Lawyering Across Multiple Legal Orders

Introduction

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Why LAMLO?

The basic premise of this course is that in today’s globalized world a lawyer will encounter many legal systems beyond his or her own domestic law. Even a domestic legal system can be bewilderingly complex. Consider the multiple legal orders of the US legal system you have already encountered in your first year of law school: common law and statutory law, state and federal law, substantive and procedural law, civil and criminal law, constitutional and non-constitutional law, statutory and administrative law, to name just a few. A similar complex world of law can be found in most other domestic legal systems, even if not organized along explicitly federalism lines.

The increasing density of economic, social and political ties that cross national boundaries implies that different legal systems frequently come into contact with each other. As people and firms trade with strangers, seek to exert control over assets located elsewhere in the world, or inflict damage far from home, they invoke, or have invoked against them, law at multiple levels, often without even knowing it. The rules of different legal systems may conflict; they may seek to achieve similar outcomes but use very different means to do so; or they benefit different interests. Thus, it matters which law applies; to know why and how, it is essential to have some familiarity with the basic principles of different legal systems.

Formal law promulgated by States is only one form of legal ordering. Religion is another source of law that predates State law and continues to coexist with it, in some countries predominating over secular law. Trade and commerce, which predate the nation-State, have their distinctive norms and practices that can be, to varying degrees binding. Trade practices evolved historically to form a body of principles, often known as the *lex mercatoria*, or law merchant, that were understood by most traders in a given market. To this day, pockets of self-regulation exist within States and in the transnational realm. Consider religious law governing family affairs, self-regulatory organizations, such as the diamond exchange in New York, but also (with some qualifications) stock exchanges, trade associations, and sports leagues.

Moreover, States around the world have endorsed the outsourcing of legal ordering to non-State actors. The norms that have emerged are often substantive in character, but they may also be basically procedural. Thus, alternative dispute settlement has been on the rise not only domestically, but also internationally. Further, States have legally committed themselves, within limits, to enforce the judgments of other countries’ courts or the awards rendered by foreign or international arbitration tribunals, provided these tribunals have observed procedural ground rules ensuring basic fairness. In addition, States have endorsed non-governmental standard-setting organizations that determine quality standards for products, accounting principles, prudential regulation of banks, and the like, sometimes
incorporating them into formal law, sometimes leaving them in the form of “soft law,” meaning norms that guide conduct but whose violation do not give rise directly to State or non-State coercion. This evolving body of non-state law is sometimes referred to as “transnational private law”, because its scope goes well beyond the boundaries of nation-States and lacks the formal endorsement associated with public law.

As shorthand, we use the term “non-State law” to denote forms of social ordering that share with State law some features, such as authority, standardization and continuity, but are not officially promulgated by States or their agents. They also differ from State law in that their reach is not determined primarily by territory, but by membership or the scope of trading or financial networks.

In addition to State and non-State law, there is a growing body of law that is international in origin. This law takes its most formal shape in agreements among States, in the form of treaties, international conventions and agreements, or the like. These instruments affect not only the relationship of States vis-à-vis one another, but may also exert legal influence directly within domestic legal orders. International law may trump domestic rules; it may offer an alternative path to remedies or at least the airing of grievances; indeed, in countries that lack basic rules of law, it may offer the only legal redress for victims of rights abuse. International law is closely intertwined with State law. It ordinarily takes States to make international law. Moreover, the enforcement of international law relies heavily on nation-States’ coercive power.

The purpose of LAMLO is to introduce students to the multiple legal orders that we have broadly divided into State (domestic or foreign), non-State, and international law. We will select from among these legal orders those that are most relevant to the fields of law covered in this course, which mirror the fields that most students in the US encounter in their first year of law school: contracts, torts, civil procedure, property rights, criminal law, and constitutional law.

The specific goals of the course are twofold: It introduces first-year students to the principal aspects of foreign, comparative and international law (both public and private) that they will inevitably encounter in their further studies and in their professional career. It also places in a comparative and international law perspective some of the principal issues and themes that emerged or are emerging from their first-year courses, which are mostly domestic in orientation.

Throughout this course, we will use the term “navigate” to underscore the challenge of analyzing problems that implicate multiple legal orders; and the term “interface” to depict the relationship, in various respects, that these legal orders bear to one another.

“Navigation” and “Interface”

This section introduces the typology of legal orders you will encounter throughout the course and considers how they relate to each other. Part II below will offer a more in-depth analysis of certain specific legal orders and their interface. We have organized this section into paired categories. The “domestic/domestic” pairing captures differences between systems of State
law, suggesting how they might interface and what tools are available to solve the interface challenges. The “State/non-State” dichotomy addresses the relationship between State law and non-State bodies of law, with special emphasis on their transnational aspects. The “international/domestic” distinction enables us to discover basic principles of international law and explore the interface between international and domestic law.

Figure 1 below uses only the “domestic/domestic” and “international/domestic” pairings to illustrate what we mean by navigating and interfacing multiple legal orders.

“Navigation” refers principally to understanding the structure, content and fabric of different legal orders, or essentially what lies inside the three boxes labeled “international law” and “State A” and “State B”. “Interface,” or the relationship between and among legal orders is indicated by arrows and, as the arrows suggest, can be essentially horizontal or vertical in direction. Each is associated with different legal principles and tools that can help resolve potential conflicts between two or more domestic legal orders, on the one hand, and between domestic and international law orders, on the other.

Figure 1 is, of course, a gross simplification. For example, there is not simply one international law. Multiple international legal regimes coexist and sometimes stand in tension, and even conflict, with one another. A regional legal order like the European Union exhibits characteristics and relations that sometimes resemble those of States, and sometimes those of international orders. As mentioned already, there is non-State law that operates both within and across nation-States. Nevertheless, the figure captures the essence of what LAMLO is all about.

Before continuing we should recognize that not all legal conflicts have been, or can be, resolved using the tools we are about to introduce. Overlaps and conflicts among multiple legal orders sometimes defy resolution. Earlier enthusiasm about harmonizing law around the world to avoid such conflicts has given way to a more realistic assessment of the diversity among the world’s peoples, norms and polities – diversity that may in some circumstances make legal convergence a remote and perhaps even an undesirable goal. There are also some worrying signs that law may be used to build fortresses around national interests and threaten retaliation against others.
In short, LAMLO is not static (no functioning, or living, legal system is). The number of legal orders, State and non-State, domestic and international, change over time and so do the legal tools and the political goodwill or other motivations that determine their interface. However, we are confident that if a student who masters the basic principles of navigation and interface we offer in this course – not only in the abstract, but also in concrete scenarios – will find his or her way through the maze of multiple legal orders that by any measure is likely to increase over time.

State-State Law

There are today about 195 independent States in the world – that is States that have been recognized by the international community as such, with the number always changing (as recently in the case of South Sudan). Each State has its own legal order, even if it shares a common ancestry with others; in fact, many States have plural internal legal orders. Prominent examples are the “islands” of French law in predominantly common law jurisdictions, such as Louisiana (in the US) or Quebec in Canada), islands whose cultural distinctiveness is always under threat from the dominant legal culture. In many other States legal pluralism has resulted from colonization or even successive colonizations. Countries with more than one colonial master sometimes have checkered legal systems. Consider South Africa’s legacy of Roman Dutch, English law, and multiple indigenous or tribal laws; or Israel’s Ottoman and English legal ancestry together with a strong influence of continental civil law that those fleeing or migrating from Europe brought with them. Japan was never colonized, but combines its own legal tradition with French, German and American law. French and German law was imported into Asia and Latin America in the 19th century in an attempt to modernize domestic law; and American influence took hold in various places during the occupation following World War II. Indigenous legal orders that predate colonization often continue to exist to this day.

Domestic legal systems are connected by economic and social affinities that cross national and jurisdictional boundaries. People from different legal systems trade with one another; they acquire assets – whether real estate, company shares, or intellectual property rights; they render services across jurisdictional borders; they sometimes inflict cross-border damage either through their foreign operations or through the externalities of their domestic operations. For each of these transactions, questions arise as to which law or laws should govern, what difference it makes which law is applied, and what happens when decisionmakers in different jurisdictions apply different laws to the relationship. While it is common to focus on the resolution of cross-border disputes, there is also a predictive and planning aspect to all of this, for parties have need to identify at the transaction-designing and transaction-performing stage, and not only at the dispute-erupting stage, the legal order whose norms govern their relationship, and in particular the rights and obligations it entails.

If parties know in advance that their dealings potentially implicate more than one legal order, they may, if they agree, choose the one the best suits their needs. The choice they make in this regard is determined by so-called “conflict-of-law rules” (as they tend to be known in the U.S.) or rules of “private international law” (as they are commonly known elsewhere). Though these rules contemplate multiple legal orders, they represent in themselves domestic law that the national courts seized of a case will consult in order to determine the applicable
law. Of course, there have been attempts to harmonize conflict of law rules across States. To the extent such harmonization is achieved, it may constitute international law (typically in the form of conventions on choice of law) or regional law (as in the case of several major regulations of the European Union). Whether rooted in domestic law, international agreements, or regional law, conflict of law rules address the horizontal interface of multiple legal orders.

One important variable in choosing an applicable law is the legal system with which the architects of a legal relationship are most familiar or otherwise comfortable. This tends to produce a “home” bias. Yet, sometimes legal systems other than the one with which one is most familiar offer better protection or more advantageous opportunities for structuring a contract or enforcing a right. This is true not only in taxation or company incorporation – fields in which “law shopping” is particularly well known. Access to a wider range of legal orders for designing a relationship represents an important strategic advantage. In order to choose knowingly the best law among several options, lawyers need to be able to navigate different legal systems, that is, to understand how they are organized, what core principles govern them, what specific norms they embrace, and how all of this might affect the interests of the parties they represent.

While each legal system is unique, many legal systems share common ancestry. Domestic legal systems are frequently classified according to “legal origin” or “pedigree”, which refers to the family of legal systems that has influenced the formal law, as well as the organization of the courts and of the legal profession. Countries belonging to the common law family trace the origin of their legal systems to England. Those belonging to the civil law family have their roots in Roman law and owe the specific structure and/or content of their law to a type of civil law, commonly French, German, or Scandinavian. Some have also encountered socialist law in the 20th century. While largely extinct as a separate category of law, elements of socialist law continue to exist in China, Cuba, and North Korea. Traces can also be detected in many countries that formerly belonged to the Soviet Union.

The fact that the legal systems of 195 independent States around the world can be divided into three, perhaps four, legal systems is at first glance astonishing. In reality, the apparent commonalities often disguise a much greater diversity and legal pluralism than first appears. What the classification depicts is, above all, the diffusion of national legal systems from Europe to the rest of the world during the period of imperialism and colonization. The European colonial powers brought their legal systems with them. While they sometimes applied their own law only to settlers from the home country and colonial personnel, in most countries colonial law was extended to all citizens post-independence and formed the foundation for national political solidarity and a coherent further evolution of law within these countries.

Legal systems differ not only in the ways in which they organize relations among private parties. Administrative and regulatory law differs widely among States, and so does constitutional law, whether in form, content or practice. Political scientists commonly classify political systems into presidential and parliamentarian types, democratic and authoritarian systems, and (among democracies) majoritarian and proportional voting regimes. The US has a presidential system, and so does France, albeit of a different kind. In contrast, the UK and Germany are parliamentary systems. Significantly, these classifications do not necessarily coincide with the classification of “legal families” discussed above. The
countries of Latin America all belong to the French civil law family; however, most borrowed their constitutional law from the US, a common law jurisdiction. Germany is a civil law country, but it has influenced constitutional law not only in other civil law jurisdictions, such as Eastern Europe, but also in South Africa.

Constitutional law is a domain closely associated with national sovereignty, which might suggest that there will be less interface with foreign legal orders on this level than on others. Yet, contrasting principles of constitutional law come into play in many circumstances, as when criminal suspects are extradited (or sought to be extradited) from one jurisdiction to another, when countries decide to invoke their jurisdiction to indict war criminals or other human rights abusers, irrespective of their nationality or of where the acts have been committed, or when governments invoke constitutional principles to justify the curtailment of transnational trade in goods or services in apparent contradiction with legal commitments made under international or European Union law. New States or States emerging from revolution are also consciously borrowing constitutional forms and structures from other countries around the world.

Administrative and regulatory law – as depicted in the literature on the “rise of the regulatory state”– represents a major growth area for transnational interface. Diversity in the world marketplace for goods and services has generated concerns regarding the protection of consumer, employee, investor, and environmental interests. Areas previously subject to purely State-based regulation have come under the direct purview of international organizations like the North American Free Trade Area or the World Trade Organization. Consider that many products, including food and pharmaceuticals, are produced in global production chains. Should their safety be determined by the country where they are produced or where they are consumed? Who enforces the safety standards at the place of production? Should the same principles apply to financial products? How should we address systemic problems where harm done in one part of the system can easily spread and may wreak havoc elsewhere – as in the case of environmental pollution or financial contagion. Is the answer to this global governance and global regulation or can conventional State-based tools of interface offer adequate solutions?

State-non-State Interface

The modern nation-State potentially exercises jurisdiction over all spheres of life of its citizens and residents. Totalitarian governments of the communist or fascist types have indeed tried to make good on those principles. Other states have recognized civil and political rights that precede the State and have established procedural devices to enforce them when necessary. Most States have also tolerated or encouraged forms of social ordering alongside State-promulgated law within their boundaries. Religious laws are one such example, although the boundaries between religious and State law have frequently been disputed and redrawn. The 19th century witnessed cultural wars between church and secular law. In our own times, the question whether Muslim women may wear headscarves in French schools or whether the sharia should govern family affairs in Canada, where Christians and Jews have long enjoyed a significant measure of self-governance, have made headlines. Religious law affects not only personal relations. The charging of interest is prohibited under
Islamic law (as it was by canon law until the 19th century), forcing financial intermediaries in the Gulf States to find alternative strategies to make good on the time value of money.

Economic relations too are often governed by rules other than those of State law origin. In most legal systems today, people are basically free to contract. They can freely design the content and form of their consensual legal relationships. This freedom is not boundless, but rather is limited by considerations of legality, morality and what common goes by the name of “public policy” (ordre public). Moreover, if parties wish to enforce their contracts through litigation, they will have to demonstrate that what they seek to enforce is indeed a contract – the conditions for which may vary from country to country, thus requiring some navigation of relevant laws. In addition, many countries recognize the right to free association, whether for social, political or economic purposes. Most associations are self-regulating and are free to determine their affairs, and develop their own “soft law”, as long as they do not take actions that are illegal under the relevant civil and criminal law.

The scope of “self-regulation” can be considerable. Until 2000, the London Stock Exchange, a private organization which houses one of the largest securities trading platforms in the world, was the main regulator of securities in the UK. It was eventually subjected to regulation by the newly created Financial Services Authority, but continues to regulate the affairs of its members and determine listing requirements for firms within the boundaries established by the new agency. The New York Stock Exchange and NASDAQ are also heavily self-regulatory organizations. However, they too operate in the shadow of State regulation: The Securities and Exchange Commission may step in and regulate their affairs if it deems their self-governance inadequate for the stability of the financial system or protection of investors. Sometimes, the mere threat of State regulation can induce a self-regulating entity to improve its own governance.

In the transnational realm there are far fewer shadow regulators. States are reluctant to establish transnational regulators for fear of curtailing their regulatory prerogatives. Moreover, different countries have different regulatory philosophies. Some prefer private autonomy, others place greater weight on the public interest and view it as best protected by state law and regulation rather than the market. As a result, we have few, if any, formal regulators in a global world where billions of goods and trillions of dollars worth of financial products are traded on a daily basis. There is no international anti-trust agency, no international securities or banking regulator, no international food and drug administration, and no international environmental agency with the power to make rules and regulations and enforce them against violators. A partial exception is the European Union, where reforms enacted in the aftermath of the 2008 financial crisis led to the creation of European Banking, Securities and Insurance Authorities. Still, enforcement of their norms rests largely with national regulatory authorities.

What we do have, however, is a growing body of non-State law established by bodies that are formally private even if many of their delegates represent public regulators at the State level. Consider the International Organization for Standardization (ISO) located in Geneva, Switzerland. It is a voluntary, non-treaty based organization established by national standard setting organizations from 130 countries. It has established product standards for 18,500 products. Among the most recent “best-selling standards” are those for corporate social responsibility or risk and environmental management systems. One may take issue with these standards being considered as “products”.

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More generally, one may question whether product standards are even “law”. Clearly, they are not State-promulgated law. However, in other respects ISO standards resemble law. They create standardized practices, establish quality principles, and thereby help coordinate contracting and trading around the globe. Those not abiding by the standards set by the ISO do so at their own peril, as parties may refuse to contract with them. Similar organizations exist for accounting standards (the International Accounting Standards Board, IASB) or securities regulation (the International Organization of Securities Committees, IOSCO) and internationally active banks (the Basel Committee of Banking Supervisors, BCBS).

State law frequently refers directly to the principles established by these organizations, which have come to be referred to as the “new global rulers”. The principles of banking regulation established by the BCBS have made it into EU directives and into many national laws. In the US, the non-State accounting standard-setter, the Financial Accounting Standards Board (FASB), has signed an agreement with the IASB with the goal of achieving convergence between their respective standards. This sounds like a technicality, but how assets and liabilities, revenues and profits are accounted for can make a huge difference in economic and financial terms. The interface of IASB standards with US law is indirect. US securities laws and stock exchange listing standards (also non-State law) refer to the General Accepted Accounting Principles (GAAP) established by the non-State actor FASB, which in turn has entered into agreements with the IASB with a view to harmonizing the standards of the two organizations.

Not all “new global rulers” were created by national regulators (i.e., public agents at the national level). Private agents also have established organizations that have become the de facto standard-setters for the global market. Consider the International Swaps and Derivatives Association (ISDA) located in London. It counts among its members the largest banks and law firms around the world. Its purpose is to standardize contracts for swaps and derivatives, including financial instruments such as the collateralized debt obligations (CDOs) and credit default swaps (CDS) that have come into some disrepute during the global financial crisis. The standard-setting power of ISDA, just like that of ISO or IASB, is based not on elections, but on the power of exclusion. Those who do not play by the rules set by the organization are excluded from the game. ISDA’s influence can also be gauged from the fact that it has been able to lobby legislatures in over 50 countries to change their bankruptcy codes to make them compatible with the ISDA Master Agreement for derivatives. This suggests another form of interface between State and non-State law: even without delegating authority to such organizations, States may recognize non-State law by embodying it in legislation, by incorporation or otherwise, or by allowing their courts to consult these standards when determining contract- or tort-based liability.

Another important manifestation of the State/non-State law interface is State recognition of awards rendered by private dispute settlement bodies that are only marginally regulated by States. The 1958 “UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards” is a relatively short and simple instrument that has engendered an entire industry of private arbitration for claims worth billions of dollars in international trade, commerce and investment. The basic principle established by the Convention is that States must, except to the extent the Convention itself allows, recognize and enforce the awards rendered by foreign arbitral tribunals without conducting review of those awards on their merits. This means that States allow a foreign party to use its courts and bailiffs to enforce an arbitral award against
persons or assets located within that jurisdiction, without those national actors exercising much by way of supervision or control. Curiously, as of yet, no such general instrument exists for the recognition and enforcement of awards rendered by foreign country courts.

In short, descriptively we can distinguish between several forms of interface between State and non-State law, including, but certainly not limited to, coexistence, delegation, and recognition.

**International Law – Domestic Law**

The interface between and among multiple domestic legal systems, and between State and non-State legal orders, does not exhaust the domain of LAMLO. Central to LAMLO is also the relationship between domestic and international law. International law governs basic principles of State-to-State conduct based sometimes on international agreement and at other times by operation of what has come to be known as customary international law. The influence of international law emanating from these two sources has impact of different magnitudes depending on the field of law in question. Its impact on certain matters – the law of war and peace, the law of the sea, the law of international trade, human rights law and environmental law – has been profound.

Bodies of international law – principally treaties and customary international law – co-exist in a non-hierarchical fashion. Not all States are parties to all international treaties, far from it. The vast majority of treaties and some of the most important – like the plethora of investor protection treaties – are bilateral. There is no international constitution or supreme court that can authoritatively reconcile or establish priorities among them. International tribunals frequently pay tribute to other international legal regimes by invoking their principles in justifying decisions rendered. However, this does not make for a unified body of international law. Thus, international law is best described as a set of multiple supranational legal orders with varying memberships and purpose. How these bodies of international law relate to one another is another problem of horizontal interface.

The interface between and among treaties is especially difficult to trace when it comes to customary international law, due to its unwritten form and its relative indeterminacy. Customary international law has some parallels to the common law in that it needs to be distilled from actual state practices, though it may also on occasion be announced by an authoritative body, such as the International Court of Justice – a judicial organ of the United Nations that hears disputes brought by countries that have subjected themselves to its jurisdiction. We will have further occasion to explore the difficult concept that is customary international law. Suffice it to say that it is said to consist of principles that, while unwritten (and certainly not signed and ratified), are considered by States as binding upon them. The tautological aspect of customary international law – States becoming bound by it to the extent they consider themselves under an obligation to respect it – only adds to its analytic difficulties.

