

# Why and How to Study “Transnational” Law\*

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*A child is injured in California by a product manufactured  
in Germany.*

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\* I dedicate this article to my late friend and personal mentor, Professor Rhonda Copelon, a role model for transnational legal justice. Beginning as a domestic women’s rights advocate in the United States, Rhonda litigated the path-breaking international human rights case of *Filártiga v. Péna-Irala*, 630 F. 2d 876 (2d Cir. 1980), which recognized the right, under the Alien Tort Claims Act, 28 U.S.C. § 1350, of foreign nationals to litigate human rights claims in United States courts. Rhonda then went on to be a champion of women’s rights (particularly in the area of domestic violence) around the world, participating in many international conferences, conventions for treaty drafting, and litigation in international tribunals. She founded an international women’s human rights clinic at CUNY Law School. Always committed to social justice, Rhonda Copelon exemplified what all justice seekers should learn—justice may be struggled for, sought, and achieved in many different forums throughout the world. With multiple jurisdictions we can achieve multiple legal rights. Dennis Hevesi, *Rhonda Copelon, Lawyer in Groundbreaking Rights Cases, Dies at 65*, N.Y. TIMES, May 8, 2010, at A25; see also *Law Professor, Rights Activist*, L.A. TIMES, May 16, 2010 at A45. Rhonda and I were Fulbright Scholars together in Chile in 2007 where, as always, she challenged my work in conflict resolution and mediation to achieve the justice she sought through advocacy and litigation. Her work shall continue to inspire many for years to come.

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*A British citizen conspires to blow up a plane destined for New York.*

*A multi-national corporation discharges a high-level employee, who is based in three countries, when he holds a press conference to denounce his company's environmental and labor law violations.*

*A Japanese company with manufacturing plants in California seeks counsel from its Japanese lawyers in Orange County.*

*An American commits a murder and flees to a European country which prohibits extradition to any nation with the death penalty.*

*A movie star and noted political activist brings a libel claim in the United Kingdom, seeking damages and an injunction to prevent publication of an article, written in the United States, which describes her childhood in less than flattering terms.*

*A foreign government announces it will turn off internet access to a particular browser, owned and managed by an American company.*

*Three major corporations from different countries agree on a joint venture to construct a major public works project in a developing nation (with financing supported by private investment and a grant from the World Bank) and then have several disputes about the payment schedules and quality of goods in the contract.*

*The United States incarcerates and "mistreats" (tortures) detainees captured during the post September 11th period in various offshore locations and claims neither American law nor international law (the Geneva Conventions) apply to either procedural rights or substantive claims about their treatment.*

*A woman, fearing domestic violence from her military officer husband in another country, seeks political asylum in the United States.*

*A charitable benefactor seeks to establish schools for young girls in thirteen different Asian and Middle Eastern countries and recruits teachers in 30 different countries.*

*An American member of a political group posts a racist and hateful comment on his blog, which is blocked by the*

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*French government.*

*A Swiss pharmaceutical company perfects a pill to prevent implantation of a fertilized egg which is legally sold in Canada and made available to Americans through mail or internet ordering, though it is not available for sale in the United States.*

*Fearing a military coup by a violent group of “insurgents” or “freedom fighters,” thousands of citizens of a Central American country flee from their country into both neighboring countries and also attempt to head north to Mexico, the United States, and Canada, where they are followed by armed members of their own country.*

*A ballet company from one country travels to another and is told by representatives of the host country that its female dancers may not wear their sheer costumes at the scheduled performance.*

*American and Mexican fishermen dispute tuna fishing rights off the coast of San Diego and Tijuana, as the American and Mexican governments seek to cooperate by building water and waste treatment plants on both sides of the border that will serve the larger bi-national “metropolitan” area.*

*A gay American couple, married in Spain (or Canada or Argentina), seeks marital benefits in the United States.*

I. WHY WE MUST STUDY TRANSNATIONAL LAW AND LEGAL INSTITUTIONS

All of these scenarios are based on events which have actually occurred in recent years. Some directly involve American citizens (whether individuals, corporations, or other entities) and some do not. Some are situations or problems that affect only private parties; others include state actors or affect the implementation of government policies or laws of various nations. Some of these situations involve individual or group efforts, across borders, to engage in profit seeking activities. Others involve poverty reduction, economic aid, or other improvement of the human condition, whether material or cultural. Some of this activity involves economic and business interests (formerly thought of as primarily “private” interests). Others of these situations involve human rights claims derived from legal undertakings or treaties that transcend national boundaries but are initially often a matter of “state” action (e.g., signing an international or regional treaty). Some of these situations involve both state and private

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 action on the same issue or site. Many of these situations involve multiple legal jurisdictions including local, federal (state or provincial), national, regional, and international levels of possible regulation or dispute resolution. Some involve cultural differences, but violations of cultural norms or taboos may also have legal implications. All of these situations invoke legal issues that transcend legal (or sovereign) boundaries. This is the modern world of human activity, facilitated, regulated, sometimes thwarted, and often affected, by laws that “cross borders” in order to effectuate their purposes.

