] Lozada left Bolivia in October of 2003 and became a Maryland resident, and Berzaín left Bolivia around the same time and became a Florida resident.[33]

The district court granted in part and denied in part defendants' motion to dismiss.[34] Although our primary concern is the adjudication of the state law claims, a brief digression into the disposition of the ATS claims will help frame the litigation stakes. The district court found that seven of the nine plaintiffs had pleaded facts sufficient to state a claim under the ATS for extrajudicial killings, and that all plaintiffs had pleaded facts sufficient to state a claim under the ATS for crimes against humanity.[35] Defendants were then granted permission to file an interlocutory appeal on the ATS claims.[36]

The Eleventh Circuit Court of Appeals dismissed all of the ATS claims for failure to plead facts sufficient to state a claim.[37] In reaching this conclusion, the court of appeals—without citing a single international law source—found that the claims were pitched at too high a level of generalization and were therefore not actionable under the ATS, which was, according to the court, "no license for judicial innovation."[38] Whether the Eleventh Circuit's failure to engage international law sources stemmed from the court's unfamiliarity with them or something else is impossible to know. But it highlights a certain judicial discomfort with delving into international law that plaintiffs may face in ATS

29. Mamani v. Berzaín, 636 F. Supp. 2d 1326, 1328 (S.D. Fla. 2009).

30. *Id.* at 1328–29.

31. *See* Corrected Amended Consolidated Complaint at 22–27, *Mamani*, 636 F. Supp. 2d 1326 (No. 07-22459-CIV).

32. Order Granting in Part and Denying in Part Motion to Dismiss at 1–2, *Mamani*, 636 F. Supp. 2d 1326 (S.D. Fla. Nov. 9, 2009) (No. 07-22459-CIV).

33. *Id.*

34. *Id.* at 40.

35. *Id.* at 25–31.

36. Order Granting Defendants' Motion for Certification for Interlocutory Appeal at 5, *Mamani*, 636 F. Supp. 2d 1326 (No. 07-22459-CIV).

37. Mamani v. Berzaín, 654 F.3d 1148, 1156–57 (11th Cir. 2011).

38. *Id.* at 1152. In this connection, the court's statement that "[t]he scope of what is, for example, widespread enough to be a crime against humanity is hard to know given the current state of the law," *id.*, makes a certain degree of sense if one doesn't look to the law.

suits. And this potential discomfort may, in turn, lead to a strategy of adding state law claims. It so happens this exact strategy has succeeded to a limited extent so far in *Mamani*.

As to the state law tort claims, defendants moved to dismiss on the grounds that they were time-barred under Maryland and Florida law and, moreover, involved novel and complex issues of state law such that dismissal was appropriate under 28 U.S.C. § 1367.[39] As noted, the intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence claims were brought under Florida law, but plaintiffs did not specify what law governed their wrongful death claims.[40] The district court found under Eleventh Circuit precedent and choice-of-law principles that when a party does not allege the law of a sister state or another nation applies, Florida law will generally be assumed to control.[41] The court thus found that plaintiffs' wrongful death claims would proceed under Florida law.[42]

To address the statute of limitations question, however, the court engaged in another choice-of-law analysis. While defendants argued that the claims were barred by the Maryland statute of limitations as to Lozada and by the Florida statute of limitations as to Berzaín, plaintiffs argued that the claims were not untimely because Bolivia's statute of limitations applied.[43] Using the *Restatement (Second) of Conflict of Laws*' most significant relationship test, the court determined that Bolivia had the most significant relationship to the statute of limitations issue.[44] And, because under Bolivian law the relevant statute of limitations for wrongful death mirrored the Bolivian criminal statute of limitations, the claims were timely. However, because the other Florida tort claims did not constitute crimes under Bolivian law, Bolivia's standard three-year civil statute of limitations applied and the claims were dismissed. Accordingly, at this point in the litigation the only claims that have survived appear to be tort claims under Florida law.