However, the most prominent challenges created by international law entail are essentially vertical interfaces. International legal orders interact on a regular basis with State and non-State legal orders; indeed they are typically dependent on implementation by State and non-State legal orders for their efficacy. A simple contract for the export or import of goods can
implicate principles of international law. A country that imposes trade barriers, such as customs or quotas, or non-trade barriers, such as regulatory controls, may find itself in violation of international trade agreements. It may even be pursued by another State at the World Trade Organization WTO and become the subject of sanctions. Similarly, the parties to a private contract may have included an arbitration clause according to which any dispute between them must be resolved by an international arbitration tribunal (under the auspices of the International Chamber of Commerce, for example). A State court of a country that is a party to the 1958 New York Convention that ignores a valid arbitration clause and exercises jurisdiction places the State in violation of its international law obligations.

Companies migrating abroad in search of lower labor costs may find themselves operating in jurisdictions that are in violation of principles established by the International Labor Organization (ILO). However, unlike the WTO, the ILO is not equipped with a dispute settlement system and is accordingly (at least partly for this reason) regarded as a rather weak organization. To enhance the protection of workers in global production chains (as well as other interests), the UN has established a voluntary compliance mechanism, the Global Compact. Companies can register if they are willing to comply with basic standards of labor, human rights, and environmental protection. Registration triggers reporting obligations, but no legally enforceable substantive commitments. In addition, multinational corporations have begun to issue their own “codes of conduct” that express a commitment to basic labor and environmental standards. While not enforceable as such, these commitments, if violated, may produce important reputational sanctions. They may even result in domestic litigation over misrepresentation or unfair competition and, to that extent, exert coercive power.

Violations of international law do not, for the most part, give rise to rights enforceable by private parties. They are commitments that sovereign States make to one another. Only to the extent that the international treaties involved create mechanisms for the benefit of private parties can the latter invoke them in anticipation of having a remedy at the international level. One of the most important growth areas for private beneficiaries of State-to-State agreements is investor protection. Literally thousands of bilateral investment treaties (BITs) enable private investors from one country to bring arbitral proceedings against the government of another country, if they consider that the latter has infringed investor protection rights enshrined in the relevant treaty.

Significant efforts have also been made in the realm of human rights law to give private parties, including individuals, access to international courts for protection of their most basic rights, even and importantly against their own governments. The European Court of Human Rights and the Inter-American Human Rights Commission are the foremost examples of treaty-based human rights adjudication. Typically, an individual must first exhaust all domestic legal remedies to gain access to a court. This can be a tall order. Moreover, international courts lack police, bailiffs, courts proper and prisons (although the Netherlands has made prison space available to the International Criminal Court and several war tribunals in The Hague). Their effectiveness depends primarily on the powers of persuasion, shaming, and, to a lesser extent, fines. Nonetheless, they have become important fora for developing international human rights law and influencing state practices.

To distill general principles governing international treaties, States have entered into a separate treaty, the Vienna Convention on the Law of Treaties of 1969. The Vienna Convention comprehensively governs the law of treaties, including on such matters as the
creation and repudiation of treaties, the interpretation of treaties and the effect of reservations and declarations that States make upon ratifying a treaty. Not all countries – not even all countries that are major international players – have become parties to this Convention. (The US, for example, is not.) However, even those States that are not parties to it, have largely accepted its principles as a reflection of customary international law.

Some treaties go further than to articulate substantive norms. They may establish or authorize the establishment of true international institutions of a quasi-legislative or quasi-judicial character. The UN system that was established after World War II is based on a treaty, but a treaty that equipped it with a complex international regime consisting of, among other things, a General Assembly, a Secretary-General, and a Security Council, each having committees, procedures and specialized bureaucracies of their own that can issue their own rules, regulations and guidelines. Indeed, the proliferation of rule making by the various UN agencies has been likened to legislation. The United Nations importantly also has a judicial organ, the International Court of Justice, situated in The Hague, and authorized to make authoritative and binding judicial pronouncements. Still, the UN does not have its own police or enforcement agents. Indeed, even to enforce its law of peace the UN relies on the willingness of nation-States to staff a contingent of blue helmets or to send in their own troops.

The European Union is commonly described as a “supranational” rather than “international” entity, meaning that, while it is not in itself a State, it is also not a purely intergovernmental coming together of its constituent States. The Treaty of Rome of 1958 committed its six founding Member States to establish a common market. Many treaty amendments later, that Treaty has been superseded (through the Lisbon Treaty of 2009) by a Treaty Establishing the European Union (TEU) and a second, much more detailed and operational Treaty on the Functioning of the European Union (TFEU). The EU now consists not of six, but of 27 Member States and encompasses not only the free movements of goods, people (natural and legal), services and capital (the “four freedoms”), but border control, foreign policy, social security, social and political rights, and a host of other substantive policies. Yet, the EU is not a State, not even a federal one. The term “supranational” has more recently fallen out of favor, yielding to the more easily visualized notion of a “multi-level governance” regime.

The relation between the EU and its Member States illustrates another aspect of the “domestic-international” interface that applies to international law more generally. Once sovereign States enter into legally binding commitments under international law, what effects do these laws have within their own domestic legal orders? The question usually arises when there is a conflict between a domestic and an international law norm. Which trumps? And who can challenge the validity of the domestic or international norm in case they conflict? International law does not itself provide an answer to this question. The answer must be found in the national law of each country that is a party to an international treaty and is otherwise subject to international law, and their responses vary widely.

In other words, States differ in their understanding of the effect that international law has in their domestic (or as it is sometimes called “municipal”) legal orders. The constitutions of some countries expressly provide that international treaties which have been duly signed and ratified automatically become a part of the domestic legal order and trump preexisting and possibly subsequent domestic law. The States that treat international law as directly applicable domestically are called, in common international law parlance, “monist”, while
States that deny domestic effect to international law (even treaty) law, unless, until and only to the extent statutorily implemented at the State level, have been called “dualist”. In the latter systems, it is not enough that an international treaty has been signed and ratified; it must also be affirmatively transposed into domestic law if it is to have domestic legal effect. The categories of “monist” and “dualist” are in fact misleading. Most States partake in some measure of both views. The United States, for example, cannot reliably be placed in either camp.

The fact that national law ultimately determines international law’s effect illustrates the central importance of States to the international legal order. It also suggests that even international law must be approached as a comparative discipline, since it means different things and has different effects in different States. The result is a range of different interfaces.

**Summary**

In sum, the purpose of LAMLO is to introduce students to the multiplicity and complexity of legal orders with which they will either come into contact or from which they may derive inspiration and utility in their future professional undertakings. It has been designed in large part to acquaint students with what it means to *navigate* these systems, that is appreciate their core features, be they substantive or procedural, or merely structural. Having “understood” those systems, students and future lawyers then need to identify, understand and, as appropriate, strategically use their various *interfaces*, be they “domestic-domestic,” “domestic-non-State”, or “domestic-international”.

Having explored the multiple facets of navigation and interface, we conclude this introduction with another illustration.

Figure 2 below shows how the different domains of domestic law to which first-year students are introduced are really “nested” within a much larger universe of law. That universe includes, in addition to domestic law, also non-State and international law. Thus domestic law interfaces with non-State law through various mechanisms, such as delegations of authority to non-State actors and recognition of standards that those non-state actors develop. It also includes international law which, depending on the interface established between it and domestic law, may or may not exert direct effect or otherwise come to be “domesticated”.

Figure 2

International Law

Transnational Non-State Law

State Law

- Customary Int'l Law
- UN
- Human Rights Law
- WTO
- EU

Transnational Private Regulation

Contracts
Property
Civil Procedure
Constitutional
Conflict of Law
Comparative law and horizontal interface

As discussed in the previous Part, legal orders come in many different forms and shapes. And they intersect in ways that are determined by rules which themselves may vary from jurisdiction to jurisdiction. This Part is meant as a general introduction to comparative law and core characteristics of legal orders that we will navigate in this course. In addition, we will address basic principles of horizontal interface, i.e. the rules that govern multiple legal orders that may be relevant, and compete with each other, for determining the outcome of a given case.

Comparative Private Law

Many attempts have been made to organize legal systems into broad categories that can help academics and practitioners navigate multiple legal orders more easily. Some attempts have focused on the ideological foundations of legal orders (i.e. religion, socialism, capitalism), others on geography (East vs. West), yet others on historical legal origin. None of these organizing principles is perfect. The most widely recognized among them is “legal origin”. It divides legal systems around the world into three major legal systems: the common law, the civil law, and the socialist legal system, and summarizes religious laws (Islamic, Jewish, Hindu, Christian), as well as indigenous legal systems, into a separate category of “others”. It should not surprise that these classification were developed by Western legal scholars who viewed the formal legal systems of the European nation-States as superior to the others. Nonetheless, the classification has stuck, mostly because these formal legal systems have in fact, through colonization and borrowing, shaped law in countries around the world. We therefore depict the core of these different legal systems below, using secondary sources to illuminate their differences.

However, we note at the outset that none of these legal systems exists in pure form. Most systems have become hybridized and many of the seemingly systemic differences among them may be less significant than they appear to be at first glance: Closer inspection reveals that for many legal rules there exist functional equivalents in other legal orders. They may have different names or can be found in different legal sources, but they often achieve similar results.

Legal Families


A legal tradition, as the term implies, is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather, it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of
a legal system, and about the way law is or should be made, applied, studied, perfected, and taught. The legal tradition relates the legal system to the culture of which it is a partial expression. It puts the legal system into cultural perspective.

Rene David & John E. C. Brierley, Major Legal Systems in the World Today
22-27 (Stevens & Sons 3. Ed. 1985), Section III—Legal Families in the World Today

Outline

What, then, are the major contemporary legal families found in the world today? There would appear to be three at least which occupy an uncontested place of prominence: the Romano-Germanic family, the Common law family and the family of Socialist law. These three groups, whatever their merits and whatever their extension throughout the world, do not however take into account all contemporary legal phenomena. There are other systems, situated outside these three traditions or sharing only part of their conception of things, which prevail in a large number of contemporary societies and in their regard too a number of observations will be made.

Romano-Germanic family

A first family may be called the Romano-Germanic family. This group includes those countries in which legal science has developed on the basis of Roman ius civile. Here the rules of law are conceived as rules of conduct intimately linked to ideas of justice and morality. To ascertain and formulate these rules falls principally to legal scholars who, absorbed by this task of enunciating the "doctrine" on an aspect of the law, are somewhat less interested in its actual administration and practical application—these matters are the responsibility of the administration and legal practitioners. Another feature of this family is that the law has evolved, primarily for historical reasons, as an essentially private law, as a means of regulating the private relationships between individual citizens; other branches of law were developed later, but less perfectly, according to the principles of the "civil law" which today still remains the main branch of legal science. Since the nineteenth century, a distinctive feature of the family has been the fact that its various member countries have attached special importance to enacted legislation in the form of "codes."

The Romano-Germanic family of laws originated in Europe. It was formed by the scholarly efforts of the European universities which, from the twelfth century and on the basis of the compilations of the Emperor Justinian (a.d. 483-565), evolved and developed a juridical science common to all and adapted to the conditions of the modern world. The term Romano-Germanic is selected to acknowledge the joint effort of the universities of both Latin and Germanic countries.

Through colonisation by European nations, the Romano-Germanic family has conquered vast territories where the legal systems either belong or are related to this family. The phenomenon of voluntary "reception" has produced the same result in other countries which were not colonised, but where the need for modernisation, or the desire to westernise, has led to the penetration of European ideas.

Outside Europe, its place of origin, these laws although retaining membership in the Romano-Germanic family nonetheless have their own characteristics which, from a sociological point of view, make it necessary to place them in distinct groups. In many of these countries it has been possible to "receive" European laws, even though they possessed their own civilisations, had their own ways of thinking and acting and their own indigenous institutions, all of which ante-
date such reception. Sometimes the reception has left some of these original institutions in place; this is particularly clear in the case of Muslim countries where the reception of European law and the adhesion to the Romano-Germanic family have been only partial, leaving some legal relations subject to the principles of the traditional, local law. The old ways of thinking and acting peculiar to these countries may also mean that the application of the new law is quite different from what it is in Europe. This question is particularly important in the case of the countries of the Far East, where an ancient and rich civilisation existed long before the reception of western law.

…

**Common law family**

A second family is that of the Common law, including the law of England and those laws modelled on English law. The Common law, altogether different in its characteristics from the Romano-Germanic family, was formed primarily by judges who had to resolve specific disputes. Today it still bears striking traces of its origins. The Common law legal rule is one which seeks to provide the solution to a trial rather than to formulate a general rule of conduct for the future. It is, then, much less abstract than the characteristic legal rule of the Romano-Germanic family. Matters relating to the administration of justice, procedure, evidence and execution of judgments have, for Common law lawyers, an importance equal, or even superior, to substantive legal rules because, historically, their immediate preoccupation has been to re-establish peace rather than articulate a moral basis for the social order. Finally, the origins of the Common law are linked to royal power. It was developed as a system in those cases where the peace of the English kingdom was threatened, or when some other important consideration required, or justified, the intervention of royal power. It seems, essentially, to be a public law, for contestations between private individuals did not fall within the purview of the Common law courts save to the extent that they involved the interest of the crown or kingdom. In the formation and development of the Common law—a public law issuing from procedure—the learning of the Romanists founded on the ius civile played only a very minor role. The divisions of the Common law, its concepts and vocabulary, and the methods of the Common law lawyer, are entirely different from those of the Romano-Germanic family (…)

And as with the Romano-Germanic family, so too the Common law has experienced a considerable expansion throughout the world—and for the same reasons: colonisation or reception. The observations made with respect to the Romano-Germanic family apply with equal value. But here again a distinction between the Common law in Europe (England and Ireland) and that outside Europe must be made. In certain extra-European countries, the Common law may have been only partially received as in the case, for example, of certain Muslim countries or India; and where it was received, attention must be given to its transformation or adaption by reason of its co-existence with the tradition of previous civilisations…

**Family of socialist laws**

The Socialist legal system makes up a third family, distinct from the first two. To date, the members of the socialist camp are those countries which formerly belonged to the Romano-Germanic family, and they have preserved some of the characteristics of Romano-Germanic law. Thus, the legal rule is still conceived in the form of a general rule of conduct; and the divisions of law and legal terminology have also remained, to a very large extent, the product of the legal science constructed on the basis of Roman law by European universities.
But apart from these points of similarity, there do exist such differences that it seems proper to consider the Socialist laws as detached from the Romano-Germanic family—the socialist jurists most decidedly do—and as constituting a distinct legal family, at least at the present time. The originality of Socialist law is particularly evident because of its revolutionary nature; in opposition to the somewhat static character of Romano-Germanic laws, the proclaimed ambition of socialist jurists is to overturn society and create the conditions of a new social order in which the very concepts of state and law will disappear. The sole source of Socialist rules of law resides therefore within the revolutionary work of the legislature, which expresses popular will, narrowly guided by the Communist Party. However, legal science as such is not principally counted upon to create the new order; law, according to Marxism-Leninism—a scientific truth—is strictly subordinate to the task of creating a new economic structure. In execution of this teaching, all means of production have been collectivized. As a result the field of possible private law relationships between citizens is extraordinarily limited compared to the pre-Marxist period; private law has lost its pre-eminence—all law has now become public law. This new concept removes from the very realm of law a whole series of rules which jurists of bourgeois countries would consider legal rules.

…

The French and the German Civil Law Tradition

The Origins of Codification and the French Code Civil

Seagle, The History of Law
Chapter 18, The Age of Codification (pp. 277-288) (1946)

A new and strange delusion beset the age of the Enlightenment, which, because of it, may perhaps also be called the Age of Codification. This delusion, in brief, was that the problems of the administration of justice current at the time could all be solved simply by reducing the law to a set of rules set forth in a code…. 

The driving force behind the movement for codification (the term itself, like many others in the legal literature of the age, was an invention of Jeremy Bentham) was a highly urgent desire for legal unity. The revolutionary age needed a speedy means of bringing about the centralization of judicial administration, which it discovered in codification. In the seventeenth century England was the only country in Europe which had succeeded in centralizing the administration of justice effectively and in creating a body of law which, despite important exceptions, was common to the whole realm. But [the] countries of Continental Europe had no such common law. Every little province, every little principality, indeed almost every little town had a law of its own. The reception of the Roman law had provided a basic law for most of Continental Europe, but this European "common" law had only subsidiary force in the absence of provincial, territorial, or town law. This state of affairs, which we have seen was typical of Europe beyond the Middle Ages, remained largely unaltered during the sixteenth and seventeenth centuries. Here and there local customs had been reduced to writing, sometimes by private initiative, and here and there legislation had been enacted to reduce to unity the law upon some limited subject. The urge was particularly great to unify and reduce the civil law to writing, for upon the civil law depended the
expansion of trade and commerce which was taking place on the eve of the French Revolution. The first and primary concern of the movement for codification being the civil law, codification has traditionally remained synonymous with civil codification.

But there were also motives other than the desire for legal unity, which entered into the drive for codification. In the burgeoning age of nationalism the received Roman law was becoming more particularistic. It began to be modified more and more by local legislation. In a sense there was a revolt against the domination of Roman law; but as in the case of the natural-law jurists, this revolt was more against the form than the substance of the Roman law. The individualism of the Roman law was highly acceptable to the men of the Enlightenment. But the Roman law, which was buried in the Digest of Justinian and the commentaries of the jurists, was not easily accessible. It could be made so only by being embodied in the vulgar tongue. Every burgher and every peasant should be able to find the law, presumably by consulting the index of the code. Presumably also the code would be on the Citizen's table together with the Bible. But unlike the Bible and the Roman Digest, which were thick, the book of the code was to be thin, stating the law in short and simple aphorisms.…

The idea of codification appealed mightily to the French philosophers. "Let all laws be clear, uniform, and precise," said Voltaire. "If laws are simple and clear," said the Abbe de Mably, "there is no need for much study to make a good judge." But they only repeated with perhaps a more popular accent what had become an article of faith of the school of natural law. Legislation was simply human reason made concrete in a particular set of circumstances. Since the natural law could be discovered by an exercise of human reason, the entire law should be reexamined and made to conform to the precepts of nature. There was no justification for half-way measures. Moreover, since the law of nature was not only discoverable but immutable, it could be reduced to a permanent body of rules, known and accessible to all and sundry, and would never be in need of change. Hitherto legislation had had a more or less adventitious character. The lawgiver could destroy today what he had created yesterday. But if legislation was to express only natural law, the work it could accomplish would be real and lasting. The Roman law might express many of the principles of natural law, but these needed to be universalized to meet the requirements of the new age. If in fact the systems of natural law were not always precisely alike, there was all the more reason for authoritative settlement by means of a code.

… The modern code professes to be a complete and systematic statement of the whole body of law with which it purports to deal. If it is a code of civil law, it attempts to cover the whole of the civil law completely. If it deals with criminal law, it does the same for this branch of law. The dominant tendency of modern codification is to supply a set of four codes: separate civil and criminal codes, and separate codes of civil and criminal procedure. Expressed in programmatic terms: even as every bourgeois family was to have a set of furniture, every bourgeois state was to have its set of codes. The preference for multiple codes reflects the dualism between public and private law that is characteristic of modern legal system.

… One ancient body of law, the Corpus Juris of Justinian, approaches the modern codes in completeness. But technically the Corpus Juris was primarily a digest of former decisions rather than a code. Justinian vaingloriously, as has been related, expressed his conviction of the
completeness of his work by forbidding commentaries, only to be ignored; and the same fate has overtaken all those who have sought to emulate him in modern times.

…

[T]he code of codes which really inaugurated the era of modern codification is the French Code Civil. Even before the Revolution France had tired of its local customs, and the Estates General petitioned for a unified national law. The judges of the French parliaments were especially unpopular, and a code seemed a good way to tie their hands. The Declaration of the Rights of Man and the Citizen had proclaimed the fundamental articles of the Social Compact. It remained only to work out its technical details in the form of a code. The Constituent Assembly voted on October 5, 1790 that a code should be prepared but was too busy sweeping away abuses of the ancien régime by special acts of legislation to take steps to realize the project. It remained for the Convention to create a commission of three on June 25, 1793 under the presidency of Jean Jacques Regis de Cambaceres, son of a noblesse de la robe, who actually prepared the draft of a code. The code apparently was to state only the fundamental principles of the law of nature, for the commission was ordered to present the draft within a month. Even more remarkable to relate, the order was obeyed almost literally. On August 9, 1793 Cambaceres presented the Convention with a draft of a Civil Code, which contained about 700 articles. It was feared that a longer code might fetter the freedom of the individual. Nevertheless the draft, which today would be regarded at least by all jurists as wildly revolutionary, was rejected as not revolutionary enough.…

It remained for the quieter period of the Consulate to resume the labours of codification. Napoleon, now First Consul, dreamed like Frederick of being a great lawgiver. The time seemed propitious. The excesses of the Revolution had been curbed; yet its more permanent achievements remained to be embodied in the form of a civil code. The four commissioners appointed by Napoleon on August 12, 1800 to prepare a draft show quite clearly that there were to be no wild experiments. They were all past middle age and conservative. (…) A preliminary draft was submitted by the commission within four months after commencing its labours, but this differed from the final plan submitted in 1801. The principal consideration which the draft received was in the Council of State, presided over by Napoleon himself. (…) Napoleon was very proud of his work on the code. Later, when in exile, he is supposed to have said: "My glory is not to have won forty battles. Waterloo will destroy the memory of those victories. But nothing can blot out my civil code. That will live eternally."