The modern law student, even at a public state law school, like the University of California Irvine, School of Law (UCI), must engage in what we have termed “international legal analysis” (in our required first-year curriculum) in order to be an effective lawyer in the twenty-first century, regardless of where that student might ultimately practice law (or not!). Goods, services, ideas, and people cross legal borders and boundaries in the millions each day during modern human commerce and communication. When and how transfers of goods, services, people, and ideas should occur are the subject of much rule-making and policy consideration at a variety of different levels of regulation. How these transfers actually occur may or may not conform to national, regional, or international rules and regulations.

Lawyers of the twenty-first century must come to understand that, with respect to most of what we do or want to do, we are now in an interdependent world of manufacturing, distribution, consumption, and promotion of creative action, as well as, sometimes sadly, destructive sites of interaction. Even if national legal systems wanted to control and cabin all that happened within their borders, it is now true, as the poet W.B. Yeats said, “the center cannot hold.”<sup>1</sup> Goods, services, people, and ideas migrate and actors may attempt to choose their intended sites of action but not their points of impact (with varying degrees of legal liability).

This recognition of our legally “migratory” society, or “globalization”<sup>2</sup> as others controversially label it, requires some

<sup>1</sup>. THE VARIORUM EDITION OF THE POEMS OF W.B. YEATS (Peter Allt & Russell Alspach eds., 1965).

<sup>2</sup>. WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE 14 (2009); See Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARVARD L. REV. 1528 (2008); See also Paul Schiff Berman, *Global Legal Pluralism*, 80 SO. CAL. L. REV. 1155 (2007); Duncan Kennedy, *Three Globalizations of Law and Legal Thought, 1850-2000* in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, (Alvaro Santos & David M. Trubek eds., 2006); THOMAS FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE 21ST CENTURY

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 reorientation of conventional legal education. In this essay I review some of the leading issues in studying law that is not "primarily" American law, whether federal or state, local or international, and discuss how these issues will be taught at our new law school.<sup>3</sup>

As Professor Peter Strauss of Columbia Law School has noted, with respect to McGill University Law Faculty's new program to teach "transsystemically" (by teaching both common and civil law concepts together),<sup>4</sup> we may be in a "new Langdellian moment" in legal education. At some point shortly after the Civil War, study in American law schools moved from the study of local (state) law to the more "national" law, use of the Socratic method, which focused on legal concepts, and inductive case study, rather than jurisdiction-specific laws and didactic lectures. Harvard, and then Columbia and Yale graduates who were taught in this "transsystemic" (beyond states) national law were considered better trained to be lawyers in the newly industrial society in which railroads and goods crossed state lines (even before federal agencies were created to deal with both federal and inter-state commerce issues). This new national legal education changed both substantive teaching and the method of instruction (generalized conceptual learning of the Socratic method). Strauss suggests (and I agree) that we are now in a similar "moment" of change as we recognize that law may be even more "transsystemic" (beyond national boundaries), requiring knowledge of law and general principles beyond domestic/national law, and beyond our own (common law vs. civil law) system. I hope this will also be a moment that unleashes new methods of teaching as well. For me, the "transnational" focus, linked to experiential and multi-disciplinary methods of study, provides the promise of teaching the modern lawyer how to be a creative legal problem solver, learning how to use lawyering skills, and a great possible variety of legal (and non-legal!) solutions to different kinds of social, legal, and economic problems.<sup>5</sup>

(2005).

<sup>3</sup>.Of course UCI is not the first law school to consider these issues. In the last few years several law schools, including Harvard and Georgetown (where I came from), have put international law in the first-year curriculum, *see infra* Section III, as many other law schools have done or are doing. *See Symposium, Integrating Transnational Legal Perspectives Into the First Year Curriculum*, 24 PENN. ST. INT'L L. REV. 735 (2006).

<sup>4</sup>.Peter Strauss, *Transsystemia-Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?*, 56 J. LEGAL EDUC. 161 (2006), *reprinted in* 24 PENN. ST. INT'L L. REV. 763 (2006).