What differentiates *Mamani* from the many federal cases that have come before it in which foreigners have sued foreigners for human rights abuses abroad is not the lack of a U.S. connection save for the parties' postconduct move to the United States. In probably the most well-known lower court case under the ATS, *Filártiga v. Peña-Irala*, Paraguayan plaintiffs brought suit in U.S. court against a

39. Defendants' Joint Motion to Dismiss at 47–49, Mamani v. Berzaín, 636 F. Supp. 2d 1326 (S.D. Fla. 2009) (No. 07-22459-CIV), 2008 WL 2913425.

40. Corrected Amended Consolidated Complaint, *supra* note 31, at 22–24.

41. *See* Stone v. Wall, 135 F.3d 1438, 1441–42 (11th Cir. 1998).

42. Order Granting in Part and Denying in Part Motion to Dismiss, *supra* note 32, at 35.

43. Plaintiffs' Opposition to Defendants' Joint Motion to Dismiss at 45–46, Mamani v. Berzaín, 636 F. Supp. 2d 1326 (S.D. Fla. 2009) (No. 07-22459-CIV), 2008 WL 2913427.

44. Order Granting in Part and Denying in Part Motion to Dismiss, *supra* note 32, at 36–37. The court avoided a comprehensive analysis under the significant relationships test by examining a Florida Supreme Court case with relatively similar facts. *See* Fulton Cnty. Admin. v. Sullivan, 753 So. 2d 549, 551–52 (Fla. 1999).

Paraguayan defendant for torture in Paraguay.[45] Instead, the differentiating feature in *Mamani* is the law, or more accurately, the laws under which the suit has proceeded. The court in *Filártiga* famously held under the ATS "that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[46] *Mamani* now asks, what about Florida tort law? More pointedly, what if the conduct alleged does not rise to the level of an international law violation for which liability attaches, but does constitute a tort under U.S. state tort law? While foreign actors may be deemed on notice that torture "violates universally accepted norms of the international law of human rights," they may not reasonably have been on notice that Florida state tort law would apply to their conduct.

Two things probably need to happen for the Due Process Clause to prevent the application of forum law in this type of situation: one, there must be a conflict between U.S. forum and foreign law, and two, the U.S. court must choose U.S. forum law.[47] As to the first prong, it may be easy to locate equivalent causes of action in the foreign law of the place where the conduct occurred to torts in U.S. state law, though some foreign jurisdictions certainly do not have equivalents to U.S. torts like intentional and negligent infliction of emotional distress.[48] Moreover, and perhaps more importantly in cases alleging human rights abuses abroad, there must be liability for the particular foreign actor under foreign law, something that may be difficult to show in cases involving state action.[49]

As to the second prong, the U.S. court, either through a very flexible or a very bad choice-of-law analysis, would choose forum law—a choice that while perhaps unlikely is not inconceivable. For example, U.S. courts may be inclined to liberally choose forum law in a "justice administering state" intent upon "maximizing the tort recovery of plaintiffs,"[50] or where U.S. courts apply forum law as a default rule because they find foreign law "radically indeterminate,"[51] not a far-fetched scenario given the nature of the legal systems in many of the places where the harms are alleged to have occurred in human rights cases.[52] In the

45. Filártiga v. Peña-Irala, 630 F.2d 876, 878–80 (2d Cir. 1980).

46. *Id.* at 878.

47. Naturally, defendants also likely would have to timely object to the application of forum law on due process grounds, or else the objection could be waived.

48. Bowoto v. Chevron Corp., No. C 99-02506 SI, 2006 WL 2455761, at *8 (N.D. Cal. 2006) (finding "that a true conflict exists between California law and Nigerian law" because "Nigerian law does not recognize intentional infliction of emotional distress, negligent infliction of emotional distress, civil conspiracy, [or] loss of consortium").

49. *See, e.g.*, Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 28–29 (D.D.C. 2005) (involving PT Arun LNG Co., "an entity that is 55% owned by Pertamina, Indonesia's state-owned oil and gas company").

50. Hague v. Allstate Ins. Co., 289 N.W.2d 43, 47 (Minn. 1978).

51. Doe v. Unocal, No. BC 237980, slip op. at 8 (Cal. Super. Ct. July 30, 2003).

52. *Id.* (refusing Unocal's request to apply Burmese law on public policy grounds because Burmese law would not recognize the forced labor claim in the absence of an independent judiciary).

combination of these two scenarios, due process acts as a species of side constraint[53] to block the application of state tort law to foreign conduct in a way that would defeat defendants' reasonable expectations about the law applicable to their conduct when and where they engaged in it. In this respect, the Due Process Clause places outer limits on the U.S. court's choice of its own law to regulate conduct abroad.