The Civil Code was proclaimed March 21, 1804 under the title Code Civil des Français. From then until 1810 the French were busy completing their set of codes and establishing the modern fashion in codification. A code of civil procedure was proclaimed in 1806; a code of commerce in 1807; a code of criminal procedure in 1808; and finally a penal code in 1810. The titles of these four codes have remained unchanged, but the title of the Code Civil has been dependent on the fortunes of the Napoleonic legend. The title of the Code Civil was changed to Code Napoleon in 1807. The original title was restored in 1816, reconferred in 1852, and again withdrawn in 1870. The present title is simply Code Civil.

The sources of the Code Civil or the Code Napoleon, were the local customs and the Roman law. Two of the commissioners came from the regions of "written" law. The two types of systems
were fused in the Code Civil: the law of property and contract was primarily Roman, while the customary law preponderates in the rest of the code.

The Code Civil has been in force for over a century and a quarter. The period itself, as human history goes, is not long; but it happens to include a century which witnessed the invention of those miracles of the machine that have transformed industry and created for mankind unparalleled resources. Yet the Code Civil has not been replaced by another code. It has long been regarded by the French as the Sacred Ark of the Covenant, and to exchange it for another, it has always seemed, would imperil the foundations of national life.

It is even more fortunate that the rules of the code themselves were couched in such broad terms as to be no more than vague general principles. Thus it has been possible without altering the text of the Civil Code to adapt the law of liability for wrongs to the conditions of the machine age.

The Bürgerliche Gesetzbuch (BGB) was promulgated as a code of civil law for Germany in 1896 and entered into force on January 1, 1900. Although it is one of the most successful and influential codifications of modern times, it was by no means the first systematic body of law governing the daily lives of citizens in "Germany," (...). Up until 1900, two very long-standing legal traditions, Roman and Germanic, existed and greatly influenced the ultimate form of the BGB.

**Political Unification and Legal Codification**

When, after the establishment of the [German] Confederation in 1815, political unification had first begun to appear feasible, proposals for the drafting of a common codification had been made. Several German states had already adopted national codes, such as Prussia's *Allgemeine Landrecht für die Preussischen Staaten* (1794), and certain Rhineland states had adopted the new French codes during the Napoleonic wars. However, progress towards a German codification was hindered because of a celebrated dispute between two distinguished German legal scholars. Carl von Savigny, the leader of the "historical school" of German jurisprudence and a leading Romanist, argued that the time was not yet ripe for the adoption of a codification, and that study, development, and elaboration of the Roman-German common law would be more appropriate than the promulgation of an altogether new text. Savigny's adversary was Professor Thibaut of Heidelberg, the leading proponent of the natural law school of German jurisprudence, who argued for codification. Although Thibaut's point of view ultimately prevailed, and natural law elements found their way into the BGB, the split between two such prominent theorists deprived the movement for codification of much of its force....
[Note: in 1871 Germany was united after the war between Prussia and France]. In 1871 quite extraordinary constitutional and legislative diversity existed in Germany. There were more than twenty kingdoms, grandduchies, duchies, free cities, and principalities and one imperial territory. Each of these had its own hierarchies of courts and its own laws, or at least its own particular combination of ancient codifications, Roman-German common law, modern codifications, and local custom. More than ten separate codifications were in force but did not necessarily apply in the face of contrary local custom. Even within individual states, different texts applied in different areas.…

The Drafting of the BGB

In December 1873 the newly established Reich legislature, the Reichstag, was at last given legislative cowers for all civil law matters….The Code was …officially promulgated on August 18, 1896, and entered into effect on January 1, 1900…. The BGB has been very influential in the drafting of codes in other countries: the Japanese Civil Code (1898), the Swiss Civil Code (1907), and the Swiss Code of Obligations (1911) were influenced, as were the revisions to the Austrian Code in the 1910s and, indirectly, the Turkish Code of Obligations (1926). Legal ties between Italy and Germany have traditionally been strong, and the drafters of the Italian Code (1942) were substantially influenced by the BGB.

Alterations to the BGB

The BGB has not been consistently well regarded at all periods of its history. In particular, during the Nazi era, numerous statutes derogating from its provisions were passed. During the Third Reich, the practice developed of repealing sections of the Code and enacting special laws outside it. Some of the Nazi legislation was abrogated by the Allied military administration after 1945, but certain provisions such as the Law on Missing Persons, which replaced sections 13 through 20, remained in force with some modification. The tendency now is to try to include new social legislation within the framework of the Code, although possibly with supplementary separate legislation. In all, there have been about sixty statutory modifications to the Code, of which perhaps half could be described as technical or which affected only one or two articles. The Code originally consisted of 2,385 sections: just over 800 sections have been modified, repealed, renewed, inserted, or declared unconstitutional by the Federal Constitutional Court. Of these, by far the greatest number have been in Book Four (Family Law) followed by Book Two (Obligations)…

[Note: a major revision of the law on obligations, which had been twenty years in the making, was enacted in 2001].

Questions to Consider:

1. Based on the above excerpts, what are the major differences between French and German civil law?

2. How important might these differences be in the long term?
3. Are French and German law closer or more distant to one another than to US law? Explain.

4. Can what you just learned about the German legal system help you understand Japanese law? Or what you learned about the French legal system help you make sense of Mexican law?

**Legal Origin and Economic Performance**

While legal scholars have long debated the differences among legal families, only recently have economists discovered that legal systems differ from one another in ways that may be important for economic outcomes. They have coded countries as belonging to the common law, the French and German civil law, and the Scandinavian legal families and have investigated differences in terms of investor protection, legal formalism, and labor laws, among others.¹ Most of these studies suggest that legal families differ systematically from one another in substantive law terms. Specifically, common law systems on average provide higher protection of shareholder rights, less legal formalism, and lower protection for workers than do civil law countries. Regression analysis using data mostly from the 1990s indicates that common law countries outperform civil law countries: they tend to have bigger and deeper capital markets, and are more effective in evicting defaulting lessees.

The accuracy of the coding used in some of these papers has, however, been disputed. Using a corrected data set for investor rights, one study finds that none of the results that indicate superior performance by the common law withstands closer scrutiny.² Nonetheless, the original authors of this “legal origin” approach have defended their results in a 2008 article that summarizes 10 years of empirical investigations.

**The Economic Consequences of Legal Origin**

La Porta, Lopez-de-Silanes, Shleifer

*Journal of Economic Literature, 2008, 285 at.*

In this paper, we adopt a broad conception of legal origin as a style of social control of economic life (and maybe of other aspects of life as well). In strong form (later to be supplemented by a variety of caveats), we argue that common law stands for the strategy of social control that seeks to support private market outcomes, whereas civil law seeks to replace such outcomes with state-desired allocations. In words of one legal scholar, civil law is “policy implementing,” while common law is “dispute resolving” (Mirjan R. Damaška 1986). In words of another, French civil law embraces “socially-conditioned private contracting,” in contrast to common law’s support for “unconditioned private contracting” (Katharina Pistor 2006). We develop an interpretation of the evidence, which we call the Legal Origins Theory, based on these fundamental differences.

¹ The original study is {La Porta, 1998 #299}; however, see also {La Porta, 2006 #1926} {La Porta, 2004 #2385}, among others.
² {Spamann, 2010 #3163}.
Legal Origin Theory traces the different strategies of common and civil law to different ideas about law and its purpose that England and France developed centuries ago. These broad ideas and strategies were incorporated into specific legal rules, but also into the organization of the legal system, as well as the human capital and beliefs of its participants. When common and civil law were transplanted into much of the world through conquest and colonization, the rules, but also human capital and legal ideologies, were transplanted as well. Despite much local legal evolution, the fundamental strategies and assumptions of each legal system survived and have continued to exert substantial influence on economic outcomes. As the leading comparative legal scholars Konrad Zweigert and Hein Kötz (1998) note, “the style of a legal system may be marked by an ideology, that is, a religious or political conception of how economic or social life should be organized” (p. 72).

The key feature of legal traditions is that they have been transplanted, typically though not always through conquest or colonization, from relatively few mother countries to most of the rest of the world (Alan Watson 1974). Such transplantation covers specific laws and codes and the more general styles or ideologies of the legal system, as well as individuals with mother-country training, human capital, and legal outlook.

Of course, following the transplantation of some basic legal infrastructure, such as the legal codes, legal principles and ideologies, and elements of the organization of the judiciary, the national laws of various countries changed, evolved, and adapted to local circumstances. Cultural, political, and economic conditions of every society came to be reflected in their national laws, so that legal and regulatory systems of no two countries are literally identical. This adaptation and individualization, however, was incomplete. Enough of the basic transplanted elements have remained and persisted (Paul A. David 1985) to allow the classification into legal traditions. As a consequence, legal transplantation represents the kind of involuntary information transmission…, which enables us to study the consequences of legal origins.

Legal Origins Theory has three basic ingredients. First, regardless or whether the medieval or the revolutionary narrative is the correct one, by the eighteenth or nineteenth centuries England and Continental Europe, particularly France, have developed very different styles of social control of business, and institutions supporting these styles. Second, these styles of social control, as well as legal institutions supporting them, were transplanted by the origin countries to most of the world, rather than written from scratch. Third, although a great deal of legal and regulatory change has occurred, these styles have proved persistent in addressing social problems.

Djankov et al. (2003a) propose a particular way of thinking about the alternative legal styles. All legal systems seek to simultaneously address twin problems: the problem of disorder or market failure and the problem of dictatorship or state abuse. There is an inherent trade-off in addressing these twin problems: as the state becomes more assertive in dealing with disorder, it may also become more abusive. We can think of the French civil law family as a system of social control of economic life that is relatively more concerned with disorder, and relatively less with dictatorship, in finding solutions to social and economic problems. In contrast, the common law family is relatively more concerned with dictatorship and less with disorder. These are the basic attitudes or styles of the legal and regulatory systems, which influence the “tools” they use to...
deal with social concerns. Of course, common law does not mean anarchy, as the government has always maintained a heavy hand of social control; nor does civil law mean dictatorship. Indeed, both systems seek a balance between private disorder and public abuse of power. But they seek it in different ways: common law by shoring up markets, civil law by restricting them or even replacing them with state commands.

[Note: the diffusion of legal orders around the world is depicted below in what is Figure 1 in the authors’ paper]

Questions
1. Compare the legal origins theory put forward by La Porta et al. with the excerpts in the previous sections about the history of codification in France and Germany. Are these views consistent?
2. If La Porta et al. are correct about the persistence of legal origin over time and across countries, what implications might this have for legal reform as a means of promoting economic development?

Legal Transplants

The above figure illustrates how widely law has been diffused. La Porta et al. emphasize that, despite the many different ways in which transplanted law evolved in their new host settings, core features remained the same. In contrast, Berkowitz et al. suggest that there is a major divide between countries that developed their legal systems internally and those that received them via
transplant. They also find that when transplants are divided into “receptive” and “unreceptive” transplants, the former outperform the latter and in fact are statistically no different from origin countries. Note that the outcome variable they use is the “effectiveness of law” whereas La Porta et al. focused primarily on financial market development.

Legal transplants have been ubiquitous throughout human history. Alan Watson (Legal Transplants: An Approach to Comparative Law, 1974) argues that legal transplants are as old as the law itself. That, however, says little about the effectiveness of transplants in practice. Consider the various ways in which law may be transplanted from one legal system to another. One of the most extensive modes of legal transplantation was accomplished by the process of colonization or economic pressure, but the process of legal transplantation may also be voluntary (in the sense that a country copies certain features of another country’s legal system on its own accord). Foreign law can be enacted with or without being modified to account for local conditions. Finally, the “importing” country may be more or less familiar with the principles of the transplanted law. Does it matter for the legitimacy, credibility and ultimately the effectiveness of law, whether law is “home grown” or transplanted? Even when borrowing takes place, does the process by which foreign law is transmitted from one legal system have an effect on whether and how the law is used in the new environment? These are critical questions in our times, where legal reform is hailed as critical to economic and political development and where international organizations, including the World Bank and the International Monetary Fund, regularly advise developing countries on how to change their laws in order to promote these goals.

Berkowitz, Daniel, Katharina Pistor and Jean-Francois Richard
Legal Transplants

We propose that countries that have developed their formal legal order internally have a comparative advantage in developing effective legal institutions over countries on which a foreign formal legal order was imposed externally. Internal development can take advantage of new solutions economic agents develop in response to new challenges and existing constraints. Lawmakers can build on domestic knowledge and expertise and can take full advantage of complementarities between new and old institutional arrangements. This is most explicit for case law, where new legal rules are generated from litigated cases. But legislatures can also take advantage of social knowledge about perceived problems and possible solutions through survey instruments or law commissions staffed with experts.

By contrast, countries that receive their formal legal order from another country have to come to grips with what was often a substantial mismatch between the preexisting and the imported legal order. They may be unfamiliar with dispute settlement through adversarial litigation rather than mediation and negotiation, or with the rigidity of legal rights independent of kinship relations or norms of social obligations. Moreover, the social, economic and institutional context often differs remarkably between origin and transplant country, creating fundamentally different conditions for effectuating the imported legal order in the latter. Transplant countries therefore are likely to suffer from the transplant effect, i.e. the mismatch between preexisting conditions and institutions and transplanted law, which weakens the effectiveness of the imported legal
order. In order to test these propositions empirically, we divide our 49 countries into ten that developed their formal legal order internally (origins) and 39 that received their formal legal order externally (transplants); we then divide the transplants into those that are and those that are not subject to the transplant effect.

When a transplant country applies a rule that it has received from an origin, it is effectively applying a rule to its own local circumstances that was developed in a foreign socioeconomic order. Thus, we would expect that the interpretation of a legal rule will differ more within a transplant than an origin. Applying a simple rule that prohibits stealing in the context of communal property is a case in point. Other examples include:

- the enforcement of the freedom of contract principle in a society governed by kinship relations or guangxi - the Chinese term that refers norms of reciprocity or more generally, human emotions;
- the introduction of the corporate form in pre-Revolutionary mainland China, where mistrust in the state prevented entrepreneurs from registering their business with the state;
- the introduction of the corporate form in early 19th century Colombia, which at that time was dominated by a handful of state run enterprises, overwhelmingly agricultural production, and state policies that discouraged the formation of private capital.

In each of the above cases the transplanted law was largely ineffective. In early 20th century China, for example, family-owned businesses frequently called themselves limited liability companies but in fact were unincorporated family owned businesses. In the words of Kirby, "it had become fashionable and modern to attach the term youxiangongsi (limited company) to almost any enterprise. But it was not in vogue to register with the government, even with the very weak central government of 1916-28". Even where the corporate form was used, outside finance was marginal, as kinship networks provided the most important financial resources. They also ensured that obligations would be honored. And in Colombia, the introduction of the corporate law did not lead to the establishment of corporations or the reorganization of existing partnerships. In fact, there is evidence that knowledge of the existence of this law was not widespread.

The context specificity of formal legal order has important implications for the effectiveness of the legal order (legality) in transplant countries. Where the meaning of specific legal rules or legal institutions is not apparent, they will either not be applied or applied in a way that may be inconsistent with the intention of the rule in the context in which it originated. This in turn has implications for the perception and trustworthiness of the institutions applying them, and thus for the future demand for these institutions. However, if a transplant country adopts foreign laws from origins in a way that is sensitive to its initial conditions, then the meaning of these rules becomes clearer, and it is also simpler to develop institutions such as the courts, procurators, anti-trust agencies, etc. that enforce these rules. We conjecture that there are two reasons for this. First, when the law is adapted to local needs, people will use it and want to allocate resources for enforcing and developing the formal legal order. Second, legal intermediaries responsible for enforcing and developing the formal legal order can be more effective when they are working
with a formal law that is broadly compatible with the preexisting order, or which has been adapted to match demand.

Note: In order to capture the closeness of the fit between a transplanted law and local conditions, the authors divide the 39 countries in their sample into “receptive” transplants and “unreceptive” transplants: “… if a transplant has familiarity with the country or countries from which it takes the formal legal order, and/or it transplants the formal legal order with significant adaptation to its initial conditions, then it is a receptive transplant”; otherwise it is unreceptive.

Regressing origins vs. transplants, and receptive vs. unreceptive transplants, the authors find that countries that developed their formal legal order internally (origins) have more effective legal systems today than all other countries. However, they also find that “receptive transplants,” i.e. those that adapted the imported law, or had a population that was familiar with it, show legality ratings that are statistically no different from those of origin countries. Countries without similar predispositions, i.e. unreceptive transplants, perform much worst. These countries suffer from the transplant effect.”

Questions:

1. Are the two accounts of legal transplants consistent?

2. What explains the distinctive features of the history of legal transplantation in Latin America?

3. How do the results in Berkowitz et al. compare with the La Porta et al. assertion about the persistence of core features of legal origin even in far away countries? Can the two views be reconciled?

Courts and the Legal Profession in Comparative Perspective

Most comparative law scholarship focuses on substantive law. Yet, several comparativists have stressed that the distinctiveness of different legal systems is ultimately revealed in legal processes: access to the judiciary; the role of judges, juries, and prosecutors; the organization and governance of the legal profession. The literature most frequently mentions the following differences between common law and civil law systems.

- adversarial vs. inquisitorial civil and criminal procedure
- party- vs. judge-dominated procedure
- jury vs. non-jury systems
- judging as a bureaucratic career vs. a professional career move
- access to and the costs of litigation
- the organization of the legal profession
- the independence of the judiciary

The Levers of Legal Design: Institutional Determinants of the Quality of Law
Gillian Hadfield
There appear to be two distinctive types of judiciary: the career judiciary and what I call the “capstone” judiciary.

Judges in the career judiciary are career civil-servants, typically with little experience outside of the judiciary. Indeed, in some cases, such as (traditionally) France, judicial remove from the world of commerce and ordinary affairs is prized. Judges in these systems generally enter the judiciary directly from law school with a first undergraduate degree in law, undertake specific judicial training offered by the state, and progress through the system from junior positions in low-level courts through to more senior judicial posts. The initial selection of judges is based on performance on judicial exams. Promotion within the system can mean moving to a higher level court within an area or to the head or presidency of a particular court, or being transferred to a more important or desirable location or type of court. Promotion is generally described as being on the basis of performance reviews, in the civil service tradition, and seniority. Performance reviews are conducted in general by senior judges. The panel that reviews performance of sitting judges in the courts of ordinary jurisdiction in France, for example, is composed of (in addition to the President and Justice Minister) five senior judges elected from the private law courts, a public prosecutor, and four members appointed by the President, Senate, National Assembly and State General Assembly. These fours members cannot be private law judges but one must be from the Conseil d’Etat, the supreme court on the administrative side; the others appear to be drawn largely from other parts of the legal profession. Since 1994, for example, of the three remaining appointments, one was president of the Cour des Comptes, a court which oversees the administration of public funds, and one was a law professor. This panel recommends to the President appointments to the 350 senior judgeships in the ordinary courts, and has binding authority to determine all other judicial appointments. The panel is also a disciplinary body, taking disciplinary action against judges, including removal from office. Similarly, in Germany promotion of judges at all but the highest levels within the system is on the basis of evaluation and review by senior judges. In these countries, this peer review of judges is understood as a requirement of judicial independence: judges are evaluated by and as judges, and not by and as policymakers or politicians. The understanding of law as legal science (Germany) or the guardianship of a complete, coherent and clear body of code (France) makes sense of the institution: judges can be trained, selected and promoted on the basis of objective criteria evaluated by those who are specialists in law.

While some judges in countries such as the US are in a career judiciary (administrative law judges, for example) the career of most judges in regimes such as those found in the US, the UK and Canada follows the capstone model: appointment to the bench is the crowning achievement of a successful career as a practicing lawyer. Entry into the judiciary in the US and Canada, for example, comes after completion of a first undergraduate degree in a subject other than law, a graduate degree in law, admission to the bar and a fairly lengthy period of practice as an attorney (at least 10 years, for example, in New York and Ontario).