<sup>5</sup>.There is a growing emphasis on problem-based (not case-based) learning in

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The study of law that is not primarily “American” falls into different categories, even as those categories are themselves dynamically changing. Traditional conceptions of international law most often contemplate treaties (*formal* signed documents and obligations) or *customary practices* (less formal but recognized by courts and other bodies) that bind states or sovereigns and are often known as *public international law* (or the relations between post-Westphalian<sup>6</sup> states). Another recognized conventional category is *private international law* which contemplates that private entities and individuals will make contracts, deals, and transactions with each other across borders that may then require legal enforcement and have complex issues of *conflicts or choices of laws* (whose law applies if several different jurisdictions are affected by the transaction or dispute).<sup>7</sup> Public law is enforced by formal institutional bodies (like the International Court of Justice at The Hague) or, more often, by diplomatic, political, and negotiated processes. Private law is enforced by formal international litigation in domestic national courts, and now, most often, by private (international commercial arbitration panels) or hybrid (the International Centre for Settlement of Investment Disputes) arbitral fora. Thus, conventional international law has both complex substantive and procedural dimensions.

Private international law is probably even older than public international law in the earliest acts of trade and commerce across “political” and legal boundaries, and its earliest regulation in Roman, medieval and other forms of “transsystemic”<sup>8</sup> regulation of commerce and trade. Much formal public international law has been enacted following the end of World War II. This modern public international law

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legal education generally. See PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS* (2010); *Graduation Checklist*, Harvard Law School, first-year required course, Problem Solving Workshop, <http://www.law.harvard.edu/academics/registrar/policies-forms/graduationchecklist2009-10.pdf> (Sep. 7, 2010, 11:37 AM).

<sup>6</sup>.Modern conceptions of the State are said to date to the Treaty of Westphalia of 1648 (ending the Thirty Years War and creating legal conceptions of sovereign States) even though most modern states, including the United States, Italy and Germany did not emerge until sometime later.

<sup>7</sup>.See *generally* BARRY CARTER ET AL., *INTERNATIONAL LAW* (5th ed. 2007).

<sup>8</sup>.This term “transsystemic,” now used by McGill Law School to describe its own “transsystemic” legal education program (both civil and common law studied together, see Peter Strauss, *supra* note 4), may be a bit anachronistic for older legal history. Roman law was not really transsystemic—it transcended physical and cultural borders, but, like more modern colonial legal systems, when “imposed,” it becomes “the” legal system.

201x] *Why and How to Study “Transnational” Law* 107 includes the Charter of the United Nations (UN), many international treaties, the Bretton Woods agreements, and the many modern international and supranational institutions created by these agreements, including the International Court of Justice (in The Hague)(ICJ), the World Bank, the International Monetary Fund, the World Trade Organization (WTO) and most recently, the International Criminal Court (ICC).<sup>9</sup> Other “transnational” bodies of legal action include regional organs such as the European Council, the European Union, the Organization of American States, Mercosur,<sup>10</sup> NAFTA,<sup>11</sup> ASEAN,<sup>12</sup> ANZUS,<sup>13</sup> and the African Union, which vary in their attempts to regulate, on a regional basis, economic and trade relations, or more “thickly” developed regulations for more social legislation (as the European Union has accomplished in a variety of areas including employment, consumer, and health matters). Separate from economic relations, both international and regional treaties and regulations on a variety of human rights issues have led to new regional, multi-national tribunals and institutions, like the European Court of Human Rights in Strasbourg (separate from the European Court of Justice in Luxembourg) and the Inter-American Court of Human Rights, and have led to new and overlapping jurisdictions for adjudicatory purposes. In traditional legal terms, questions about the relations of these tribunals to each other and to the courts of nation-states is complex and has been characterized as both “dialectic” and “dialogic” if not “determinative.”<sup>14</sup>

#### A. What is “Transnational” Law?

Beyond these more conventional understandings of “international” (inter-nation) law are newer conceptions of lawmaking that cross borders. We speak now of “globalization” studies, “transnational” law (law that transcends or crosses borders but may not be formally enacted by states) and comparative law, which seek to trace how laws have influence, if not total power, in places other than those where they are

<sup>9</sup>.Rome Statute of the International Criminal Court, art. 1, July 17, 1998, 2187 U.N.T.S. 3, available at <http://untreaty.un.org/cod/icc/statute/rome.htm> (entered into force in 2002 without the United States).