At this point we should stress, however, that if the conduct violates an international norm for which liability exists, a spatial legality approach operating through the Due Process Clause would not preclude application of U.S. law to the purely foreign conduct where defendants are found in the United States. *Linder v. Portocarrero*,[54] another case out of the Eleventh Circuit, offers a good illustration. Plaintiffs, acting as representatives of decedent Benjamin Linder's estate, brought suit against defendants in Florida for ordering the torture and execution of Linder in Nicaragua during the civil war there.[55] The court refused on political question grounds to entertain a majority of claims that would have required judging the legitimacy of a foreign civil war and various related operations but allowed tort claims under Florida law to proceed. The court explained, "there is no foreign civil war exception to the right to sue for tortious conduct that *violates the fundamental norms of the customary laws of war*."[56] Indeed, relying on *Filártiga*—among other sources—the court observed, "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."[57]

Interestingly, the court then went on to suggest that the same may not be said for foreign activity that, while it may be tortious under Florida law, does not violate international law. The court noted that although torture and summary execution were actionable because they violated international law, the court's holding did not interfere with the "generally accepted premise that acts of *legitimate warfare* cannot be made the basis for individual liability, and that each belligerent has an undoubted right to exercise all the *rights of war* against the other."[58] In short, state tort law could not impose liability for the foreign conduct if it was permissible where it occurred. But where the conduct violated universal norms of international law applicable everywhere, state law could provide the vessel through which those norms might entitle plaintiffs to relief in U.S. court.

53. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 33–35 (1974).
54. Linder v. Portocarrero, 963 F.2d 332, 335 (11th Cir. 1992).
55. *Id.* at 333–34.
56. *Id.* at 336 (emphasis added).
57. *Id.*
58. *Id.* at 337 (citations omitted).

### *B. General Jurisdiction*

Another important question in human rights cases alleging foreign harms is whether defendants subject to general jurisdiction in U.S. forums may, as a result, also be subject to forum law, even for activity outside the forum.[59] Unlike postconduct presence, which is more likely to provide the personal jurisdiction hook for human being defendants, the answer to this general jurisdiction question holds major legal consequences for corporate defendants doing business in multiple jurisdictions.

The Supreme Court has been clear that the relevant tests governing personal jurisdiction and choice of law are constitutionally different, or that "examination of a State's contacts may result in divergent conclusions for jurisdiction and choice-of-law purposes."[60] Indeed, a very recent Supreme Court decision on personal jurisdiction observes, "A sovereign's legislative authority to regulate conduct may present considerations different from those presented by its authority to subject a defendant to judgment in its courts."[61] Thus, just because a U.S. forum has personal jurisdiction over a foreign defendant does not necessarily mean that the forum may apply forum law to the defendant's foreign activities. In *John Hancock Mutual Life Insurance Co. v. Yates*, for example, an insured's widow moved to Georgia and sued a Massachusetts insurance company there on a policy that had been entered into in New York.[62] The company evidently did enough business in Georgia to subject itself to personal jurisdiction in Georgia courts, but because the policy had been issued in New York and the insured had died there, the Supreme Court found the application of Georgia substantive law unconstitutional.[63]

The Supreme Court's recent general jurisdiction opinion, *Goodyear Dunlop Tires Operations, S.A., v. Brown*,[64] opens up a few options for addressing whether general adjudicative jurisdiction over a defendant can translate into general prescriptive jurisdiction to regulate that defendant's conduct everywhere. On one hand, forums that the Court identified as "paradigm forums" for general personal jurisdiction over defendants may have contacts sufficient also to justify general prescriptive jurisdiction over the defendants' conduct, even if the conduct occurs outside the forum. According to the Court, "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly

59. *See* Childress, *supra* note 28.