In many capstone judiciaries, appointment to the bench is significantly affected by politics. Judges are either appointed by elected officials (the Attorney-General in Canada, the President, governors and legislatures in the US) or elected by popular vote, sometimes based on political
party nomination; in many US states, judges who are appointed initially by governors or legislators are subject to retention elections by popular vote (Hanssen, 2004). In the UK selection among judicial candidates was formerly made by the Lord Chancellor—now also Secretary of State for Constitutional Affairs—a Cabinet Minister drawn from the politically appointed House of Lords. As of 2006, however, selection has been vested in an independent Judicial Commission; the Lord Chancellor must approve a recommended appointment but cannot select alternative candidates. Whereas senior judges appear to play the primary role in evaluating the merit of judges in career judiciaries, evaluation of potential candidate for judicial office in capstone judiciaries is substantially affected by the judgments made by practicing lawyers and members of the public. (...)

**Court specialization**

Legal regimes can be organized along more or less specialized lines. At one extreme, a legal regime, we could have a single general jurisdiction court that hears all types of matters; at the other it could create separate courts for each individual area of law. In practice, modern legal regimes all use some degree of specialization. Countries such as the US and the UK rely heavily on general jurisdiction courts that are empowered to hear almost any type of claim (civil, criminal, administrative and constitutional) but use specialized courts in areas such as small claims, traffic infractions, tax matters, family disputes, and bankruptcy. Although there can be overlaps in jurisdiction, countries such as Germany and France typically have separate courts for ordinary private law matters (contract, tort, property), criminal law, commercial law, employment law, social security matters, administrative law and constitutional law. Specialization in all regimes may also occur *de facto*, as litigants flock to particular courts; examples include the Delaware court for US corporate law, and some state courts that receive high volumes of tort or patent infringement claims in the US.

The key distinction between these systems in terms of the extent of specialization is found in the pattern of appeal. In the US and the UK, specialized courts (such as bankruptcy courts or administrative agencies) feed into general jurisdiction courts. Sometimes the pattern is reversed, with more general jurisdiction courts feeding into specialized appellate courts (such as the Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over patent appeals in the US). Some specialized lower courts (notably Article I courts in the US such as the Court of International Trade or the Court of Federal Claims) feed into specialized intermediate appellate courts (e.g., the Court of Appeals for the Federal Circuit). In all these cases, however, ultimate appeal is located in a single supreme court. In the US the only separation at the final appellate level is along state and federal lines. In countries such as Germany and France, however, the lower specialized courts generally feed into higher specialized courts, with a separate supreme court for that area. In France, the division at the highest level is between three areas: public law matters (administrative jurisdiction, actions between citizen and the State), private law matters (ordinary jurisdiction, actions between citizens) and constitutional matters. At the highest court for ordinary jurisdiction, the Cour de Cassation, specialization is maintained with separate chambers that hear appeals in different areas. (In some cases, an appeal may be heard by judges drawn from multiple chambers.) In Germany, the divisions are more extensive, with separate supreme courts for constitutional, administrative, tax, labor, social insurance and private matters (including criminal law).

**Information distribution**
One of the critical attributes of the institutional setting for a legal regime is the nature and extent of information sharing. I will focus on two particular types of information: information about cases and decisions, available to those other than the judge(s) who decided the cases; and information about the performance of individual judges. Legal regimes differ substantially with respect to the sharing of information of both types.

As a starting point, it is important to remember that most courts prepare written statements of their decisions, which are held in the case file. The question concerns when, how and to whom the contents of those decisions are distributed beyond the parties and at what cost. The written accounts of case decisions are more widely, probably much more widely, available and at lower cost in some legal regimes than in others. In countries such as the US and Canada, for example, electronic access to the decisions of both trial and appellate courts in the state and federal systems is widely available both to the legal profession and to the public at large. Even decisions that are not “published” in the US, in the sense of being citable as precedent, are generally available in electronic databases. In countries such as Germany and France, on the other hand, there has traditionally been more restricted publication, with an emphasis on important cases from higher courts. Although this is changing, perhaps rapidly, electronic access is more limited, making court decisions less available to the legal profession and the public at large.

Even if court decisions are published, however, the amount and type of information conveyed by the published decision varies across legal regimes. Although I know of no systematic effort to measure this, it appears to be the case that case decisions in the US and Canada, for example, are substantially more detailed in their narration of the facts and substantially more expansive about their reasons than in France and somewhat more so than in Germany. (....) As some scholars have observed, “French decisions are not considered to be very enlightening as to the true bases of a court's decision or of the difficulties encountered in arriving at it” (Glendon et al., 1999). German court decisions appear to be lengthier, provide greater factual detail and more discussion of reasons but still appear to be systematically shorter and less detailed than American cases. Commentators (legal academics) play a key role in France and Germany with their detailed analysis of cases often published alongside judicial opinions, but these no doubt vary in the extent to which they focus on legal reasoning as opposed to facts. Unlike the trial court judge who both hears the evidence and writes the opinion, commentators must rely on whatever version of the facts are made available outside of the court. ()

The publication of cases in different regimes also reveals different degrees of information about particular judges. In Anglo-American systems, the identity of the judge or judges who decide a case is uniformly included in the decision of the court. American court opinions are almost always signed by an authoring judge. (....) In contrast, French and German judges are far more invisible to the public. Decisions in France and Germany generally do not identify an author of a decision. Dissenting or concurring opinions are rare if not unheard of. Senior judges may be known within broader professional circles but are unlikely to be the subject of popular commentary.

Procedure
It is conventional to identify common law courts as following an adversarial process, in which lawyers are active and judges are passive in shaping issues and collecting evidence, and civil code courts as following an inquisitorial process, in which judges are responsible for shaping
issues and collecting evidence. The distinction is generally overdrawn: judges in common law jurisdictions are increasingly active in pre-trial stages in managing the identification of issues and the collection of evidence through discovery; lawyers in civil code jurisdictions are able to propose issues and sources of evidence (Langbein, 1985).

But even accounting for the overstatement of the differences, it is true that lawyers play a much greater role in shaping issues and collecting evidence in some legal regimes than in others and that the differences are to some extent located in institutional, as opposed to behavioral, differences. Judges in some regimes (Germany, for example, Langbein, 1985) are authorized to seek out evidence on their own account, contacting authorities for copies of documents, for example, or appointing experts; judges in a typical Anglo-American regime must look only to evidence that is presented by the parties and would violate clear rules against ex parte contacts if they engaged in their own fact-finding. Moreover, there is no general practice of American-style discovery in many regimes, in the sense of the document and deposition (oral examination) demands made and carried out by the parties themselves, subject only to supervision by the court for abuse. In countries such as France and Germany, for example, evidence is sought by an individual party by making a request that the court obtain particular documents or testimony. Lawyers for the parties propose lines of questioning to be conducted by the judge; no lawyer-conducted cross-examination is available.

The collection of evidence in many legal regimes is also affected by the use of a different judge, an examining or hearing judge, for purposes of collecting evidence. This judge then prepares a summary of testimony (which may not be otherwise recorded), which is forwarded to the judges (often more than one) who will decide the case. In Anglo-American trial courts, in contrast, evidence is heard in the first instance by the same judge (usually one) who will decide the case. The evidence is not reduced to a judicially-determined record but rather is retained in its original received form through transcripts, exhibits, etc.

(…) In regimes such as those in France and Germany evidence is heard and decisions made in a series of short hearings, in piecemeal fashion, and often on the basis of documents and written submissions alone; there is no ultimate ‘trial’ at which evidence is presented orally by the parties and a final decision rendered. Judicial control over fact-finding in such a regime is thus importantly exercised through judicial identification of disputed issues of fact and judicial determination of how and in what sequence disputed facts will be resolved.

The use of juries is sometimes identified as a key difference between common law and civil code regimes, but in reality the use of juries beyond the criminal setting is relatively rare outside the US. Civil juries are virtually non-existent in the UK. Civil juries are virtually non-existent in the UK. In Canada, some provinces prohibit civil juries entirely, while in other provinces the availability of juries is a matter of judicial discretion; in one study, it was estimated that juries heard cases in 3–10% of civil trials in British Columbia, and 22% in Ontario in the early 1990s (Bogart, 1999). Even in the US the actual incidence of jury trials is low; Hadfield (2005) estimates, for example, that in 2000 approximately 37% of contested US federal civil cases were disposed of by judicial decision on a pre-trial motion or a bench trial while only 2.5% were disposed of after a jury trial; there were almost three times as many bench trials as jury trials. In the states, jury trials are generally not available in small claims matters, which are estimated to comprise roughly half of all civil filings (Schauffler et al.,
2006); very roughly speaking, approximately 1% of other civil matters (contract, tort, probate, property, etc.) are resolved by a jury trial, 7% by a bench trial.

Juries are not the only method by which members of the lay public may participate in court. In many countries such as France and Germany, first-instance courts are composed of panels which combine professional judges with lay judges who possess expertise in the court's area of jurisdiction (for example, commercial law).

Legal issues, and hence evidentiary investigations, are also shaped by the rules governing appeal. In Anglo-American regimes, the trial court has primary control over the determination of evidentiary issues; appeals are largely limited to legal questions with only narrow review of factual determinations to identify gross errors; review of jury factual determinations is highly limited, allowing a reversal or remand on appeal only in the event that there exists no evidence to support a jury's (often implicit) factual findings. In many legal regimes, however, appellate courts are generally free to re-examine facts as well as legal issues. Moreover, if a case is remanded by the appellate court (as it must be in France, for example, if the Cour de Cassation finds legal error as that court generally cannot enter a decision, it can only annul the first decision) it is sent to a different (set of) judge(s) than the one that entered the initial decision. The new trial court is often not bound by the higher court's interpretation of the law (although this is clearly persuasive) and new factual investigations may continue, whether they were raised in the first instance proceedings or not.

Markets for legal services
Although much is made of the different ‘style’ of legal practice in the US as compared to civil law (and indeed, other common law) countries, differences in the organization and regulation of the legal professions across countries have historically been small. The legal profession in most regimes is a self-governing entity with substantial controls over entry and practice, including restrictions on the form of practice (generally a restriction to partnerships) and competition. Changes in the professions worldwide over the last several decades have increased the extent of differences across countries, although the greatest divergence appears to be between the US and most other countries.

The US and Canada have among the most restrictive rules limiting who may practice law: anyone who has not been admitted to the state (provincial) bar and who provides either advice or advocacy services in that state engages in the unauthorized practice of law and is subject to civil or criminal penalties. The UK, in contrast has few limits on who may provide advice or advocacy services; there is a small set of tasks (such as drafting particular documents) that must be done by a licensed solicitor and only some members of the bar (or other professional associations) may appear in some courts. In countries such as France and Germany, lawyers must be duly admitted to the relevant bar association in order to engage in private practice, but need not be bar-admitted to provide legal services as an employed company lawyer to their employer. In these cases, employed lawyers are sometimes prohibited from appearing in court or engaging in private practice. Essentially all countries restrict the practice of law to those who have been admitted to practice in that country and many limit the capacity of foreign lawyers to form associations with domestic lawyers. (For an overview, see Hadfield, 2007b.)
Restrictions on the provision of legal services are also imposed on the form of organization offering legal services. By and large, legal practice is restricted in most countries to solo or partnership forms. In the US non-lawyers may not own or share in the revenues of a firm providing legal services; one implication of this is that a law firm cannot engage in ‘multi-disciplinary practice,’ providing legal advice within the same firm as those providing accounting services, for example. Multi-disciplinary practice is not, however, prohibited in countries such as France and Germany. In some countries, lawyers have historically been prohibited from being employed by other lawyers (requiring all lawyers to practice as partners with direct client relationships) and from opening more than a single office, thus restricting the size of firm; the US and the UK lack such restrictions. Advertising restrictions have largely been eliminated in the US and (more recently) other Anglo-American jurisdictions such as Canada and the UK, whereas they continue in many regimes in forms ranging from outright bans on anything other than a nameplate to prohibitions on the identification of past clients or specialties. Similarly, whereas bar association price controls have long been struck down in the US as antitrust violations, statutory fees continue to be found in many countries. In Germany, for example, the fees for an uncontested divorce are calculated by the court based on the income in the marriage. In Canada and the UK, review of the reasonableness of fees by the law society can be obtained (called assessment) and excessive fees reduced. Many jurisdictions follow the practice of requiring a losing party to pay the winner's legal fees (the “British rule,” generally limited to a judicial determination of reasonable fees, not actual fees, unless there has been misconduct); the US appears to be an outlier in following the “American rule” under which parties, win or lose, are responsible for their own legal fees in the absence of express statutory provisions shifting fees to the losing party. The US is also an outlier in allowing extensive use of contingency fees and class actions. Finally, many countries, such as Germany, Canada and the UK, subsidize legal fees, providing state-compensated lawyers for low-income litigants (including plaintiffs) engaged in civil or criminal lawsuits; in the US, the state provides legal assistance only for criminal defendants.

Summary

Table 1 [infra] provides a summary overview of the typical institutional features of four major legal regimes: the US, the UK, France and Germany. In the common law versus civil code literature, the US and the UK are generally identified as the paradigmatic common law regimes, while France and Germany are the paradigmatic civil code regimes. It is clear, however, that when we look beyond the conventional focus on the source of law, there are substantial overlaps and differences that do not map one-to-one with the common law/civil code distinction. Moreover, there is intra-category variation, even in this small set of example regimes.

Comparative Constitutional Law

The field of comparative constitutional law has received a great deal of attention in recent years, not least because of the waves of constitutionalism that swept the world. First came the emergence of countries from colonial rule as independent states; then came the transition from authoritarianism to democracy in Latin America and parts of Western Europe (1980s and 1990s).
and East Asia (1980s), followed by the collapse of the Soviet Union (1989-1991); and most recently the “Arab spring” that has put authoritarian countries in parts of North Africa and the Middle East on the rocky road toward a new constitutional order. However, an analytical framework for organizing and analyzing the emergence of these new constitutional orders other than by region or period of instigation is still lacking.

In the US, there is an ongoing debate about whether the constitutional jurisprudence of other countries should play any role in the interpretation and application of the US Constitution. We will address this debate later on. However, it is useful even at this early stage to ask ourselves whether, as a matter of descriptive or positive analysis, we can classify countries in constitutional law terms in a fashion comparable to the way in which legal scholars have classified countries in private law terms.

Islamic Constitutionalism
Said Amir Arjomand
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Islamic constitutionalism emerged in the late nineteenth and early twentieth centuries with the reception of Western constitutionalism in the Muslim world. It was elaborated and reformulated with successive waves of constitutional and political ideas. These waves gave rise to an early phase of liberal constitutionalism in the Muslim world, followed by an era of ideological constitution-making (Arjomand 1992, 2007c), and finally the current return to the rule of law and post-ideological constitutionalism. The conception of the place of the shari’a (Islamic law) in the constitutional order is crucial for the definition of Islamic constitutionalism, but it was not a constant and has in fact varied considerably from one period to the next.

The emergence of Islamic constitutionalism proper, however, dates from the Iranian Constitutional Revolution (1906–1911). It was the result of the first serious constitutional debates about Islam occasioned by the prominence of the Shi’ite jurists in that revolution as the national leaders against the Shah and autocracy. All the major issues and problems concerning the place of Islam in a modern constitutional order surfaced in the process of constitution-making and judicial reforms and dominated the public debate in the lively free press. The illusion of the identity of Islam and constitutionalism was badly shaken as the secularizing implications of constitutional law and parliamentary legislation became clear in this process, but it was never given up and was in fact made more robust by being transformed into the proposal for “shar’i” or “shari’a-permissible” constitutionalism (mashrūṭa mashru’a). Although few of these problems were definitively or satisfactorily resolved by it, the idea of shar’i constitutionalism became clearly defined and elaborated. As distinct from secular constitutionalism, this form of Islamic constitutionalism considered the shari’a a firm limitation on government and legislation.

The next phase of Islamic constitutionalism began after the creation of Pakistan in 1947 and continues to the present; its distinctive feature has been the ideological treatment both of Islam and of the constitution. After the partition of India, with which occurred much communal violence, the citizens of the new nation of Pakistan, including many refugees, embarked on setting up a constitutional state for the Muslims of India. Despite the declaration of Pakistan’s founder in favor of a secular state, a consensus soon emerged that this new state was to be based
on Islam. The fundamentalists, led by Mawlana `Abu’l-a` la` Mawdudi (d. 1979), founder of the Jamaat-i Islami, who had opposed the idea of Pakistan as a secular state, now launched the movement for an Islamic constitution, calling for an ideological state that was endorsed by a convention of Sunni and Shi`ite ulema (Maududi 1960, pp. 154–56, 354; Binder 1961). (..)

The nonideological core idea of Islamic constitutionalism, namely the idea of shari`a as a limitation to legislation, was embodied in the so-called “repugnancy clause” [Article 205 (1)] of the 1956 Constitution of Pakistan that stated that “no law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Qur’an and the Sunnah,” without, however, giving any organ the authority for constitutional review(..)

Turning to (Sunni) Islamic constitutionalism in the Arab Middle East, we find it inseparable from the organizational and ideological evolution of the Muslim Brotherhood, founded by Hasan al-Banna in Egypt in 1928 to translate the Salafi idea of Islamic reform into a modern sociopolitical movement….The fascist and communist ideological influences on the Muslim Brothers in the 1930s and 1940s must have been considerable and were especially reflected in its secret armed organization for revolutionary takeover…. The Muslim Brotherhood’s turn to Islamic constitutionalism must be dated from the composition in 1969 of … “Missionaries not judges” by the movement’s imprisoned leaders, which was not published until 1977….

Although the appearance of [Missionaries not Judges] in 1977 indicated the will to political accommodation with the authoritarian state, the true epistemic break with ideology came with the abandonment of the idea of the Islamic state for democracy by a group of writers and publicists who have been described as “Islamic liberals” (Binder 1988) and “New Islamists” (Baker 2003). The acceptance of political pluralism and a multiparty system, in short, of democracy by the postideological Islamic constitutionalists as “the form of government that is closest to Islam” … means abandoning the utopia of the Islamic state executing the Law of God and guarding a total ideology based on the Qur’an and the Sunna. Furthermore, the idea of the shari`a as a constitutional limitation on legislation is often softened by considering it as the reference point (marja`) rather than the source of law….

The acceptance of democracy and rejection of the conception of Islam as a total ideology are shared features of post-ideological Islamic constitutionalism in Iran and Egypt. Egyptian Islamic constitutionalism has two remarkable additional features. First, it has a stronger legalistic dimension that rests on the endorsement of the early twentieth-century Islamic reform movement and the codification of the Egyptian law inspired by it (Bishri 1996). In other words, it returns to the pre-ideological Islamic constitutionalist idea of government limited by law—this time, a law inclusive of certain principles and substantive norms of the shari`a but extending far beyond it to include democratic constitutional law. Second, in this legal dimension, Qur’anic and Sunnah textualism, which implies the immutable eternity of the shari`a as the divine law, is severely restricted and replaced, at least in the writings of its leading figure Tariq al-Bishri, by a historical perspective with a pioneering sketch of the Islamic legal system. This distinctive legal realism is not accidental but deeply rooted in contemporary Egyptian constitutional politics. Not only is Tariq al-Bishri a high ranking judge who narrowly missed the presidency of the Egyptian Council of State … because of his political views, but Islamic constitutionalism has been fully
endorsed in the political program of the Muslim Brothers in 2004 and 2005. This development can in turn be partly attributed to the expansion of judicial power under the Egyptian authoritarian regime and to the assertiveness of the Supreme Constitutional Court (SCC) of Egypt as well as the Council of State.…

The key feature of the Egyptian Islamic constitutionalism is the inclusion of other constitutional principles beside those of the shari‘a to determine the constitutionality of laws and the acceptance of the extension of the shari‘a in modern legal codes. This key feature was fully anticipated in the felicitous and liberal formulation of the repugnancy clause in Article 64 of the Afghan Constitution of 1964 [“No laws can be in contradiction (muna qez) to the principles of the sacred religion of Islam and the other values contained in this Constitution”], which I had hoped would be retained and reinforced by a modern constitutional court competent to reconcile the principles of Islam and other constitutional principles within a unified and coherent framework (Arjomand 2003). The formula survived into the published draft constitution put before the Constituent Loya Jirga but was unfortunately changed behind the scenes and without public discussion and does not appear in the constitution promulgated in January 2004. The 2005 Constitution of the predominantly Shi‘ite Iraq also significantly broadens the repugnancy clause, requiring in its Article 2 that no laws can contradict (a) the undisputed ordinances of Islam, (b) principles of democracy, or (c) basic rights and freedoms. Unfortunately, however, the breakneck speed imposed upon the constitution-making process by the American occupying power, among other factors, prevented a spelling out and institutional translation of this formulation in an otherwise deliberately vague and unsatisfactory constitutional document.

CONSTITUTIONAL COURTS IN NEW DEMOCRACIES: UNDERSTANDING VARIATION IN EAST ASIA

Tom Ginsburg
Global Jurist Advances, Vol. 2 (1):

After decades of authoritarian rule, East Asia has experienced a wave of democratization since the mid-1980s. Transitions toward more open political structures have been effectuated in Korea, Taiwan, Thailand, Mongolia and Indonesia, and even the Leninist states of China and Vietnam have experienced tentative moves toward more participatory politics. These political transitions have been accompanied by an important but understudied phenomenon: the emergence of powerful constitutional courts in the region. In at least three countries, Thailand, South Korea and Mongolia, constitutional courts created during the democratic transition have emerged as real constraints on political authority. A fourth court, the Council of Grand Justices in Taiwan, reawakened after years of relative quiet to play an important role in Taiwan’s long political transition to democracy. In other countries, including China and Indonesia, constitutional courts have been discussed though not yet created.