<sup>10</sup>.Mercado Comun del Sur, March 26, 1991, 30 I.L.M. 1041 (Treaty of Asuncion 1991).

<sup>11</sup>. North American Free Trade Agreement.

<sup>12</sup>.Association of Southeast Asian Nations.

<sup>13</sup>.Australasian New Zealand US Security Treaty.

<sup>14</sup>.Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301, 315-18 (2007); Robert Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2051-118 (2004).

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 initially enacted. Beyond formal law enacted by states are a variety of more “informal” forms of legal activity, including “private” tribunals, like the International Chamber of Commerce in Paris, that administer private international commercial arbitration proceedings; the International Centre for Settlement of Investment Disputes (ICSID), a hybrid arbitration body which decides disputes between private investors and nation-states;<sup>15</sup> and the thousands of informal “networks” that have developed among both intergovernmental and non-governmental (NGO) bodies to deal with specific legal and social issues, including global terrorism, national security, environmental and climate change, monetary and banking policy, women’s<sup>16</sup> and children’s rights, health, Internet, intellectual property, labor, food and drug safety, and migration policies, and a host of other “transnational” issues. Scholars now talk of a network of “global governance” as distinguished from global government of more formal international institutions.<sup>17</sup>

Thus, international or transnational law might not even be formal “law,” as enacted by a state or formal governmental body. Transnational law, like formal international law, has customary practices, norms, and patterns of behavioral regulation that are broader than, and perhaps, even more complex than formal law. Indeed, several scholars<sup>18</sup> have made the claim that most of what is meant by “globalization” actually occurs at “sub-national” levels, such as religious rules and laws that affect millions of people across national borders, sub-national governmental groups of policy making, political affinity and activist groups (including environmentalists and many “anti-globalists”),<sup>19</sup> and reform groups that seek to effectuate laws and practices that are not only “national.” In our modern age, alliances for security and military purposes, including both formal public alliances, and the private undertakings of large multi-national security corporations also blur the lines of the nation-state as the principal (or legal)

<sup>15</sup>. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965 17.1 U.S.T. 1270, 575 U.N.T.S. 159 (established the International Centre for Settlement of Investment Disputes); Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 L. & ETHICS HUM. RTS. 47 (2010), available at <http://www.bepress.com/lehr/vol4/iss1/art4>.

<sup>16</sup>.See, e.g., SUSAN DELLER ROSS, *WOMEN'S HUMAN RIGHTS: THE INTERNATIONAL AND COMPARATIVE LAW CASEBOOK* (2009).

<sup>17</sup>.ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>18</sup>.TWINING, *supra* note 2, at 3; SLAUGHTER, *supra* note 17.

<sup>19</sup>.See DAVID HELD & ANTHONY MCGREW, *GLOBALIZATION/ANTI-GLOBALIZATION: BEYOND THE GREAT DIVIDE* (2d ed. 2007).



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 actor.<sup>20</sup> And many critics of modern globalization developments claim that the most powerful transnational actors are private multi-national corporations who attempt to avoid regulation (at national, supranational or international levels).<sup>21</sup>

Transnational law (or legal movements, such as the “anti-globalization” movement)<sup>22</sup> is the study of legal phenomena, including lawmaking processes, rules, and legal institutions, that affect or have the power to affect behaviors beyond a single state border. In California that definition applies to a great deal of our ordinary behavior—consumption of products made all over the globe, business contracts, leisure activities, communication (Internet, cell phones and other electronic devices), technology, medical treatment and research, entertainment (international intellectual property), and in many cases, health, employment, education, and criminal issues as well, not to mention the obvious immigration and migration issues that are particularly prominent in the region.

As a thought experiment, take a look at the front page of any “local” newspaper and see how many stories invoke “transnational legal issues.” In today’s (August 4, 2010) *Los Angeles Times*, for example, there are stories about the British Petroleum oil spill in the Gulf of Mexico (involving a British company in US waters with environmental, economic, employment and energy liability issues involving many American states, and corporate headquarters in the United Kingdom that affect Mexico and the Caribbean), multi-national jockeying for power (and jobs and influence) in Iraq following an announcement that the United States military withdrawal would soon be accomplished, and a proposed pit-mine (owned by a multi-national partnership involving the United States, Canada and the United Kingdom) in Alaska threatening salmon fishing boat interests (affecting both American and Canadian commercial fishing interests, as well as indigenous peoples protected by national, tribal and international laws) and multi-national environmental interests, as well as employment interests for locals and indigenous people.<sup>23</sup> Modern law students, who will most likely specialize in practice, cannot learn about such regular legal staples as contracts, torts,

<sup>20</sup>Jody Freeman & Martha Minow, *Introduction to GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* (Jody Freeman & Martha Minow eds., 2009).