60. Allstate Ins. Co. v. Hague, 449 U.S. 302, 317 n.23 (1981) (plurality opinion).

61. J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780, 2790 (2011).

62. John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182 (1936).

63. *Id.* Although the Court relied primarily on the Full Faith and Credit Clause, the analysis is the same under the Due Process Clause, and the two have since been combined. *See Hague*, 449 U.S. at 308 & n.10. Indeed, one member of the Court has since observed that "*John Hancock Mutual Life Ins.* is probably best understood as a due process case." *Id.* at 321 n.4 (Stevens, J., concurring).

64. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853–54 (2011).

regarded as at home."[65] To the extent these contacts align with the defendants' citizenship, applying forum law to defendants' activities looks constitutional under both general personal jurisdiction and general prescriptive jurisdiction since states generally may regulate the conduct of their citizens abroad, easing fair notice concerns.[66] Again, the possibility of this happening is not far-fetched. At least one court so far has found that state (or, more precisely, district) law applied to a U.S. corporation's conduct abroad on the grounds that "the United States, the leader of the free world, has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries."[67]

Of course, corporations may—and likely do—try to avoid this result by restructuring. This raises another issue opened up but left unresolved by the Court in *Goodyear*: the relationship between jurisdictional principles and the underlying substantive law of corporations. Plaintiffs in *Goodyear* belatedly tried to get personal jurisdiction over a foreign subsidiary of Goodyear via a "'single enterprise' theory, asking [the Court] to consolidate petitioners' ties to North Carolina with those of Goodyear USA."[68] Such a strategy would also seem applicable to gaining prescriptive jurisdiction over, or justifying the application of forum law to, a foreign subsidiary's activity abroad. For both personal adjudicative jurisdiction and prescriptive choice-of-law purposes, plaintiffs have available a number of options rooted in the underlying substantive law.

One option would be to try to "pierce the veil" as the Supreme Court suggested in *Goodyear*.[69] If the entities are in effect merged into a single enterprise, the argument goes, the U.S. parent entity's home forum not only can hail the merged enterprise into court but also may apply forum law to all of the enterprise's activities. Another option would be to use agency theories to show that the foreign subsidiary had acted as an agent of the U.S. parent.[70] Finally, and relatedly, plaintiffs could demonstrate that the U.S. parent's conduct in the United States contributed to the foreign harm.[71] Any of these techniques likely establishes

65. *Id.*

66. *See* Colangelo, *supra* note 8, at 99–100.

67. Doe v. Exxon Mobil Corp., No. Civ.A.01-1357(LFO), 2006 WL 516744, at *2 (D.D.C. Mar. 2, 2006), *rev'd in part*, 654 F.3d 11 (D.C. Cir. 2011) (rejecting the District Court's choice of law determination); *see also* Friends for all Children, Inc. v. Lockheed Aircraft Corp., 587 F. Supp. 180, 191 (D.D.C. 1984) ("[U]nder the interest analysis approach to choice of laws . . . foreign jurisdictions have no interest in applying their law to damages issues if it would result in less protection to their nationals in a suit against a United States corporation.").

68. *Goodyear*, 131 S. Ct. at 2857.

69. *Id.*

70. *See, e.g.*, Doe v. Exxon Mobil Corp., 573 F. Supp. 2d 16, 30–32 (D.D.C. 2008) (discussing and applying agency and veil-piercing theories in this context).

71. *See, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 26 n.11 (D.C. Cir. 2011) ("The complaints at issue concern aiding and abetting liability where at least some of the conduct causing harm to the plaintiffs in Indonesia occurred in the United States.").

contacts with the forum sufficient to justify not only personal jurisdiction in the forum's courts but also the application of forum law.