Given the cultural and political history of the region, this is a phenomenon that might be seen as surprising. After all, most political systems in the region until the 1980s were dominated by powerful executives without effective judicial constraint. The political systems of non-Communist Asia involved varying degrees of what Scalapino called “authoritarian pluralism,” wherein a certain degree of political openness was allowed to the extent it did not challenge
authoritarian rule. Thus there was little precedent for active courts protecting rights or interfering with state action.

Furthermore, traditional perspectives on Asian governance, most recently articulated by proponents of “Asian values,” have tended to view political culture in East Asia as emphasizing responsibilities over rights and social order over individual autonomy. Both Buddhist and Confucian religious traditions emphasize the ideal of concentrating power in a single righteous ruler (the Buddhist dhammaraja or the Emperor enjoying the Mandate of Heaven) rather than establishing multiple seats of competing power and authority as a means of effective governance. These traditional images of a single righteous leader have been exploited by rulers in the region, from Ho Chi Minh to Chiang Ching-kuo, usually to justify and perpetuate authoritarian rule.…

Beginning in the 1980s and accelerating in the 1990s, a global wave of democratization and political liberalization led to significant changes in East Asia and beyond. In many countries, this was accompanied by a shift away from traditional notions of parliamentary sovereignty toward the idea of constitutional constraint by expert courts. While it is beyond the scope of this paper to explain the phenomenon, we note that East Asian countries were not immune to global geopolitics and pressures for rationalization.

[Note: Ginsburg examines the development of constitutional courts in four countries: Thailand, South Korea, Taiwan and Mongolia. The comparative analysis below is based on these four case studies.]

The four courts under consideration exhibit a range of features. Yet all four of the constitutional courts reflect the Kelsenian model of a centralized institution, paradigmatically embodied in the German constitutional court, rather than the American decentralized model in which any court can make a declaration of unconstitutionality. This choice of the continental model was made despite substantial American influence on the law and politics of Korea and Taiwan. In this sense, courts in Asia are reflecting the dominant role of the continental model in all legal systems except those subject directly or indirectly to British colonialism. In a global sense, only a very few courts without British or American colonial experience have adopted a decentralized model of judicial review.
single designated body, the details of institutional design are likely to reflect in large part the political configuration during the time of constitutional drafting. Thus the appointment mechanisms are most complex in Thailand, wherein drafters sought to insulate the justices from politics by setting up an intricate array of appointment mechanisms and committees. Although many American states and several countries use mixed committees to appoint ordinary judges, the Thai scheme is particularly byzantine and reflects the importance of various professional factions in the drafting process. In Taiwan, in contrast, the drafting of the constitutional text in 1947 reflected the dominance of Chiang Kai-shek in the KMT. The President plays the major role in appointing the Grand Justices, a desirable feature for a powerful figure certain to win the Presidency.

Mongolia and Korea utilize the Italian model of representative appointments by each of three political branches. This representative model may be desirable when parties are uncertain of their position in government after the constitution is adopted. Whereas Chiang Kai-shek knew he would be able to appoint the Grand Justices and was happy to keep the power centralized in the Presidency, situations of greater political uncertainty are likely to lead drafters to ensure wide representation on the court. When each institution appoints a third of the members, no institution can dominate the court.

This dynamic is best illustrated in Korea, where the Constitution was drafted behind closed doors by three factions with roughly equal political support. Situations of such uncertainty mean that each faction believes it is likely to be out of power. This may also give the drafters the incentive to include the power of constitutional petition by citizens. Constitution petition guarantees that political losers will have access to the constitutional court in the event the winners trample their rights.

Table 1: Features of Institutional Design

<table>
<thead>
<tr>
<th></th>
<th>Thailand</th>
<th>Korea</th>
<th>Taiwan</th>
<th>Mongolia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date of establishment</td>
<td>1997</td>
<td>1989</td>
<td>1947, as modified by constitutional amend.</td>
<td>1992</td>
</tr>
<tr>
<td># Members</td>
<td>15</td>
<td>9</td>
<td>15</td>
<td>9</td>
</tr>
<tr>
<td>How appointed</td>
<td>7 elected by top courts; 8 selected by a mixed commission as qualified in law and political science; confirmed by Senate</td>
<td>3 each from Court, President and National Assembly</td>
<td>By President with approval by the National Assembly</td>
<td>3 each from President, Parliament and Supreme Court</td>
</tr>
<tr>
<td>Term length in years</td>
<td>9</td>
<td>6</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>Terms renewable?</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Constitutional petitions from public?</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Abstract/concrete review</td>
<td>Both</td>
<td>Concrete</td>
<td>Abstract but includes referrals from ordinary courts</td>
<td>Both</td>
</tr>
<tr>
<td>Review of legislation ex post/ex ante</td>
<td>Both</td>
<td>Ex post</td>
<td>Ex post</td>
<td>Ex post</td>
</tr>
<tr>
<td>Decisions final?</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Initial decisions can be rejected by the legislature, but subsequently confirmed by \textit{en banc} sitting of court</td>
</tr>
<tr>
<td>Important ancillary powers</td>
<td>Overseeing corruption and electoral commissions</td>
<td>Impeachment, dissolution of political party</td>
<td>Declare political parties unconstitutional</td>
<td>Impeachment, overseeing electoral commission</td>
</tr>
</tbody>
</table>
Another issue in constitutional court design is that of term length. It is usually suggested that longer terms are likely to lead to more independent adjudication. There seems to be a tradeoff in our four cases between a short renewable term (Korea and Mongolia) and longer non-renewable terms (Thailand and Taiwan). While this does not reflect any apparent political pattern, it is interesting that the shift to nonrenewable terms in Taiwan only took place after democratization began in earnest; in the one-party period it may have been politically useful for the KMT to wield the threat of non-reappointment over the Grand Justices.

This illustrates that dominant party regimes may be in a better position to hinder strong review power in constitutional design. Strong parties that believe they are likely to control the legislature are likely to want weaker courts. In both Mongolia and Taiwan, strong party regimes built in controls over the court in the design process: in Mongolia through the anomalous institution of parliamentary approval of initial decisions by the court on constitutionality, and in Taiwan, through the centralized appointment mechanism. The more diffuse political environments of Thailand and Korea, wherein multiple political parties were competing for power, may have contributed to more powerful court design.

Other features of institutional design reflected political concerns associated with particular circumstances. Examples include the emphasis on anti-corruption and the mechanism of abstract pre-promulgation review in the Thai constitutional court design. These features both reflect the overarching distrust of partisan politics in Thailand. As the French experience has shown, abstract pre-promulgation review tends to lead to the insertion of the constitutional court into the legislative process. While it is not yet clear that the Thai court will play this role, it is a potential development that bears scrutiny in coming years.

In short, institutional design of constitutional courts should be understood as reflecting a process of adapting foreign models with local institutional needs. This account suggests that political considerations play an important role in understanding court design in Asia and elsewhere.

**Horizontal Interface**

In this section, we turn to the interface between and among different legal systems. Recall that we have identified interface as the relation of two or more legal systems to each other – an interface that can be problematic on account of the systems’ divergent values and preferences, as well as their sheer competition for authority and influence. We have differentiated between horizontal and vertical interface.

In this section, dominated as it is by the discipline of comparative law, we confine ourselves to the horizontal interface dimension, i.e., the relations between and among different legal orders that are largely situated, at least formally, on an equal footing.

The focus of this section will be on the subject of “conflicts of law” rules (or “private international law” as it is commonly called in Continental Europe), which embraces (1) rules of choice of forum and the exercise of jurisdiction (2) rules on choice of applicable law in situations in which the substantive legal norms of more than one legal order are actually or potentially
competing for application, and (3) rules governing the recognition and enforcement of judgments rendered by the courts of foreign jurisdictions.

Despite their inherent cross-border character, conflict of law norms, for the most part, derive from and take the form of domestic law. (We shall explore the harmonization of such rules in the EU in greater detail in the Civil Procedure unit of this course). In the scenarios that populate this course, more than one jurisdiction will ordinarily have a plausible claim to exercise jurisdiction over the disputes that emerge. A State that manages to assert jurisdiction over an international dispute will then have the privilege of applying its own domestic choice of law rules to that dispute, thereby determining the substantive law by reference to which the dispute will be resolved. Parties to transnational transactions have a heightened interest in determining – preferably in advance of any dispute between them – the competent court.

**Jurisdiction/Choice of Forum**

First-year students observe that once a case is filed with a court, the court’s first task will often be to determine whether or not it course has jurisdiction. In the U.S. legal system, but not necessarily everywhere else, a sharp distinction is drawn between subject matter and personal jurisdiction, both of which must be established. The answer to this question is found in most legal systems in their rules of civil procedure, which commonly take the form of a code of some sort. These too constitute domestic norms that vary from place to place. As will later be seen, numerous attempts have been made to harmonize jurisdictional rules for such purposes as enhancing predictability, avoiding forum shopping, and managing problems of concurrent jurisdiction. These attempts have differed in their ambitiousness and their degree of success.

Jurisdictional openendedness has its supporters, however. Some authors, like Dammann and Hansmann, infra, go so far as to advocate forum shopping and a robust international market for litigation. Their major argument is that parties have a legitimate interest in avoiding dysfunctional judicial systems, even if those systems happen to be their own. Disabling parties from escaping their own courts in litigation over transnational disputes can easily disadvantage operators coming from countries whose judiciaries are dysfunctional and render them unreliable business parties.

The choice between having fixed jurisdictional rules, on the one hand, and enabling parties to forum shop, on the other, is to some extent a false one, however. Increasingly, jurisdictional rules within domestic systems recognize a high degree of party autonomy in the determination of the competent court, and more often than not, the exclusively competent court. However, the freedom that such rules recognize is the freedom to select a forum on a pre-dispute basis. Post-dispute freedom – i.e. after-the-fact forum shopping – is necessarily curtailed.

Pre-dispute choice of forum is most typical in contract cases. Indeed, the choice will almost invariably be expressed in a clause of the very contract in question. Things become more complicated when parties could not anticipate the emergence of a dispute and provide jurisdictionally for it. Tort cases are the obvious example.

**Globalizing Commercial Litigation**
A variety of obstacles face merchants who wish to use foreign courts to adjudicate purely domestic disputes. Some of these are practical, including distance, language, differences in commercial culture, and the availability of legal counsel. Other obstacles are of a legal character, including the willingness of foreign courts to accept jurisdiction, the willingness of local courts to cede jurisdiction, and the ability to obtain prompt local enforcement of a foreign judgment.

_Taking Advantage of Uninformed Parties:_ We are concerned here only with situations in which both parties to a dispute have consented to have their dispute heard by a foreign court, either in their contract or after their dispute arose. This restriction removes the most serious problems of plaintiffs’ forum shopping that can arise when parties are given a choice of forum. It does not, however, eliminate all such problems.

Even if the forum is chosen by contract, the parties may end up picking a sub-optimal forum if one of the parties is much better informed about the relevant facts than the other party. The general problem is familiar and is not limited to choice of forum clauses.

Consumers, for example, commonly do not understand—or even read—the terms in standard form contracts, including particularly esoteric terms such as choice of forum clauses. The result is the familiar “market for lemons”: Consumers are unable to distinguish between fair and unfair standard form contracts and therefore are unable to reward sellers for including fair contract terms. Consequently, sellers have the incentive and the opportunity to put exploitative terms in their contracts.

This problem can be managed with respect to choice of forum clauses using the same techniques employed for standard form contract terms in general. One approach is to prohibit the use of certain terms across the board; another is to use a balancing test focusing on the specific circumstances of the case. With respect to forum selection clauses, courts are already using both approaches. For example, German law contains a near complete ban on forum selection clauses in purely domestic consumer contracts by which the parties designate a German court other than the one that would normally have jurisdiction. Most U.S. jurisdictions take a case-by-case approach and look at the reasonableness of the forum selection clause.…

_Lawyer-client relationship:_ Another potential problem results from opportunism in the lawyer-client relationship. For several reasons, lawyers might recommend a choice of forum that is less than optimal for the client.

To begin with, the number of jurisdictions in which any given lawyer is admitted to the bar, and with whose law she is familiar, is usually limited. Hence, she may recommend a particular jurisdiction—usually the one where she has her office—not because of the efficiency of that jurisdiction’s judiciary, but because the lawyer is well acquainted with the relevant procedural rules and admitted to the local bar. Second, rules governing lawyer’s fees may distort choices. Some jurisdictions have much more liberal fee rules than others. For example, some countries, such as the United States, allow contingent fees, while others do not. Hence, law firms may be tempted to shepherd their clients toward jurisdictions with more generous rules on lawyer’s fees. Finally, it is not clear that lawyers prefer efficient legal proceedings. For example, lawyers paid on an hourly basis may prefer complex proceedings with numerous hearings.
However, these problems are unlikely to be serious. A client will most likely scrutinize a lawyer’s decision to litigate the case in a foreign jurisdiction more closely than a decision to litigate locally. Moreover, as a general matter, the quality of courts is unlikely to be overly case-specific. Thus, it will not take much specialized knowledge for clients to monitor their attorneys when it comes to choice of forum decisions. And this should be true even if, as seems both likely and desirable, particular jurisdictions specialize in certain areas of the law, as Delaware has done with corporations and New York has done with contracts. The number of jurisdictions that offer attractive courts for foreign litigants is likely to be limited, and thus clients will probably develop a general understanding of which courts are most effective.

The use of foreign courts to adjudicate domestic disputes also has the potential to create negative externalities—deleterious consequences for persons beyond the parties to the contract involved—and to reduce positive externalities that otherwise would have been realized.

*Less Refinement of Origin State’s Law:* Litigation can yield positive externalities of two types. First, it can improve substantive law through the refinement of precedent. Second, litigation can benefit the court system by permitting judges to hone their skills. Extraterritorial litigation shifts those external benefits—at least to begin with—from origin states to host states, threatening to further weaken the legal systems of the origin states…

Similar considerations apply to the development of judicial expertise. As a general matter, there is reason to believe that the positive externalities in the form of judicial expertise will be particularly great in cases in which the parties opt for extraterritorial litigation: A host-state judge who specializes in commercial contractual disputes may gain useful expertise at the margin from hearing a case involving novel law or facts—expertise that can be applied in related cases as they come before her. In contrast, a generalist judge in an origin state where such cases are rare may never hear another case like it.

*Weakening Voice by Exit:* As Albert Hirschman famously observed, competition for local services, including particularly public services, can sometimes weaken incentives for consumers to press established local providers to improve their services. This could happen with courts. If prominent merchants who would otherwise have a stake in the quality of a country’s courts are given the opportunity of simply taking their litigation elsewhere, the result may be to remove much of the political pressure to reform local courts. Consequently, the quality of adjudication for those types of cases that are not appropriate for litigation in foreign courts—such as tort cases and perhaps consumer contract cases—might even decline.

*Burdening Witnesses:* Another concern involves the interests of witnesses who are, perhaps against their will, involved in litigation. Witnesses stand to lose time and effort from participation in a trial and may have to reveal information that they would rather keep secret for personal or business reasons. With global access to judicial services, the magnitude of these costs may grow. For example, the parties may choose a forum that does not ensure that witnesses are adequately reimbursed for their efforts or that is overly aggressive in forcing the witnesses to disclose confidential information.…. 

Questions:

1. How powerful are the negative aspects of globalizing commercial litigation in your view?
2. With what arguments might you refute them?

Choice of Law

Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law
Ralf Michaels & Joost Pauwelyn

Legal systems provide their own tools to establish their internal coherence. More than one rule may a priori be applicable to a set of facts. Institutionally, internal coherence is established mainly through highest courts. Doctrinally, the solution lies in legal rules that determine the relation between different norms. European law in the civil law tradition (which historically relied less on courts to establish internal coherence procedurally) has been particularly robust in developing a number of presumptions of statutory interpretation to resolve conflicts between norms, but similar solutions are found in the common law.

A first set of conflict rules acts at the level of hierarchy of norms. Thus, under the rule of *lex superior derogat legi inferiori*, the hierarchically superior rule trumps the hierarchically inferior. It is for this reason that constitutional law trumps ordinary statutory law, which in turn trumps common law rules; mandatory rules of contract law trump party agreements, and these agreements in turn trump subsidiary rules of contract law.

Where no such hierarchy of sources exists and rules are enacted in the same field, for example in contract law, a second set of conflict rules must be developed. As between more general and more specific rules, for example, the one with the more specific scope of application applies (*lex specialis derogate lege generali*). (…)

All of this is well-known. What is sometimes underappreciated is the extent to which the above ‘conflict-of-norms’ rules work smoothly only insofar as we can assume that (i) all legal rules in play coexist within a single overarching system and (ii) the decision which rule to apply can be imputed, albeit by fiction, to a unitary lawmaker with a coherent legislative intent. This is why these rules are traditionally applied within legal systems, not between legal systems, and in a universe with a unitary lawmaker, not with many lawmakers. (…) 

One reason, then, for why conflicts between different legal systems are governed by different rules than are conflicts within one legal system is that the rules developed for intra-systemic conflict do not work well in the context of inter-systemic conflict. There is no hierarchy among different legal systems, except for the relative hierarchy that each system may claim for itself over others. There is no overarching system within which rules on statutory interpretation could achieve coherence. There is no uniform legislative intent on which the resolution could be based. There is no neutral or mutually accepted standard under which different values could be balanced.

The alternative is not anarchy but private international law. In private international law, several methods exist on how to resolve conflicts *between* legal systems. With gross simplification, it
may be appropriate to present three methods: the traditional method, governmental interest analysis, and functional analysis. While the first two are tied to conflicts between state laws, the third one is more promising for international law.

The first method, here called the traditional method, exists in both Europe and the United States, with some differences that need not concern us here. Under the traditional method, the applicable law is determined on the basis of conflict-of-laws rules designed for different areas of law in the abstract, without regard to the content of the substantive law. Essentially, determining the applicable law is a three-step endeavour. In a first step, the matter in question must be characterized as one of contract law, tort law, procedure, etc, so the applicable choice-of-law rule (eg that for contract or tort) can be determined. In a second step, application of this choice of law leads to the determination of the applicable law on the basis of a connecting factor. Most of these connecting factors are either territorial (the place of the tort for matters of tort, the place of performance for matters of contract law, etc.) or personal (the law of nationality or of domicile for matters of personal status, etc.). In a third and final step, the law so determined is applied unless its application would violate the public policy of the forum law. A second approach, developed in opposition to the traditional method described above, is called governmental interest analysis. The starting point for this method is the ‘governmental’ interest of a state in having its own law applied. Hence, the substance of the respective laws provides the starting point of the analysis (though their respective quality or desirability is not normally a criterion). Here, the first step is to determine which rules of law claim applicability, in view of both their text and of whether the respective legislative intent would be furthered by their application. If more than one state is interested in having its law applied and their laws differ, the resulting ‘true conflict’ must be resolved, and various suggestions have been made for how such a conflict can be resolved.

Perhaps the most important solution is that of ‘comparative impairment’: as between two conflicting laws, the judge should apply the law that would be more impaired by non-application.

Finally, more recent methods of conflict of laws adopt variants of a functional perspective, even though the meaning of such a term and the method discussed under it differ among different authors and courts. In England, this means that the court should look for the proper law, the law most appropriate to govern the issue in question. In the United States, Arthur von Mehren and Donald Trautman developed a multifaceted method to determine the applicable law on the basis of a number of factors, including the relevant strength of the policies of the involved states, a comparative evaluation of the asserted policies, a commonly held multi-state policy, and the degree of effective control each state has over the matter. In Europe, a functional approach led not to a rejection but a refinement of the traditional approach. The three steps of the European approach outlined above were maintained but disentangled from the idea that the applicable law should be based on the power of the state over its territory and its citizens. In all of these functional approaches, the search is ultimately for the most appropriate law, the law with the closest connection to the facts, considering a variety of factors.

Questions:

1. Suppose the rules that govern the internal coherence of domestic law applied to the international context, say in a case that pits the French constitution against the US constitution. What would be the implication?
2. Consider the three approaches to conflict of law described by Michaels and Pauwelyn. Can any or all of these approaches be applied to conflicts between any two systems? What are the implicit assumptions these approaches share?

Recognition and enforcement of foreign judgments & arbitral awards

Choice of forum and choice of law clauses provide a high degree of predictability in matters of jurisdiction and applicable law. The result of an exercise of jurisdiction and an application of the governing law to the facts of a case is a judicial judgment (in the case of a national court) or an arbitral award (in the case of arbitration). If the judgment or award remains unsatisfied, the important issue of enforcement arises. The problem is equally present in the domestic setting, but well-established procedures for executing a judgment, including the mobilization of bailiffs to seize property or freeze bank accounts, are available to the prevailing party.