<sup>21</sup>Raising, for example, critical questions about whether the Geneva Conventions against torture apply to private security enterprises. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146 & 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>22</sup>. See, e.g., JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003).

<sup>23</sup>.L.A. TIMES, Aug. 4, 2010, at A1.

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 employment law, intellectual property and technology law, environmental law, banking, commercial, corporate, or even constitutional law, without studying “transnational” aspects of the legal issues they will likely face in practice.<sup>24</sup> Indeed, with all of the immigration and migration into the United States (and increasingly, back out again), even such “local” subjects as family law (child custody, as well as spousal support), trusts and estates (inheritance), tax and property ownership often have “multi-national” dimensions.

The older study of comparative law<sup>25</sup> has asked both scholars and practitioners of law to look at patterns or families of legal solutions to common legal problems and to note both differences and similarities. While the old families of civil, common, socialist, and “Other” systems of law (read as Asian, African, or colonial, indigenous or hybrid) may be “converging” (or not) or further disaggregating (e.g., Islamic, Shar’ia<sup>26</sup> or religious law, as well as sub-national legal systems of semi-independence),<sup>27</sup> tracing the different treatments of common legal problems provides at least one useful methodological point of entry for understanding and describing the more modern reality of “legal pluralism.” While scholars debate whether there can be legal transplants<sup>28</sup> from one legal system to another or what the cultural and legal effects are of “copy-paste” lawmaking, the rigors of comparative law, as both legal and cultural analysis, has come into its own as various bodies

<sup>24</sup>.And that includes both practice in the U.S., see Laurel Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT’L L. & BUS. 527 (2008), and the practice of U.S. lawyers in global or international law firms. See also Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL’Y INT’L BUS. 1093 (2000) (describing the international expansion of U.S. law firms through foreign offices); D. Daniel Sokol, *Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Future Study*, 14 IND. J. GLOBAL LEGAL STUD. 5, 10 (2007).

<sup>25</sup>.K. ZWEIFERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., Clarendon Press 3d ed. 1998); see generally H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD (3d ed. 2010).

<sup>26</sup>.Although Shar’ia law is derived from the text of the Qur’an (with multiple schools of interpretation), its enactment into positive law varies in the 57 countries that are formally Muslim. See, e.g., WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005).

<sup>27</sup>.Consider the devolution of legal authority over such matters as taxation or education in such regions of the world as the Basque and Catalonia regions of Spain, Scotland and Wales in the UK, or language policy in Canadian provinces, see, e.g., W. KYMLICKA & A. PATTEN, LANGUAGE RIGHTS AND POLITICAL THEORY (2003); Wallonia and Flanders in Belgium, see, e.g., R. Mnookin & A. Verbeke, *Persistent Nonviolent Conflict with no Reconciliation: The Flemish and Walloons in Belgium*, 72 LAW & CONTEMP. PROBLEMS 151 (2009).

<sup>28</sup>.ALAN WATSON, LEGAL TRANSPLANTS (2d ed. 1993); Pierre LeGrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111 (1997).

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 debate whether the unification of law across legal and cultural systems is necessary, desirable, or possible.<sup>29</sup> Other scholars have suggested that in comparative studies it is not enough to look only at formal law. How law is used or “assimilated” in a culture will depend on political, historical, social and cultural factors. Professor Victor Ramraj, for example, has argued that even if constitutional provisions look the same in different constitutions they will not have the same meaning in societies where “constitutional values” (such as true separation of powers or checks and balances) are not yet truly “embedded” in the political, not only legal, culture.<sup>30</sup>

### *B. The Importance of Studying Transnational Law*

Below I explore the importance of understanding the terminological differences in these forms of “transnational” law, and the “international” and cultural legal analysis that distinguishes this form of law study from domestic law study. At the outset, however, it is important to point out why we should study these complex forms of legal regulation and action, even as they may complexify the meaning of law for neophytes to the profession.