The flip side of this general personal jurisdiction and choice-of-law question involves foreign corporations that do substantial, continuous, and systematic business in the United States such that they are subject to general jurisdiction in a U.S. forum. The question here is, do these contacts with the U.S. forum also authorize the general application of forum law to the foreign corporation's foreign activities? Some courts have said yes, but have mixed up personal jurisdiction and choice-of-law tests—for example, justifying the extraterritorial application of U.S. law to foreign activities of foreign corporations because the corporations have sufficient "minimum contacts" with the U.S. forum under tests laid out in Supreme Court personal jurisdiction decisions.[72] The relevant jurisprudence in this context, however, concerns constitutional limits on choice of law, not on personal jurisdiction.[73]

In sum, the choice of state law to regulate foreign activity in suits between foreigners presents complex issues of fair notice, particularly when the only nexus with the forum is a party's postconduct move or the general personal jurisdiction of the forum's courts arising out of contacts unrelated to the suit. In choosing the applicable law, courts should be cognizant of the constitutional limits on their choice of law and should take care to rely on apposite Supreme Court jurisprudence under the Due Process Clause.

## II. SPATIAL LEGALITY: COMPLIANCE

Another formal rule-of-law element captured by due process in the context of litigation alleging foreign conduct and harms is the avoidance of contradictory laws. An example in the single-state context would be avoiding laws that contain simultaneous contradictory commands, such that compliance is impossible.[74] For instance, imagine a law that commanded everyone to sit and stand at the same time. Such a law would contradict itself and undermine the ideal of the rule of law within that state's legal system.

In multistate systems like the international system, the contradictory law problem also can arise when different states' laws overlap and contain contradictory commands. Instead of one contradictory law emanating from one sovereign, there are multiple contradictory laws emanating from multiple sovereigns. U.S. courts have shielded parties from the operation of U.S. law under

72. *See* Goldberg v. UBS AG, 690 F. Supp. 2d 92, 106–07 (E.D.N.Y. 2010).

73. There is also a body of dormant commerce clause jurisprudence disfavoring extraterritoriality that, while not legally apposite because it does not apply in the international context, suggests that permitting U.S. forums to regulate foreign activities of foreign entities over which a forum has personal jurisdiction is bad policy because it frustrates commerce. This point has been expanded upon elsewhere. *See* Colangelo, *supra* note 8, at 102–104.

74. *See* FULLER, *supra* note 14, at 65–66.

the Due Process Clause in these types of situations where compliance with both U.S. and foreign law in the place where conduct occurs is impossible. According to the Supreme Court, these situations arise when parties are able to show that "[foreign] law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible."[75] Thus in *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, the Supreme Court held that compelling a party to violate a foreign sovereign's nondisclosure laws in foreign territory would effectively put the party in a legally impossible position and deprive it of due process under the Fifth Amendment.[76] The relevant defense in U.S. law is the so-called "foreign sovereign compulsion doctrine."[77] Unlike the related act of state doctrine, which blocks U.S. courts from judging acts of foreign sovereigns in their own territories for political and diplomatic reasons, foreign sovereign compulsion blocks U.S. law from clashing with a foreign sovereign's laws in its own territory to protect parties' rights. More specifically, the doctrine protects parties from being "caught between the proverbial rock and a hard place where compliance with one country's laws results in violation of another's."[78]

*Doe v. Exxon Mobil Corp.* illustrates how the defense might play out. Indonesian villagers brought suit in U.S. District Court for the District of Columbia against Exxon and a number of related entities, as well as an unrelated Indonesian entity, for human rights abuses in Indonesia.[79] Plaintiffs alleged that their family members were tortured during a period of civil unrest in Indonesia's Aceh province between 1999 and 2001,[80] and sought, through a variety of statutory and common law causes of action, to attach liability to the corporate defendants operating in the province at the time. In addition to claims under the ATS and Torture Victims Protection Act (TVPA), plaintiffs also brought common law tort claims for wrongful death, assault, battery, arbitrary arrest and detention, false imprisonment, intentional and negligent infliction of emotional distress,

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75. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993) (internal citations and quotation marks omitted); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 403 cmt. e, § 415 cmt. j. Note that the Court in *Hartford Fire* did not find this to be the case because while the foreign law permitted the conduct prohibited under U.S. law, it did not require it.

76. Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 210–11 (1958) ("It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign."). It should be noted that the cases in this area require good faith. Thus, if the party attempts to use foreign law to evade U.S. law, the defense will not apply. *Id.* at 212; *see also* Don Wallace, Jr. & Joseph P. Griffin, *The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process*, 23 INT'L LAW. 593, 599–600 (1989).

77. *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 551 (E.D.N.Y. 2008).