In the international setting, it is the judgment of a foreign court or foreign arbitral tribunal that requires enforcement by a national judiciary. The coexistence of multiple legal orders and the absence of a central enforcement authority create the need for more alternative strategies to deal with the fact that while economic relations may have become global, enforcement powers still rest largely with the nation-State.

One possible response is an international treaty by which sovereign States agree to recognize and enforce judgments of each other’s courts, subject of course to certain safeguards. With the exception of a recent Choice-of-Court Convention (which contemplates only judgments predicated on a choice of forum clause and which has been signed but has not yet been ratified by the US or entered into force), no such international convention exists. There is, however, a convention that obliges its members to recognize and enforce arbitral awards rendered by arbitral tribunals located abroad, without review of the merits of the case. The 1958 New York Convention conditions that obligation on various requirements, such as the adequacy of the tribunal’s jurisdiction, the observance of fair procedures and non-violation of the public policy (ordre public) of the State where recognition or enforcement is sought.

The Convention today has 146 parties. Some countries, however, have been reluctant to join the Convention. The Brazilian government, for example, took the position that the obligations imposed by the Convention would deprive Brazilians of their constitutional right to a judge. Eventually, however, Brazil signed and ratified the Convention in 2002, altering its constitution to make that possible.

The growth of international commercial arbitration has grown significantly over the years. The International Chamber of Commerce in Paris reports the following figure in its 2010 statistical report (available at http://www.iccwbo.org/collection34/folder332/id41190/printpage.html?newsxsl=&articlexsl

- 793 Requests for Arbitration were filed with the ICC Court;
- Those Requests concerned 2,145 parties from 140 countries and independent territories;
• In 10% of cases at least one of the parties was a State or para-statal entity;
• The place of arbitration was located in 53 countries throughout the world;
• Arbitrators of 73 nationalities were appointed or confirmed under the ICC Rules;
• The amount in dispute was under one million US dollars in 24.1% of new cases;
• 479 awards were rendered.

Questions:
1. What are the costs and benefits of international commercial arbitration? As compared to what?
2. Who would benefit most if these cases migrated back to courts? Who would lose?
Public international Law & vertical interface

This Part is devoted to the basic principles of international law; it will also offer an introduction to the problem of vertical interface, i.e., how legal orders of different levels (domestic and international) relate to one another.

A good introduction to international law is Kent McKeever’s instruction on how to research international law, which is excerpted below.

Researching Public International Law
Kent McKeever, Columbia Law School

Definitions of International Law

Public International Law is the law of the political system of nation-States. It is a distinct and self-contained system of law, independent of the national systems with which it interacts, and dealing with relations which they do not effectively govern. Since there is no overall legislature or law-creating body in the international political system, the rules, principles, and processes of international law must be identified through a variety of sources and mechanisms. This can make international law appear difficult to pin down. Students and scholars in the United States often use the Restatement of the Law (Third), the Foreign Relations of the United States as a guide to identifying international law as applied in the US.

ALI Restatement 3rd, Section 101, International Law Defined:

"International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical."

From the Oxford English Dictionary:

"[I]nternational law, the law of nations, under which nations are regarded as individual members of a common polity, bound by a common rule of agreement or custom; opposed to municipal law, the rules binding in local jurisdictions."

Institutions Involved in the Process

As international law developed in the 17th and 18th centuries, it was widely understood that it was a tool for relations between nation-States. Individuals had no role in the process which resolved disputes between States except as representatives of the States, such as diplomats or
The classic ‘player’ is the sovereign body of the nation in whatever form it takes for a given State. It can be the President, Prime Minister, King, or Queen, but it is now often the bureaucratic representation of the sovereign power, such as the State Department, the Foreign Ministry, the military, etc. Until the middle of the 20th Century, international law consisted primarily of custom. More recently, customary international law has been increasingly codified.

While that part of the governmental entity charged with foreign relations will have the lead role in developing international law for the country, in practice each sub-unit of a government has some ability to create what can be recognized as International Law. In the United States, for example, the Executive Branch (acting through the State Department) may sign a treaty, but the President ratifies it with the "advice and consent" of the Senate, and the Congress as a whole may pass laws implementing it. In addition, administrative agencies can make and enforce regulations implementing the treaty and the statutes, and the courts can interpret any of the above and use non-treaty-related international law as an exercise of their judicial power.

On the global scale, international organizations such as the United Nations and the European Union have become extremely important as forums for creating international law. The most recent development in this area has been the recognition that there is a role, within the sphere of public international law, for individuals to pursue remedies against sovereign nations.

*Identification of Authoritative Texts*

The Charter of the United Nations establishes the International Court of Justice (ICJ) as the principal judicial organ of the UN. The treaty which establishes the ICJ is informally known as the "Statute." Article 38 of the Statute furnishes an indirect answer to the question: What are the texts of international law? The article is written in terms of what sources the Court will use in order to resolve a dispute. These sources include treaties, customary law, case law, academic writings, and general principles of law. Article 38 reads:

"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b. international custom, as evidence of a general practice accepted as law;
   c. the general principles of law recognized by civilized nations;
   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

A different presentation of these ideas can be found in the Restatement of the Law 3d: Foreign Relations Law of the United States, Articles 102 (Sources of International Law) and 103 (Evidence of International Law).

§ 102 Sources of International Law
(1) A rule of international law is one that has been accepted as such by the international community of States
(a) in the form of customary law;
(b) by international agreement; or
(c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation.

(3) International agreements create law for the States parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by States generally and are in fact widely accepted.

(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

§ 103 Evidence of International Law

(1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive (§ 102).

(2) In determining whether a rule has become international law, substantial weight is accorded to
(a) judgments and opinions of international judicial and arbitral tribunals;
(b) judgments and opinions of national judicial tribunals;
(c) the writings of scholars;
(d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.

…

How International Law Texts are Created

The ICJ statute shows that International Law does not have an easily identifiable "law-giver". Under these circumstances, how do we find out if something is a rule in international law? What is it we are looking for? The ways norms are identified as international "law" include: agreements negotiated by the affected parties, deference to a third-party decision-maker, academic persuasion and consensus, and custom (state practice and the opinion that the practice is dictated by a legal obligation).

The Fate of Public International Law: Between Technique and Politics
Martti Koskenniemi
THE PROJECT OF MODERN INTERNATIONAL LAW

Public international law is rules and institutions but it is also a tradition and a political project. If you view it only as rules or institutions, you will be struck by how different it looks from the rules and institutions you know from the domestic context. Of course, there was always the suspicion that what international lawyers do is not like domestic attorneys or judges reading dossiers, interviewing clients or handing out decisions. Compared with the sophisticated techniques of domestic law, international law seemed primitive, abstract and above all political, too political. It was against this attitude that international lawyers have defended their project by seeking to show that, despite appearances, it is not really so different. States could, after all, be conceived as legal subjects in a system where their territorial possessions were like property, their treaties like contracts and their diplomacy like the administration of a legal system. That strategy was quite successful. However, I would like to suggest that the problems faced by public international law today -- marginalization, lack of normative force, a sense that the diplomatic mores that stand at its heart are part of the world’s problems -- result in large part from that strategy, the effort of becoming technical. (…)

Some 60 to 80 years ago, a small group of cosmopolitan-minded lawyers translated the diplomacy of States into the administration of legal rules and institutions. This was a progressive, liberal, project, conceived originally in nineteenth century Germany from where immigrants such as Lassa Oppenheim or Hersch Lauterpacht brought it into the English-speaking world. It combined a political realist reading of statehood with a strong anti-sovereignty ethos through a historical reading of modernity, a reading once forcefully expressed in Immanuel Kant’s 1784 essay on ‘The Idea for a Universal History with a Cosmopolitan Purpose’. Everybody agreed that although statehood was important, it was also problematic. Lawyers sought to deal with those problems by thinking of states as intermediate stages in a historical trajectory that would lead to the liberation of individuals enjoying human rights in a global federation under the rule of law.

This project always had its ups and downs. The experience with the League of Nations turned out to be particularly traumatic and deterred abstract speculation about the United Nations as an incipient world government. Nevertheless, in the 1960’s, the cosmopolitan ethos found a new home in the expanding human rights institutions and the welfare and development activities in the UN and other intergovernmental organisations.

Then came 1989 and all the enthusiasm about a global rule of law -- human rights, trade, environment, criminal law, sanctions and a world police. The end of the Cold War was understood—especially in Europe—as the removal of obstacles on the way to history’s natural progress towards a universal federation. (…)

But the new developments in the law did not point to unity. The more powerfully they dealt with international problems -- problems of economics, development, human rights, environment, criminality, security -- the more they began to challenge old principles and institutions. Specializations such as ‘trade law’, ‘human rights law’, ‘environmental law’, ‘criminal law’, ‘security law’, ‘European law’ and so on started to reverse established legal hierarchies in favour of the structural bias in the relevant functional expertise. Even though this process was often
organised through intergovernmental organisations, the governmental delegations were composed of technical (economic, environmental, legal) experts in a way that transposed the functional differentiation at the national level onto the international plane. Moreover, the resulting regimes have often been formulated in an open-ended manner, leaving power to decide -- above all, to decide on how scarce resources should be distributed-- to the legal and technical experts appointed to the supervisory organs. It is this change to which international lawyers have reacted by speculating on the ‘dangers’ of incoherence, forum shopping and, perhaps characteristically, ‘loss of overall control’. (…)

Today, few experts conceive of themselves as part of the Lauterpacht tradition of a public law oriented global federalism. Instead, they may work for private or public-private institutions, national administrations, interest groups or technical bodies, developing best practices and standardised solutions -- ‘modelisation’, ‘contractualisation’ and mutual recognition -- as part of the management of particular regimes. The vocabularies of constraint are cognitive rather than normative. They emerge from economic, military, or technological facts and calculations -- recasting problems of politics as problems of expert knowledge. The resulting regulation may also be more geared towards enabling private power than limiting it. Consumer protection within e-commerce, for instance, must take place in the informal mechanisms of the web -- anything else would be commercially and technically impossible.

In such (and other) ways, traditional international law is pushed aside by a mosaic of particular rules and institutions, each following its embedded preferences. As a result, the project of Lauterpacht and his generation is left dangling in an empty space, the ninth edition of Oppenheim’s International Law (1992) reduced into nostalgia, together with such other inter-war enthusiasms as functional architecture, conveyer-belts or European rule as ‘sacred trust of civilization’. Ideals turn into rituals, like the unending debates about UN reform, divested of political meaning.

None of this would matter too much if the new regimes were amenable to political control. But even where they are based on formal international law rule-making (typically through the device of a multilateral treaty), they lead into contextual ad hocism that further strengthens the position of functional experts. This is the difficulty with formal, universal rules. Any rule with a global scope will almost automatically appear as either over-inclusive or under-inclusive, covering cases the law-maker would not wish to cover, and excluding cases that would need to be covered but were not known of at the time when the rule was made. To forestall this, most law with a universal scope refrains from rule-setting and instead calls for ‘balancing’ the interests with a view of attaining ‘optimal’ results to be calculated on a case-by-case basis. (…)

The old international law project aimed to replace sovereignty by an international system of rights presumed as authentic, pre-political and coterminous with each other. No struggle was needed. The rights would realise themselves as soon as the obstacle of sovereignty to ‘freedom’ was lifted. Yet, this did not happen. Instead, the international was occupied by an enormous number of policies with a plethora of institutions in which every claimed benefit parades as a ‘right’ of this or that group. Priorities and choices must be made. In the absence of political institutions, however, the choices will be made by experts and advisors, economists, technicians, scientists and lawyers, all having recourse to the technical vocabularies of ad hoc
accommodation, co-ordination and optimal effect. Utilitarianism is the political constitution of a
de-politicised world. But if functional systems are as indeterminate as law, religion, or
nationalism, the question is not so much which regime should rule us, but whose understanding
of it should be authoritative, or more concretely, which experts should possess jurisdiction. “

**Questions:**

1. What is Professor Koskinniemin's major critique of contemporary international law?

2. Can the old ideas of international law be reconciled with the more complex world we live in
today? If so, how?

**Subjects of International Law**

The above excerpts offer you a glimpse into the subjects and sources of international law: 
“States could, after all, be conceived as legal subjects in a system where their territorial
possessions were like property, their treaties like contracts and their diplomacy like the
administration of a legal system.” Indeed, States are the primary subjects of international law.
And a major source of law are the “contracts”, or treaties, they enter into with one another.

1. **Individuals vs. States**

The notion that States, and only States are the subjects of international law is not undisputed.
Indeed, Hugo Grotius, who is widely regarded as the father of international law regarded both
individuals and States as rights bearers.

**The 'Grotian Tradition' in International Relations**
A. Claire Cutler

The works of Huig de Groot, or Grotius, the seventeenth-century Dutch jurist, are said to
exemplify a particular tradition in international law and in international theory. The Grotian
tradition “views international politics as taking place within an international society” in which
States “are bound not only by rules of prudence or expediency but also by imperatives of
morality and law”. This tradition contemplates a “civil science” or constitutional approach to the
study of international politics, for it directs attention to the “rules which constitute and govern
political life within and between sovereign states”. The conviction that the totality of
international relations is subject to the rule of law is one of the principal features of the Grotian
tradition, a feature that distinguishes this from alternative conceptions or traditions.

In *De Jure Belli ac Pacis* Grotius attempted to formulate a theory of law that he hoped would
assist in bringing order to the chaos of early-seventeenth-century Europe. In the Prolegomena to
the text he notes that few authors have dealt with the law governing relations between states in a
comprehensive manner, but that “the welfare of mankind demands that this task be accomplished”. He further states his reasons for writing the treatise:

... I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarian races should be ashamed of; I observed that men rush to arms for slight causes or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.

The pervasiveness of private conflict in Grotius' day was growing increasingly incongruous with the developing “statist tendencies that emphasized territoriality and the domestic centralization of both legitimate authority and military power”. Richard Falk notes that Grotius was concerned with providing the normative framework for the newly emerging States system -- a framework that accommodated statist tendencies and filled the void created by the collapse of the unity and authority provided by the Church of Rome. The appearance of the text was, indeed, timely:

At the time that De Jure Belli ac Pads was published the historic process of the disintegration of European political society as hitherto known and the rise of the territorial sovereign state were being consummated ... the demise of the feudal system gave a new and higher significance to the territorial state. The need for a system of law governing the relations of the independent states to replace the legal and spiritual unity of Christendom had thus become urgently obvious. (Falk)

In terms of the phenomenon of war and the conditions of peace and order, Grotius falls squarely within the classical tradition. However, he departs from the tradition in his identification of the essential actors. It was earlier noted that the classical tradition identifies States to be the essential actors in international relations. While Grotius accepts that the sovereign State is the primary actor, he also accords to individuals a Right status in international relations and under international law. This is attributable to his theory of the essential identity of the individual and the State, which in turn reflects a “patrimonial” conception of the State and the influence of natural law theory. Grotius maintains that individuals, alongside States, hold rights and owe duties under international law. The analogy drawn by Grotius between the individual and the State reflects the absence at the time of a clearly perceived distinction between individual and State personality. The “patrimonial” conception of the state, which regards the state to be “the creature of personal rule”, formed the prevailing view and reflects the condition of the seventeenth century when the “history of Europe could still, to a large extent, be conceived of as a history of dynasties and dynastic ambitions”.

While Grotius clearly has a conception of sovereignty, it is not one premised upon the State as an abstraction or upon the juridical concept of international or State personality. The abstraction and personification of the State and the doctrine of exclusive State personality were only to take root firmly later, in the eighteenth century. ...

The theory of the essential identity of the individual and the State provided the basis for the application of the same laws of conduct to State and to individual actions. Furthermore, the
belief that the ultimate source of moral and legal obligation derive from natural law principles enabled Grotius to apply the law of nations to all States at all times. Natural law provided the “element of universalization” necessary to the conception of a universal moral order. This furnished the basis for the notion of “international society”, which is the hallmark of the Grotian tradition and comprises the third element of the tradition.

**Corporations**

In our own age, the question whether corporations, which like States are legal personae, could be regarded as subjects of and as such bear responsibilities under international law is a much discussed issue. After all, the assets of multinational corporations often surpass those of nation-States. More importantly, some corporations have actively pursued or tolerated actions of their agents that amount to violations of international law, in particular, in the area of human rights law. Nonetheless, the dominant position to this day is that under accepted principles of international law, corporations are not subjects and therefore neither bearers of rights or obligations.

**Business and Human Rights: The Evolving International Agenda**

John Ruggie  

The State-based system of global governance has struggled for more than a generation to adjust to the expanding reach and growing influence of transnational corporations. …

Fueled by escalating reports of corporate human rights abuses, especially in the extractive sector and the footwear and apparel industries, the UN Sub-Commission on the Promotion and Protection of Human Rights (“Sub-Commission”), a subsidiary expert body of the then Commission on Human Rights, established a working group on business and human rights in 1998. It was tasked to “make recommendations and proposals relating to the methods of work and activities of transnational corporations in order to...promote the enjoyment of economic, social and cultural rights and the right to development, as well as of civil and political rights.” In 2003, the working group produced the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (“draft Norms”).

Written in treaty-like language, the text comprises twenty-three articles setting out human rights standards for companies in areas ranging from international humanitarian law, through civil, political, economic, social, and cultural rights, to consumer protection and environmental practices. Acknowledging that States are the primary duty bearers in relation to human rights, it stipulates that transnational firms and other business enterprises, within their “spheres of activity and influence,” have corresponding legal duties. It also requires that corporate compliance be monitored by national and international agencies, and victims provided with effective remedies.

The Sub-Commission approved the text in 2003 [but never adopted it].

[T]he Commission then requested the UN Secretary-General to appoint a Special Representative (SRSG), initially for a two-year term, with a wide-ranging mandate to “identify and clarify”
international standards and policies in relation to business and human rights, elaborate on key concepts including “corporate complicity” and “spheres of influence,” and submit “views and recommendations” for consideration by the Commission. On 25 July 2005, the UN Economic and Social Council approved the Commission’s request, and three days later then Secretary-General Kofi Annan appointed [the author] to the post of SRSG.

Rights and Duties
If international human rights obligations are to be attributed to transnational corporations, on what basis shall this be done? It seems clear that long-standing doctrinal arguments over whether such firms could be “subjects” of international law are yielding to new realities on the ground. For example, firms have acquired significant rights under various types of bilateral investment treaties and host government agreements, they set international standards in several sectors, and certain corporate acts are directly prohibited in a number of civil liability conventions dealing with environmental pollution. Thus, at minimum transnational corporations have become “participants” in the international legal system, as Rosalyn Higgins, President of the International Court of Justice, puts it, with the capacity to bear some rights and duties under international law.

The case made for the draft Norms went like this. The UDHR, in its preamble, proclaims that “every individual and every organ of society...shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.” Transnational corporations have greater power than some states to affect the realization of rights, the argument continued, and “with power should come responsibility.” Therefore, these corporations must bear responsibility for the rights they may impact. And because some States are unable or unwilling to make them do so under domestic law, there must be direct and uniform corporate responsibilities under international law.

The draft Norms enumerated rights that appeared to be particularly relevant to business, including non-discrimination, the security of the person, labor standards, and indigenous peoples’ rights. But the list included rights that States have not recognized or are still debating at the global level, including consumer protection, the “precautionary principle” for environmental management, and the principle of “free, prior and informed consent” of indigenous peoples and communities. ….

Far more serious problem concerns the draft Norms’ proposed formula for attributing human rights duties to corporations. After recognizing that States are the primary duty bearers, the General Obligations article adds: “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect” nationally and internationally recognized human rights. That is to say, within corporations’ “spheres of influence” they would have exactly the same range of duties as States – from respecting to fulfilling rights – the only difference being that States’ duties would be primary and corporations’ duties secondary. But the draft Norms defined none of these terms. The concept of corporate spheres of influence, though useful as an analytical tool, seems to have no legal pedigree. Therefore, the boundaries within which corporations’ secondary duties would take effect remain unknown. Nor was the distinction between primary and secondary duties elaborated. With scope and threshold conditions left
unspecified, it seems highly likely that the attribution of corporate duties in practice would come to hinge on the respective capacities of States and corporations in particular situations – so that where States were unable or unwilling to do their job, the pressure would be on companies to step in. This may be desirable in special circumstances, but as a general proposition it is deeply troubling on several grounds. …

In sum, while it may be useful for some purposes to think of corporations as “organs of society,” they are specialized organs, performing specialized functions. The range of their duties should reflect that fact. Already in a 1949 opinion, the International Court of Justice explained that recognizing an international personality “is certainly not the same thing as saying that...its rights and duties are the same as those of a State.” Imposing on corporations the same range of duties as States for all rights they may impact conflates the two spheres and renders effective rulemaking itself highly problematic.”

**Corporate liability for violation of international law in domestic courts**

The question as to whether corporations are subjects of international law has important practical ramifications. It ultimately determines whether compliance with norms of international law can be enforced against corporate entities or whether the international community has to rely in their goodwill or fear of reputational sanctions.

The question has become a recent battleground in US courts, because the US Alien Torts Statute (USC Ch. 20, § 9, 1 Stat. 73 (1789)) gives US district courts jurisdictions for actions in tort, irrespective where they were committed and whether the tortfeasor is a US national or not: "The district courts shall have 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."

This statute, originally crafted in 1789, but rediscovered by imaginative attorneys in the 1980s has been used to sue multinational corporations that allegedly committed human rights violations in foreign countries or aided and abetted the governments of such countries in committing such acts. In September of 2010, the 2nd Circuit Court of Appeals held in Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010) – a case about alleged human rights violations by Royal Dutch Petroleum in Nigeria – that the question of corporate liability had to be determined under principles of international, rather than domestic law. Since international law denies corporations the status of “subjects” of international, the court argued that they could not be held liable under the ATS either. Two other district courts have diverged from this reasoning. The Supreme Court has decided to hear Kiobel during its 2011/12 term to decide on this circuit split.
Treaty-based International law

There are two major sources of international law: positive, or treaty-based, law, and customary law. In this section, we explore the making of treaty-based international law. Frequently, the term “positive law” is used to refer to treaty-based, written, international law. However, this definition might be oversimplistic in that it stresses the formality of law rather than its normative claims. Moreover, the reach and limits of positive international law are not always easy to define.

There are two major sources of international law: positive, or treaty-based, law and customary law.


PART I.
INTRODUCTION

Article 1
Scope of the present Convention
The present Convention applies to treaties between States.

Article 2
Use of terms

1. For the purposes of the present Convention:
(a) “treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;
(b) “ratification”, “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;
(c) “full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty;
(d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;
(e) “negotiating State” means a State which took part in the drawing up and adoption of the text of the treaty;
(f) “contracting State” means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(g) “party” means a State which has consented to be bound by the treaty and for which the treaty is in force;

(h) “third State” means a State not a party to the treaty;

(i) “international organization” means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

**Article 3**

*International agreements not within the scope of the present Convention*

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;

(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

**Article 4**

*Non-retroactivity of the present Convention*

Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.

**Article 5**

*Treaties constituting international organizations and treaties adopted within an international organization*

The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

**PART II.**

**CONCLUSION AND ENTRY INTO FORCE OF TREATIES**

**SECTION 1. CONCLUSION OF TREATIES**

**Article 6**

*Capacity of States to conclude treaties*

Every State possesses capacity to conclude treaties.
Article 7

Full powers

1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

   (a) he produces appropriate full powers; or
   (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:

   (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
   (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
   (c) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

…

Article 9

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Article 10

Authentication of the text

The text of a treaty is established as authentic and definitive:

(a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or

(b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Article 11

Means of expressing consent to be bound by a treaty
The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

\textit{Article 12}

\textit{Consent to be bound by a treaty expressed by signature}

1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:
   \begin{itemize}
   \item[(a)] the treaty provides that signature shall have that effect;
   \item[(b)] it is otherwise established that the negotiating States were agreed that signature should have that effect; or
   \item[(c)] the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.
   \end{itemize}

2. For the purposes of paragraph 1:
   \begin{itemize}
   \item[(a)] the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed;
   \item[(b)] the signature ad referendum of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.
   \end{itemize}

\textit{Article 13}

\textit{Consent to be bound by a treaty expressed by an exchange of instruments constituting a treaty}

The consent of States to be bound by a treaty constituted by instruments exchanged between them is expressed by that exchange when:
   \begin{itemize}
   \item[(a)] the instruments provide that their exchange shall have that effect; or
   \item[(b)] it is otherwise established that those States were agreed that the exchange of instruments should have that effect.
   \end{itemize}

\textit{Article 14}

\textit{Consent to be bound by a treaty expressed by ratification, acceptance or approval}

1. The consent of a State to be bound by a treaty is expressed by ratification when:
   \begin{itemize}
   \item[(a)] the treaty provides for such consent to be expressed by means of ratification;
   \item[(b)] it is otherwise established that the negotiating States were agreed that ratification should be required;
   \item[(c)] the representative of the State has signed the treaty subject to ratification; or
   \item[(d)] the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.
   \end{itemize}

2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

\textit{Article 15}

\textit{Consent to be bound by a treaty expressed by accession}

The consent of a State to be bound by a treaty is expressed by accession when:
(a) the treaty provides that such consent may be expressed by that State by means of accession;
(b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

...(Omitted for brevity)

**Article 18**

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

**SECTION 2. RESERVATIONS**

**Article 19**

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;
(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
ailing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

**Article 20**

Acceptance of and objection to reservations

1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.
4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;
(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
(c) an act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

**Article 21**

*Legal effects of reservations and of objections to reservations*

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

**Article 22**

*Withdrawal of reservations and of objections to reservations*

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State;
(b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

**Article 23**

*Procedure regarding reservations*
1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

SECTION 3. ENTRY INTO FORCE AND PROVISIONAL, APPLICATION OF TREATIES

Article 24
Entry into force

1. A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.

2. Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.

3. When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

4. The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

PART III.
OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES
SECTION 1. OBSERVANCE OF TREATIES

Article 26
“Pacta sunt servanda”

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Article 27
Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.
SECTION 2. APPLICATION OF TREATIES

Article 28
Non-retroactivity of treaties

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Article 30
Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:
   (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
   (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

SECTION 3. INTERPRETATION OF TREATIES

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32
Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages
1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

SECTION 4. TREATIES AND THIRD STATES

Article 34
General rule regarding third States
A treaty does not create either obligations or rights for a third State without its consent.

…

PART IV.
AMENDMENT AND MODIFICATION OF TREATIES

Article 39
General rule regarding the amendment of treaties
A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide.

**Article 40**

*Amendment of multilateral treaties*

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
   - (a) the decision as to the action to be taken in regard to such proposal;
   - (b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
   - (a) be considered as a party to the treaty as amended; and
   - (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

**Article 41**

*Agreements to modify multilateral treaties between certain of the parties only*

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
   - (a) the possibility of such a modification is provided for by the treaty; or
   - (b) the modification in question is not prohibited by the treaty and:
     - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
     - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

**PART V.**

INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

**SECTION 1. GENERAL PROVISIONS**

**Article 42**

*Validity and continuance in force of treaties*

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.
2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty.

... 

Article 43

Obligations imposed by international law independently of a treaty

The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

... 

SECTION 2. INVALIDITY OF TREATIES

Article 46

Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Article 47

Specific restrictions on authority to express the consent of a State

If the authority of a representative to express the consent of a State to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating States prior to his expressing such consent.

Article 48

Error

1. A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 shall not apply if the State in question contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error.

3. An error relating only to the wording of the text of a treaty does not affect its validity; article 79 then applies.
Article 49
Fraud
If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.

Article 50
Corruption of a representative of a State
If the expression of a State’s consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Article 51
Coercion of a representative of a State
The expression of a State’s consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect.

Article 52
Coercion of a State by the threat or use of force
A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

Article 53
Treaties conflicting with a peremptory norm of general international law ("jus cogens")
A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

SECTION 3. TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

Article 54
Termination of or withdrawal from a treaty under its provisions or by consent of the parties
The termination of a treaty or the withdrawal of a party may take place:
(a) in conformity with the provisions of the treaty; or
(b) at any time by consent of all the parties after consultation with the other contracting States.

Article 55
Reduction of the parties to a multilateral treaty below the number necessary for its entry into force

Unless the treaty otherwise provides, a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force.

Article 56
Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
   (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
   (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months’ notice of its intention to denounce or withdraw from a treaty under paragraph 1.

Article 57
Suspension of the operation of a treaty under its provisions or by consent of the parties

The operation of a treaty in regard to all the parties or to a particular party may be suspended:
   (a) in conformity with the provisions of the treaty; or
   (b) at any time by consent of all the parties after consultation with the other contracting States.

Article 58
Suspension of the operation of a multilateral treaty by agreement between certain of the parties only

1. Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if:
   (a) the possibility of such a suspension is provided for by the treaty; or
   (b) the suspension in question is not prohibited by the treaty and:
      (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
      (ii) is not incompatible with the object and purpose of the treaty.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend.

Article 59
Termination or suspension of the operation of a treaty implied by conclusion of a later treaty

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
   (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.

**Article 60**

*Termination or suspension of the operation of a treaty as a consequence of its breach*

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.
2. A material breach of a multilateral treaty by one of the parties entitles:
   (a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
      (i) in the relations between themselves and the defaulting State; or
      (ii) as between all the parties;
   (b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
   (c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
   (a) a repudiation of the treaty not sanctioned by the present Convention; or
   (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.
4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.
5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

**Article 61**

*Supervening impossibility of performance*

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

**Article 62**

*Fundamental change of circumstances*
1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
   
   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
   (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
   (a) if the treaty establishes a boundary; or
   (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

**Article 63**

Severance of diplomatic or consular relations

The severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty.

**Article 64**

Emergence of a new peremptory norm of general international law ("jus cogens")

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

**SECTION 4. PROCEDURE**

**Article 65**

Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty

1. A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.

2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.

3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.
4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.

Article 66

Procedures for judicial settlement, arbitration and conciliation

If, under paragraph 3 of article 65, no solution has been reached within a period of 12 months following the date on which the objection was raised, the following procedures shall be followed:

(a) any one of the parties to a dispute concerning the application or the interpretation of article 53 or 64 may, by a written application, submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration;

(b) any one of the parties to a dispute concerning the application or the interpretation of any of the other articles in part V of the present Convention may set in motion the procedure specified in the Annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

Article 67

Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1, must be made in writing.

2. Any act of declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

…

SECTION 5. CONSEQUENCES OF THE INVALIDITY, TERMINATION OR SUSPENSION OF THE OPERATION OF A TREATY

Article 69

Consequences of the invalidity of a treaty

1. A treaty the invalidity of which is established under the present Convention is void. The provisions of a void treaty have no legal force.

2. If acts have nevertheless been performed in reliance on such a treaty:

(a) each party may require any other party to establish as far as possible in their mutual relations the position that would have existed if the acts had not been performed;

(b) acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the treaty.
3. In cases falling under article 49, 50, 51 or 52, paragraph 2 does not apply with respect to the party to which the fraud, the act of corruption or the coercion is imputable.

4. In the case of the invalidity of a particular State’s consent to be bound by a multilateral treaty, the foregoing rules apply in the relations between that State and the parties to the treaty.

Article 70
Consequences of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention:

   (a) releases the parties from any obligation further to perform the treaty;
   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.

Article 71
Consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law

1. In the case of a treaty which is void under article 53 the parties shall:

   (a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
   (b) bring their mutual relations into conformity with the peremptory norm of general international law.

2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:

   (a) releases the parties from any obligation further to perform the treaty;
   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

Article 72
Consequences of the suspension of the operation of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the suspension of the operation of a treaty under its provisions or in accordance with the present Convention:

   (a) releases the parties between which the operation of the treaty is suspended from the obligation to perform the treaty in their mutual relations during the period of the suspension;
   (b) does not otherwise affect the legal relations between the parties established by the treaty.

2. During the period of the suspension the parties shall refrain from acts tending to obstruct the resumption of the operation of the treaty.

PART VI.
MISCELLANEOUS PROVISIONS
Article 73

Cases of State succession, State responsibility and outbreak of hostilities

The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States.

Article 74

Diplomatic and consular relations and the conclusion of treaties

The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations.

Article 75

Case of an aggressor State

The provisions of the present Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State’s aggression.

PART VIII.

FINAL PROVISIONS

Article 84

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.
**Customary International Law**

The basic ground rules for international law evolved as customary norms. With the institutionalization of international law, first in the League of Nations, and after World War II the UN system, international law has become increasingly positivistic and technical. Some believe that this has gone too far and has harmed the status of international law. Others express concern that customary international law is created by the fiat of some international law judges who are ultimately accountable to no one. These debates are likely to continue and there is not necessarily a right or wrong answer to them. For a summary of these different positions, see Max Planck Encyclopedia of Public International Law available at http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e1393&recno=34& “Customary International Law”

(a) The Basis of Customary Law

Customary rules are the result of a process—whose character has been qualified by a number of authors as “mysterious”—through which elements of fact, empirically verifiable, acquire a legal character thus creating rights and obligations for the subjects of international law. Theoretical discussions have divided, and still divide, legal scholars. One of the main objects of contention concerns what it is that makes factual elements legally binding in international law. This is the problem of the basis of customary international law. This problem is connected with ideas about the nature of law in general and of international law in particular. A central question is whether there is a rule that makes customary rules binding, and, if it exists, what its content is. The views of scholars on the subject may be grouped in two, depending on whether such rule is deemed to exist.

The position that considers that such a rule exists, which may be indicated as positivist, includes one group—to which Soviet doctrine used to belong—which deems that custom is not essentially different from agreements: it is a kind of tacit, and sometimes presumptive, agreement. Consequently, the rule on which the binding character of customary rules depends is *pacta sunt servanda*, the very rule on which the binding character of agreements depends. As underlined by D. Anzilotti, who, together with H. Triepel, is one of the main proponents of this view, this rule cannot be demonstrated. It must be taken as “an absolute objective value”, as the “primary hypothesis”. Other positivist authors criticize the assimilation of customary rules with treaty rules as being a fiction. They state that customary rules are different from treaty rules and seek a rule of a level higher than customary rules as a basis for the binding character of these rules. This is the idea of the basic norm (*Grundnorm*) of H. Kelsen, followed among others by G. Morelli: a rule whose contents would be *consuetudo est servanda*, custom is to be complied with, or, in Kelsen's words “States ought to behave as they have customarily behaved”. These authors,
similarly to the supporters of *pacta sunt servanda* as the basic rule, concede that this rule has a peculiar nature, as it is a “hypothetical” rule, the hypothesis upon which the system is based.

The position that denies the existence of a rule making customary rules binding, and also the need for such a rule, holds that certain rules are binding per se, without a superior rule giving them such character. Customary rules emerge “spontaneously” from the international community. Their existence depends on whether it can be empirically ascertained that they are considered as binding by the members of the international community and whether they function as such in the relationships between these members. This “spontaneous law” theory has been developed in particular by Italian authors of the mid-20th century (M. Giuliano, R. Ago, G. Barile), and is followed by well-known scholars such as P. Reuter and H.L.A. Hart. These authors demonstrate the continuity of this view with that followed by international law scholars of the classical or natural law school of the 16th and 17th centuries, especially when they underline the necessary presence of legal rules in a community of independent States, the *principes superiorem non recognoscentes*.

(b) The Elements of Customary International Law and the Role of the Will of States

Closely connected with the question of the basis of customary international law is the question of which are the facts to be ascertained empirically in order to determine that a customary international rule has come into existence. A key aspect of this question is whether these facts are produced by the will of States or through an involuntary process.

While the latter question is easily answered if the view that the basis of customary international law is the *pacta sunt servanda* rule is accepted, as customary rules would be produced in the same way as treaty rules, the question is more difficult if one starts from the basic rule or the spontaneous law approaches. According to these approaches, the customary process is not a voluntary one. What counts is that, as mentioned, certain facts should be empirically determined. The prevailing view is that these facts are to be grouped in two elements, an objective one, the repeated behaviour of States, and a subjective one, the belief that such behaviour depends on a legal obligation.

While the *opinio juris* is by definition an opinion, a conviction, a belief, and thus does not depend on the will of States, the conduct of States is always the product of their will. What makes the discussion complex is that in willing to behave in a certain manner States may or may not be wilfully pursuing the objective of contributing to the creation, to the modification or to the termination of a customary rule. This applies also to the expressions of views as to whether certain behaviours are legally obligatory or as to whether a certain rule of customary law exists: these may be real expressions of belief—manifestations of *opinio juris*—or acts, corresponding or not to true belief, voluntarily made with the purpose of influencing the formation, the modification or the termination of a customary rule. These latter expressions of views are objective facts rather than subjective beliefs. The difficulty of distinguishing behaviours and expressions of views that are, or are not, made with the will of influencing the customary process, explain why in modern international law, together with the prevailing theory of the two elements of customary law, theories are often held supporting the view that only the objective, or only the subjective element, is decisive for the existence of a rule of customary international law.
and views that consider decisive only material facts and others that consider that manifestations of opinion are relevant.

(c) What States Do and Say: International Practice and the Ascertainment of Customary International Law

Independently of the theoretical starting point, it is clear that the material from which customary law rules are to be ascertained is the same, namely, international practice. Such practice consists in what the subjects of international law do and say, both of which can be mere facts—or be perceived so—or evidence of opinio juris. Both may be voluntary or involuntary interventions in the customary process.

The increase in the number and frequency of multilateral forums, such as the United Nations General Assembly's sixth committee, codification conferences etc, where States meet to develop or discuss new rules of written international law, gives States many more occasions than they used to have to express views as to customary international law. This has increased the quantity of what States say, even though it has also made it more difficult to distinguish whether what they say is what they believe is customary law or what, in light of strategies developed in their foreign legal policy—to use the politique juridique extérieure expression of G de Lacharrière—they want to become customary law.

It will be up to those who have to apply customary international rules, not only judges and arbitrators, but also States and other subjects of international law, to find what is the right mix of what States do and say, and of what States want (or consent to) and what they believe, that permits one to say that a corresponding rule exists.

Such a mix may not be the same for all rules. An expression, although too schematic, of this approach is the view recently put forward that the elements of practice should be put on a sliding scale, so that when States are very active, modest or no corroborating indications of opinio juris are necessary, while when the latter indications are abundant, the need for corresponding behaviour diminishes or disappears. It would seem, for instance, that, as regards certain basic rules for the protection of human rights, such as the prohibition of torture, manifestations of opinion in favour of the rule, and the lack of manifestations in opposition, overcome the fact that violations are frequent (see Prosecutor v Furundzija [Judgment] (1999) 38 ILM 317 para. 138). This view is based on the traditional distinction between diuturnitas and opinio juris. In the light of the abovementioned fact that what States do and say may reflect their will or consent and their belief, it would seem that ultimately the conviction of those who have to apply a rule that it has a binding character will be decisive in conferring on it a legal and not a merely non-binding character. In this sense opinio juris is the key element of customary law.

In determining the right mix of manifestations of practice, there is a difference between manifestations during the formative process of customary rules and those assessed at the time when the continuing existence of a rule must be determined in view of its applicability. While in the formative process manifestations of practice may or may not be based on the belief that they correspond to a legal right or obligation, when the time comes for assessing the practice in view of determining an applicable customary law, what States have said and done becomes significant
when it is considered, by those that ascertain and apply customary rules, as corresponding to
what is then seen as conforming to the law by the generality of States.

**Enforcing International Law**

Norms of international law can be enforced coercively in different courts, at the domestic,
regional and international levels. The adjudication of international law-based claims at these
different levels raises important interface questions between domestic and international law.

*Domestic enforcement of international law*

Whether international law can be enforced in domestic courts is largely a question of interface,
which we will address in the following section. Note, however, that some countries have
assumed universal jurisdictions for violation of international law norms. One example is the US
Alien Tort Statute cited above. By availing its courts of enforcing international law, the statute
opens a domestic enforcement channel. Whether the 1789 statute was originally meant to be
availed for enforcing international human rights norms is much debated. Some authors suggest
that piracy was foremost on the minds of the original drafters. However, in a series of cases,
courts have accepted jurisdiction on the bases of the ATS and have awarded damages to victims
of human rights abuse. This has allowed victims to freeze assets of offenders in the US and
elsewhere. Other countries have assumed universal jurisdiction over crimes against humanity or
genocide anywhere in the world.

Another example of state courts lending their powers to the enforcement of international law is
the dispute resolution mechanism of the North American Free Trade Agreement, NAFTA.
NAFTA knows two types of dispute resolution: among states, which are handled by an
international body, the NAFTA secretariat; and between foreign investors and the host states of
their investments. In the latter case, an investor may either litigate in the domestic court or
initiate arbitration against the NAFTA Party.

*Regional Courts*

At the regional level we find several formal court systems. The most developed regional
adjudication body is arguably the European Court of Justice. The ECJ was established in 1952
and has heard over 15,000 cases. It reviews the legality of the acts of the institutions of the
European Union; ensures that the Member States comply with obligations under the Treaties,
and; interprets European Union law at the request of the national courts and tribunals. Each of
these functions is associated with different procedural devices that will be discussed at greater
length in subsequent units of this course.

Also located in Europe, but in Strasbourg not Luxembourg, is the European Court of Human
Rights. It hears cases alleging violations of civil and political rights established by the European
Convention on Human Rights – an international treaty that obliges the members of the Council
of Europe to recognize and protect the rights set forth in the Convention. Since 1998 the court has sat as a full time court before which individuals can file petitions directly.

In other parts of the world, similar institutions for enforcing human rights have been established. Examples include the Inter-American Human Rights Commission and the African Court on Human and People’s Right (the African Court). The latter is the most recent of the regional human rights courts and as yet is not fully functioning. However, it marks an ambitious attempt to advance human rights in Africa and differentiates it in interesting ways from the ECHR and the IACHR.