78. *Id.*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 441, 442 (1987).

79. Doe v. Exxon Mobil Corp., 473 F.3d 345, 346 (D.C. Cir. 2007).

80. *Id.* at 346–47; Reuters, *Exxon to Face Lawsuit over Rights Violations in Indonesia*, N.Y. TIMES, July 9, 2007 at B2.

negligence (in hiring and supervision), and conversion against the corporate defendants.[81]

The addition of the common law claims yielded immediate favorable results in the district court. The court initially dismissed the ATS and TVPA claims entirely for failure to state a claim, in large part because of potential interference with U.S. foreign policy and Indonesia's sovereignty.[82] In fact, while the motion was pending, U.S. District Court Judge Louis F. Oberdofer solicited the State Department's opinion on whether adjudication of plaintiffs' claims would interfere with U.S. foreign policy.[83] Along with a letter from the Indonesian ambassador explaining that the Indonesian government "cannot accept the extra territorial jurisdiction of a United States Court," the State Department sent a mixed message.[84] On the one hand, the State Department opined that the litigation "would in fact risk a potentially serious adverse impact on significant interests of the United States."[85] On the other hand, these potential effects on U.S.-Indonesia relations "[could not] be determined with certainty."[86] After dismissing all of the ATS and TVPA claims, the court dismissed all claims against PT Arun LNG Co., an entity fifty-five percent owned by the Indonesian government, as "nonjusticiable" because, according to the court, keeping PT Arun in the suit would "create a significant risk of interfering with Indonesian affairs and thus U.S. foreign policy concerns."[87]

However, the district court found that the common law tort claims against Exxon and its related entities, including Exxon Mobil Indonesia, were actionable and justiciable.[88] Echoing the sovereignty concerns that had helped wipe out the federal statutory claims entirely, the court cautioned the parties to "tread cautiously" on the common law claims and conduct discovery "in such a manner so as to avoid intrusion into Indonesian sovereignty."[89] The court concluded that allowing the claims to proceed "should alleviate the State Department's concerns about interfering with Indonesia's sovereign prerogatives while providing a means for plaintiffs to obtain relief through their garden-variety tort claims."[90] After plaintiffs' opportunity to amend the complaint and the parties' opportunity to brief the choice-of-law issue, the court found that District of Columbia law

81. *Exxon Mobil Corp.*, 473 F.3d at 346.

82. *Id.* at 347–48; *see also* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24–28 (D.D.C. 2005).

83. *Exxon Mobil Corp.*, 393 F. Supp. 2d at 22.

84. *Exxon Mobil Corp.*, 473 F.3d at 359 (Kavanaugh, J., dissenting) (quoting Deferred Appendix at 188, Doe v. Exxon Mobil Corp., 473 F. 3d 345 (D.C. Cir. 2007) (No. 05-7162)) (internal quotation marks omitted).

85. *Id.* at 347 (majority opinion) (internal quotation marks and citations omitted).

86. *Id.* at 354 (internal quotation marks and citations omitted).

87. *Exxon Mobil Corp.*, 393 F. Supp. 2d at 28.

88. *See Exxon Mobil Corp.*, 473 F.3d at 353.

89. *Exxon Mobil Corp.*, 393 F. Supp. 2d at 29.

90. *Id.* at 30.

applied to all of the common law claims except the wrongful death claim, which was governed by Delaware law.[91] The claims were later dismissed for lack of prudential standing.[92] On appeal, the D.C. Circuit reinstated the ATS claims and the "non-federal tort claims," and held that Indonesian, not District of Columbia or Delaware, law applied to the latter.[93]

A variant of the foreign sovereign compulsion issue arose in the district court proceedings while the non-federal tort claims were still purportedly governed by District of Columbia and Delaware law.[94] In its motion for summary judgment, Exxon argued that it could not be held liable for the actions of Indonesian government forces that allegedly harmed the plaintiffs because Exxon was actually required to employ the forces under Indonesian law.[95] More specifically, Exxon argued that it could not be directly liable for negligent hiring and supervision of the Indonesian forces or vicariously liable for their activities because Exxon was "required by Indonesian law to have military security personnel on site."[96] The district court rejected these arguments, finding that a genuine issue of material fact existed as to whether, under U.S. tort principles of employer liability for independent contractors and master-servant relationships, Exxon could be found liable.[97] Had the court concluded that Exxon was actually and legally forced to employ the government forces and had no control over them under Indonesian law, foreign sovereign compulsion could have kicked in to block the application of U.S. law. Exxon's defense also raises important questions now that the D.C. Circuit has concluded that Indonesian law applies to the claims. If Exxon was acting pursuant to Indonesian law, or Indonesian law at the very least permitted Exxon's conduct, presumably those claims fail.

Although due process operating through the doctrine of foreign sovereign compulsion may relieve defendants of liability under distinctly U.S. law for foreign acts compelled by foreign law, we think the doctrine should not apply where the acts would also incur liability under international law. There is much to say on this topic, and more will be said.[98] It potentially pits not only international law but also U.S. laws (like the ATS) that serve as vessels for international law against laws of foreign sovereigns in their own territories. For now, let us take a step toward

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91. Doe v. Exxon Mobil Corp., No. Civ.A.01-1357(LFO), 2006 WL 516744, at *1 (D.D.C. Mar. 2, 2006).

92. Doe VIII v. Exxon Mobil Corp., 658 F. Supp. 2d 131, 135 (D.D.C. 2009).

93. Doe v. Exxon Mobil Corp., 654 F.3d 11, 70 (D.C. Cir. 2011).

94. Doe v. Exxon Mobil Corp., 573 F. Supp. 2d 16, 22 (D.D.C. 2008).

95. *Id.* at 25.

96. *Id.*; *see also id.* at 20 ("The Indonesian Government may designate an asset as a 'Vital National Object,' which requires military security protection. Defendants contend that, since 1983, the Indonesian Government has designated the Arun Field such a Vital National Object.") (citation omitted).

97. *Id.* at 23–30.

98. One of us intends to write an article about compliance with overlapping contradictory laws. *See* Colangelo, *supra* note 8, at 125 n.290.

addressing the topic with an observation that may end up resolving most cases for most courts: there should be no real conflict of laws since foreign law generally will not compel offenses for which liability exists under international law. The whole reason offenses like torture, genocide and crimes against humanity exist to begin with and incur liability under international law is that states overwhelmingly agree on that law. Naturally there may be disagreement on the scope and contours of the offenses, but in most cases it will be difficult to demonstrate that foreign law requires the commission of international law offenses. It follows, however, that in foreign sovereign compulsion situations U.S. courts cannot use domestic laws like the ATS to expand the contours of liability beyond existing international law and thereby impose uniquely U.S. laws on foreign defendants "caught between the proverbial rock and a hard place,"[99] where compliance with uniquely U.S. law would impose liability under the law of the place of the conduct.

## CONCLUSION

Human rights litigation in state courts and under state law raises novel and complex issues involving the choice of U.S. state, as opposed to federal, law to regulate conduct outside the United States. This symposium contribution used the concept of spatial legality to identify outer limits on the ability of courts to choose U.S. state law to regulate activity abroad in light of two main rights of defendants protected by the Constitution's Due Process Clause. First, application of uniquely U.S. law, like state tort law, to foreign conduct could defeat defendants' right to fair notice of the law if no jurisdictional nexus to the U.S. forum exists save for defendants' postconduct presence or amenability to general jurisdiction in the forum wholly unrelated to the claims giving rise to the suit. Second, application of uniquely U.S. law, like state tort law, to activity abroad that is compelled by the foreign law governing the place where the activity occurred could defeat defendants' rights to compliance with the law. The discussion also suggested, however, that due process should be satisfied in both of these situations where the U.S. law faithfully incorporates or reflects an existing international law that imposes liability. Courts have notoriously flexible methodologies with which to make choice-of-law determinations involving the application of state law. Translating these methodologies to the international system in the context of human rights claims arising abroad raises new questions about the outer limits of that flexibility. This contribution hopefully set out some useful parameters in which to work.

99. *In re* Vitamin C Antitrust Litig., 584 F. Supp. 2d 546, 551 (E.D.N.Y. 2008); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 441, 442 (1987).