However, there is little that court can do if States refuse to comply: it has no access to bailiffs or sheriffs to ensure that its judgments will be executed. This state of affairs has let some commentators to argue that international law is not law. See however, the more nuanced assessment of what is law and how international law builds on a broader conception of law and enforcement mechanisms than typically recognized.

Outcasting: Enforcement in Domestic and International Law
Oona Hathaway & Scott J. Shapiro

…

We can think of legal rules, therefore, as forming enforcement chains. The first link in the chain is the conduct rule being enforced by the subsequent rules. Typically, the second link is a primary enforcement rule that imposes duties on those who violate the initial conduct rule. Later links are normally secondary rules that enforce the prior primary rules (and transitive the initial conduct rule).

We can now see how the law enforces its rules: it imposes costs on rule violators either by (1) imposing duties on them or others or both or (2) denying them rights or providing rights to others or both. Primary enforcement rules require conduct rule violators to act in ways deemed costly or deny them the right to act in ways deemed beneficial. Secondary enforcement rules require or permit others to act in ways deemed costly to the conduct rule violator or not to act in ways deemed beneficial. These primary and secondary rules form chains, with each rule designed to enforce earlier links and, ultimately, to ensure that the initial conduct rule is followed.

The Modern State Objection claims that international law is not law because most of its rules are not part of law enforcement chains. Without its own police, prosecutors, or jailors, international law cannot be enforced by the right people in the right way.

We can imagine two ways in which to respond to the Modern State Objection. One accepts its underlying theory of law, i.e., the Modern State Conception, but argues that international law does indeed satisfy it. The other accepts that international law does not satisfy the Modern State Conception, but argues that the Modern State Conception is itself flawed. (…)

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The founders of the United Nations expected that a significant portion of the enforcement actions under Chapter VII would be carried out by forces assembled from member states who would “make available to the Security Council” armed forces and assistance pursuant to special agreements. A Military Staff Committee (MSC) would be responsible for “the strategic direction of any armed forces placed at the disposal of the Security Council.”

Had this vision been realized, it would have satisfied the Modern State Conception of law enforcement by giving the United Nations Security Council the power to deploy internal physical force to enforce its decisions. But this vision was never realized. It fell victim to the Cold War before it could take shape. Instead, it is the member states that carry out the enforcement actions specified in Security Council resolutions through external physical enforcement.

Even if there are cases in which international law meets the stringent criteria of the Modern State Conception of law (we, as yet, have not identified any), it is inarguable that most of international law does not.

Instead of arguing that international law satisfies the Modern State Conception, the more promising and, in fact, popular strategy in defense of international law has been to argue against the Modern State Conception itself. Thus, most defenders concede that international law is not enforced through the barrel of a U.N. gun, but they deny that enforcement is necessary for legality. In other words, they seek to undercut the Modern State Conception by attacking the Enforcement Thesis. On their view, most conduct rules need not be part of enforcement chains in order to be legal rules. (…)

The appeal of the Modern State Conception is obvious. Every modern domestic legal system has police, prosecutors, and prisons. They are the most visible symbols of the law and its tremendous power. Indeed, it would be difficult to imagine a modern State maintaining control over its territory without bureaucratic organizations that employ the threat and exercise of physical force. Nevertheless, we argue that legal systems are possible even in the absence of these organizations. As we will see, many legal regimes have existed without police forces, prosecutors, or prisons. The Modern State Conception cannot be valid for the simple reason that it cannot account for the existence of these legal regimes.

The fact that certain legal systems have governed without the use of physical force, however, does not mean that they are the real-world analogues of the philosopher’s society of angels. Quite the contrary, these regimes enforced their rules and did so quite ruthlessly. As we will see, these systems typically externalized the enforcement of the rules to non-regime members. They relied on these outside parties either to use physical force against the disobedient or to deny the deviants the benefits of communal belonging and social cooperation. (…)

As the cases [such as medieval Icelandic law and canon law] demonstrate, the Modern State Conception is both an excessively narrow and historically incomplete account of law. Legal systems can [exist] and have existed despite lacking the capacities of a modern state. Even without police, jails, and professional prosecutors, these systems were able to do what legal systems normally do: enact legislation by officials who follow formal rules, resolve disputes
according to preexisting norms by judges following rules of procedure and evidence, and enforce legislation and court orders using various forms of coercion. (…)

In this Part, we document how international law works in light of the broader understanding of law that we have put forth. What we see is that, time and again, international legal institutions use others (usually States) to enforce their rules, and they typically deploy outcasting—denying individuals the benefits of social cooperation—rather than physical force. The much more complete picture of law offered above thus not only gives the lie to the Modern State Conception, but also provides a new way of understanding international law and how it functions. (…)

**Internal Outcasting**

Internal outcasting occurs when the internal bureaucratic structures of a legal system enforce the law without resorting to the threat or use of physical force. Internal outcasting meets the internality condition of the Modern State Conception—it has at least one secondary enforcement link that is addressed to officials of the regime in question. But it does not provide for the use of violence—it does not require or permit officials of the regime to use physical force to enforce the law. For example, minor excommunication in classical canon law entailed separation of a person from the sacraments of the Church. This penalty relied on enforcement by Church officials (internal to the Church) by denying the benefits of membership in the Church (outcasting).

Internal outcasting is used in international law any time a regime sanctions lawbreaking behavior of a State by excluding the State from participation in the treaty bodies. The World Health Organization (WHO) offers an example. The WHO directs and coordinates a vast array of international public health programs aimed at everything from combating infectious diseases (such as HIV/AIDS, swine flu, and SARS) to setting health-related norms and standards to improving access to clean water. State parties have the right to appoint delegations to the World Health Assembly, which is the WHO’s decisionmaking body. The Health Assembly elects its President and other officers, elects the Executive Board of the WHO (which serves as the executive arm of the WHO), adopts its rules of procedure, appoints the WHO Director-General, and establishes committees necessary for the work of the Organization, to name just a few of its enumerated functions. The Health Assembly also has the authority to adopt health regulations and standards that are binding on parties that do not expressly opt out within a specified time period.

The WHO is supported by mandatory contributions by State parties, as well as voluntary donor contributions. The mandatory State party contributions are enforced, moreover, by the prospect of internal outcasting. If a Member “fails to meet its financial obligations to the Organization . . . the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services.” Note that the State party is not ejected from the WHO altogether. Instead, the state party loses the ability to participate as a voting member in the Health Assembly—and thus loses control over the activities of the WHO that the Health Assembly oversees and directs. In other words, the sanction for the offense of nonpayment is exclusion from the benefit of participating in the governance of the institution—an enforcement
action carried out by the Health Assembly itself. Hence, the enforcement regime is internal outcasting: “internal” because the punishment is carried out by officials internal to the regime, and “outcasting” because the punishment constitutes exclusion from some of the benefits of community membership.

**External Outcasting**

This brings us to the final form of law enforcement—external outcasting. To put external outcasting into context, recall that external physical enforcement violates the requirement of the Modern State Conception that the law be enforced by officials of the regime. Internal outcasting, on the other hand, meets the internality requirement but violates the brute force requirement—it does not require or permit officials to use physical force. External outcasting is distinguished from these two forms of law enforcement in that it violates both the internality and the brute force requirements—it is enforced by officials outside the legal regime without the use of physical force at any point in the enforcement chain. (…)

We can now see that the WTO uses external outcasting to enforce its rules. The trade law principles established in the General Agreement on Tariffs and Trade are not enforced internally—that is, by the officials of the WTO itself. Yes, the WTO has a compulsory dispute resolution system. But the decisions rendered by the WTO’s Dispute Settlement Body are enforced through authorized retaliation by the aggrieved State party. It is the States, not the legal regime of the WTO itself, that impose the sanction. Enforcement is thus external to the legal regime. The enforcement regime of the WTO is also devoid of any threat or use of physical force. As we noted earlier, “[t]he WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.” Nor are member states permitted recourse to violence to enforce the rules. Instead, enforcement is limited to specific, approved, retaliatory trade measures taken by the aggrieved parties after a process of adjudication. Like the Icelandic outlaw, the State party found in violation of the General Agreement on Tariffs and Trade simply loses a measure of protection under the legal regime. And just as in medieval Iceland, the threat of losing the protections of the legal regime provides a powerful inducement to compliance.”

**How International Court of Justice Works**


The Court may entertain two types of cases: legal disputes between States submitted to it by them (contentious cases) and requests for advisory opinions on legal questions referred to it by United Nations organs and specialized agencies (advisory proceedings).

**Contentious cases**
Only States (State Members of the United Nations and other States which have become parties to
the Statute of the Court or which have accepted its jurisdiction under certain conditions) may be
parties to contentious cases.

The Court is competent to entertain a dispute only if the States concerned have accepted its
jurisdiction in one or more of the following ways:

- by entering into a special agreement to submit the dispute to the Court;
- by virtue of a jurisdictional clause, i.e., typically, when they are parties to a treaty
  containing a provision whereby, in the event of a dispute of a given type or disagreement
  over the interpretation or application of the treaty, one of them may refer the dispute to
  the Court;
- through the reciprocal effect of declarations made by them under the Statute whereby
  each has accepted the jurisdiction of the Court as compulsory in the event of a dispute
  with another State having made a similar declaration. A number of these declarations,
  which must be deposited with the United Nations Secretary-General, contain reservations
  excluding certain categories of dispute.

Advisory proceedings

Advisory proceedings before the Court are open solely to five organs of the United Nations and
to 16 specialized agencies of the United Nations family.

The United Nations General Assembly and Security Council may request advisory opinions on
“any legal question”. Other United Nations organs and specialized agencies which have been
authorized to seek advisory opinions can only do so with respect to “legal questions arising
within the scope of their activities”.

The World Trade Organization Appellate Body

Another important adjudicator of State-State disputes with the dispute resolution mechanism of
the World Trade Organization. Disputes arise primarily over the legality of barriers to trade.
Disputes between member states of the WTO first have to be referred to the Dispute Settlement
Body, which is the WTO’s General Council in other disguise. If a party wishes to appeal the
ruling of one of the panels, it can take the case to the WTO’s Appellate Body, which was
established in 1998. Each appeal is heard by three members of a permanent seven-member
Appellate Body set up by the Dispute Settlement Body and broadly representing the range of
WTO membership. Members of the Appellate Body have four-year terms. They have to be
individuals with recognized standing in the field of law and international trade, not affiliated
with any government.

International Criminal Court
Another relative recent addition to the world of international courts is the International Criminal Court governed by the Rome Statute. It is the first permanent, treaty-based tribunal that operates independent of the UN system to hear the most serious crimes against humanity. Its predecessors include ad hoc tribunals, such as the Nuremberg tribunal that adjudicated over Nazi atrocities after World War II; the International Criminal Tribunal for the former Yugoslavia (ICTY) and its equivalent for prosecuting the Genocide in Rwanda. The ICC was established in 1998 after 120 countries had signed the Rome Statute (note: the US is not a party to this treaty). Remarkably, the ICC has its own Prosecutor that can issue arrest warrants against perpetrators anywhere in the world. Countries that are parties to the Rome Statute have committed to hand over those sought by the Prosecutor. As of today, 13 cases in seven “situations” have been brought—all of them from Africa.

Arbitration

As noted earlier, arbitration has developed into an important form of alternative dispute settlement in commercial law. Arbitration actually preceded formal adjudication in most areas. It is therefore not surprising to find that arbitration is an important part of dispute settlement between sovereign States. Critically, it has evolved into the main form of dispute resolution for disputes between private parties and sovereigns. The right of private parties to initiate arbitration against sovereign States emanates from treaties between two or more States who vest private parties with such rights. The most important examples are trade and investment treaties. Some are multilateral (NAFTA, see supra); others are bilateral. In the world of investor rights we now have over 2,500 bilateral investment treaties that commit countries around the world pair-wise to protecting foreign investors that do business on their soil. While BITs differ to some extent, most include provisions that allow foreign investors to invoke arbitration outside the country where they invest, for example, under the International Center for the Settlement of Investor Disputes (ICSID).

Note:
The increasing number of adjudicative bodies that have been authorized by nation-States to adjudicate disputes arising out of their conduct poses an interesting puzzle, namely why a nation-State would ever consent to adjudication by an international tribunal. The puzzle resembles the one in the domestic contest, namely why rulers would ever consent to an independent judiciary. One possible answer is that international tribunals do not matter. After all, they have no power to incarcerate a foreign State, seize its property or apply coercive means in other ways. Still, the reputational and outlaw effects of a lost case and the refusal to comply with a judgment may be substantial.

Questions:

1. What is the value of international adjudication?

2. Why do states commit to international adjudication?

3. Which states are more likely to make such commitments? Why
Interface Issues: Domestic vs. International Law

As noted previously, countries have been commonly described as either monist or dualist in terms of their relation to international law. Monist legal systems declare all international law to be part of the domestic legal system once it has been duly ratified or otherwise recognized (as in the case of customary international law) as international law; dualist systems, by contrast, require a transposition of norms of international law into the national legal system in order for them to become enforceable under domestic law.

For a critique of this approach, see, however:

**Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law**
Armin von Bogdandy
ICON, Volume 6, Number 3 & 4, 2008, pp. 397–413

The relationship between the norms of international law and those of domestic law is still understood in terms of concepts developed one hundred years ago: monism and dualism. These concepts are, perhaps, the proudest achievements of the epoch when legal scholarship put enormous effort into becoming an autonomous science in step with the general development of the sciences in the nineteenth century. They reveal the greatness and flaws of that classical paradigm in legal scholarship, usually, but misguidedly, called legal positivism; a better term would be “juridical constructivism.” As often happens with its constructions, the context of their origins has largely been forgotten. Yet, if one compares the contemporary situation with that of one hundred years past, almost every relevant element has changed: the nation-State’s evolution in tandem with the process of globalization; the gradual elaboration of international law; the emergence of general constitutional adjudication; and, above all, positive constitutional provisions on the role of international law within domestic systems. As theories, monism and dualism are today unsatisfactory. Their arguments are rather hermetic, the core assertions are little developed, opposing views are simply dismissed as “illogical,” and they are not linked with the contemporary theoretical debate. As doctrines, they are likewise unsatisfactory since they do not help in solving legal issues.

Monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law. Perhaps they can continue to be useful in depicting a more open or more hesitant political disposition toward international law. But from a scholarly perspective, they are intellectual zombies of another time and should be laid to rest, or “deconstructed.” The general understanding of the relationship between international law and domestic law should be placed on another conceptual basis. (…)

Dualism started with the premise that international norms and domestic norms, in principle, deal with different issues. Yet today, many international norms address domestic issues, which are
also addressed, often, by domestic norms. Except in situations of international administration (Kosovo, Bosnia), any such effect is mediated. The mediation, or “coupling,” can be done by political institutions, on the one side, or by administrative and judicial institutions, on the other. In the latter case, the domestic effect of such international norms is usually dependent on the doctrine of direct effect and the doctrine of consistent interpretation. It is, therefore, safe to say that the deconstruction of the pyramid by way of “coupling” should lead to the exploration and even more elaborate construction of those two doctrines. The coupling of international law and domestic law by means of administrative and judicial institutions rests, to a large extent, on these two doctrines; they decide how “loose” or “tight” or “structural”—to use a term central to systems theory—the coupling will be.

There are few international norms or decisions that clearly claim to be directly effective. The grand exception is European Community law. Since the Van Gend & Loos decision, the European legal order—through the European Court of Justice (ECJ)—claims to determine the domestic position of European law, a claim that the domestic legal systems have largely, though not completely, accepted. The exception posed by Community law confirms the rule that it is up to the domestic legal order to decide on the position and the effect of an international norm within its territory. (…)

The issue of direct effect should not be argued on the criterion of determinedness and should not be regarded as technical. At least from the perspective of constitutionalism, it appears preferable to devise an answer based on the balancing of constitutional principles such as international cooperation, self-determination, subsidiarity, legal certainty, and legal equality. In this sense, the deconstruction of the pyramid should go hand in hand with a new construction of the doctrine of direct effect.

**Interface of multiple international legal regimes**

Important interface problems arise not only in the “domestic/international” (where they are basically vertical), but also in what we may call the “international/international” setting, where they are horizontal. Different international legal orders may purport to govern a single relationship or transaction, and they may do so inconsistently, creating dilemmas for affected States and private parties alike. The competing legal orders also find themselves under pressure. Consider the Kadi case of the European Court of Justice, which addressed the question of whether a regulation issued by the UN Security Council to freeze all assets of alleged terrorists was binding without regard to the compatibility of this mandate with EU law. When the UN Security Council issued its mandate, the EU Commission complied by promulgating a European regulation which, according to EU law, is directly binding on the Member States. Yaasin Abdullay Kadi and Al Barakaat International Foundation, whose bank accounts were frozen as a consequence, claimed that the EU regulation violated basic norms of due process recognized by EU law and was accordingly invalid and unenforceable.

The case poses several interesting questions: Does UN regulation “trump” EU Law? Does a European Court have the power to review the legality of a UN regulation? Under international law? Under EU law? How can a potential conflict between a legal obligation to implement a UN
regulation and provisions of EU law possibly be reconciled?

**Joined Cases C-402/05 P and C-415/05 P**

Yassin Abdullah Kadi and Al Barakaat International Foundation

v

Council of the European Union

and

Commission of the European Communities

(..)

The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. An international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system, observance of which is ensured by the Court by virtue of the exclusive jurisdiction conferred on it by Article 220 EC, jurisdiction that forms part of the very foundations of the Community.

With regard to a Community act which, like Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with jus cogens, but rather to review the lawfulness of the implementing Community measure.

Any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms has special significance. Respect for human rights is therefore a condition of the lawfulness of Community acts, and measures incompatible with respect for human rights are not acceptable in the Community.

The obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it
is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.

It is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. Such immunity from jurisdiction for a Community measure, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of that Charter, cannot find a basis in the EC Treaty. Article 307 EC may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, which include the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) EU as a foundation of the Union. If Article 300(7) EC, providing that agreements concluded under the conditions set out therein are to be binding on the institutions of the Community and on Member States, were applicable to the Charter of the United Nations, it would confer on the latter primacy over acts of secondary Community law. That primacy at the level of Community law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part.

The Community judicature must, therefore, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the regulation at issue, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.

The Community must respect international law in the exercise of its powers and a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

In the exercise of its power to adopt Community measures taken on the basis of Articles 60 EC and 301 EC, in order to give effect to resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations, the Community must attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level, a responsibility which, under Chapter VII, includes the power to determine what and who poses a threat to international peace and security and to take the measures necessary to maintain or restore them.

The Charter of the United Nations does not, however, impose the choice of a predetermined model for the implementation of resolutions adopted by the Security Council under Chapter VII,
since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order. (…)

The principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention on Human Rights, this principle having furthermore been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union.

Observance of the obligation to communicate the grounds on which the name of a person or entity is included in the list forming Annex I to Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban is necessary both to enable the persons to whom restrictive measures are addressed to defend their rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in their applying to the Community judicature and also to put the latter fully in a position in which it may carry out the review of the lawfulness of the Community measure in question which is its duty under the EC Treaty.

Given that those persons or entities were not informed of the evidence adduced against them and having regard to the relationship between the rights of the defence and the right to an effective legal remedy, they have also been unable to defend their rights with regard to that evidence in satisfactory conditions before the Community judicature and the latter is not able to undertake the review of the lawfulness of that regulation in so far as it concerns those persons or entities, with the result that it must be held that their right to an effective legal remedy has also been infringed.

The importance of the aims pursued by a Community act is such as to justify negative consequences, even of a substantial nature, for some operators, including those who are in no way responsible for the situation which led to the adoption of the measures in question, but who find themselves affected, particularly as regards their property rights.

With reference to an objective of public interest as fundamental to the international community as the fight by all means, in accordance with the Charter of the United Nations, against the threats to international peace and security posed by acts of terrorism, the freezing of the funds, financial assets and other economic resources of the persons identified by the Security Council or the Sanctions Committee as being associated with Usama bin Laden, members of the Al-Qaeda organisation and the Taliban cannot per se be regarded as inappropriate or disproportionate. In this respect, the restrictive measures imposed by Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban constitute restrictions of the right to property which may, in principle, be justified.
The applicable procedures must, however, afford the person or entity concerned a reasonable opportunity of putting his or its case to the competent authorities, as required by Article 1 of Protocol No 1 to the European Convention on Human Rights.

Thus, the imposition of the restrictive measures laid down by that regulation in respect of a person or entity, by including him or it in the list contained in its Annex I, constitutes an unjustified restriction of the right to property, for that regulation was adopted without furnishing any guarantee enabling that person or entity to put his or its case to the competent authorities, in a situation in which the restriction of property rights must be regarded as significant, having regard to the general application and actual continuation of the restrictive measures affecting him or it.

In so far as a regulation such as Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban must be annulled so far as concerns the appellants, by reason of breach of principles applicable in the procedure followed when the restrictive measures introduced by that regulation were adopted, it cannot be excluded that, on the merits of the case, the imposition of those measures on the appellants may for all that prove to be justified. (…)