First, studying transnational law is *necessary*. As more fully elaborated below, few transactions or disputes remain totally domestic in their effects and regulation.<sup>31</sup>

Second, studying transnational law, or what we at UCI are calling “international legal analysis,” is a more sophisticated form of the old saw “learning to think like a lawyer.” Law is enacted in many ways, including court decisions (doctrine and precedent), legislation, resolutions (e.g., of the UN Security Council) and rule-making. It can be enacted privately in law offices, in private arbitration hearings, in private contracts, and in meetings of international bodies, whether public and formal, or private and informal. The objectives of law in an international or transnational system may be broader, deeper, and more ambitious, but their enforcement is strikingly different from—both weaker (no final court) and stronger (the

<sup>29</sup>. See, e.g., UNIDROIT Principles of International Commercial Contracts, ALI Restatement of Contracts, Draft Frame of Reference for European Contract law, ALI-UNIDROIT Principles of Transnational Civil Procedure.

<sup>30</sup>. Victor Ramraj, *Constitutional Tipping Points: Sustainable Constitutionalism in Theory and Practice*, 1(2) TRANSNATIONAL LEGAL THEORY 191 (2010).

<sup>31</sup>. See Laurel S. Terry et al., *Transnational Legal Practice*, 43 THE INTERNATIONAL LAWYER 943 (2009); Laurel S. Terry, *The Legal World is Flat: Globalization and its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT’L L. & BUS. 527 (2007-2008).

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 use of force)—the enforcement of domestic law.<sup>32</sup> Layers of analysis of the various processes of lawmaking and enforcement broaden the scope of what law students (and lawyers) study and need to know. There are a greater variety of laws (cases, codes, statutes, directives, administrative rulings, resolutions, awards, judgments, compromis), legal materials, documents, and procedural rules to learn in international analysis, but there are also more interpretive tools, forms and metrics of analysis to learn, including cultural, sociological, historical, and linguistic,<sup>33</sup> as well as legal. Thus, international legal analysis teaches the importance of *pluralism and multi-disciplinarity in legal analysis* and multiple interpretative strategies.

*Legal pluralism* in international analysis is itself plural. There is *doctrinal (substantive)* legal pluralism in the different outcomes that different legal systems use to solve legal problems (e.g., what constitutes an enforceable contract, what losses are compensable in various forms of torts, who is an heir?). There is *methodological pluralism* in the different ways that law is itself generated (code or common law, legislative or decisional) and interpreted. And finally, there is *procedural or processual pluralism* in the different processes and institutions that are created within and between systems to make, interpret, and enforce law. The study of *international analysis* requires a broadening, expanding, and flexibility of mind to simultaneously consider and learn multiple forms of legal analysis. Thus, while it has been said that the study of law sharpens one's mind by narrowing it,<sup>34</sup> the study of transnational law may actually open one's mind by widening it.

Third, learning about the *pluralism* of international legal analysis, including different *solutions* to the same legal problem (e.g., what makes a contract legally binding,<sup>35</sup> what damages are appropriate for physical, emotional, and

<sup>32</sup>.See Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004).

<sup>33</sup>.Pierre Le Grand, "Il n'ya pas de hors de texte;" *Intimations of Jacques Derrida as Comparativist-at-Law* in DERRIDA AND LEGAL PHILOSOPHY (P. Goodrich, F. Hoffman, Michel Rosenfeld and C. Vismann eds., 2008). How appropriate it is here to cite Derrida at UC Irvine, which was his sometime home in the study of literary theory and comparative literature. Jacques Derrida was a Professor of Humanities at UC Irvine from 1986 until his death and has donated his archives to the University.

<sup>34</sup>.Oliver Wendell Holmes, Jr., *A Man and the Universe* [Brown University Commencement Address 1897], in THE MIND AND FAITH OF JUSTICE HOLMES 36 (Max Lerner ed., 1943) (attributing quote to Edmund Burke).

<sup>35</sup>.Not consideration in civil law!

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 monetary losses), different *methods* of analysis (code reasoning, common law reasoning),<sup>36</sup> as well as understanding different legal *processes* (courts vs. tribunals, arbitration vs. mediation, consensual vs. commanded solutions), teaches us that *law is chosen, not given*. Different legal cultures and societies may choose different legal solutions and mechanisms for the regulation of human conduct. That first year law students should learn early (and often) about the *contingency* (historical, political and social) of law is, for me, an essential part of any rigorous legal education.<sup>37</sup> Law is, as one legal theorist has called it, “plastic”<sup>38</sup> and flexible enough to be tailored to the needs of particular societies, as goals, enactments, and enforcement mechanisms change and vary with human needs as socially constructed by different social units over time.

Fourth, students of international legal analysis will learn what domestic lawyers must learn—the relation of different levels of authority to each other. International law is both *horizontal and vertical in authority*, different from the strictly hierarchical form of authority of courts in both our federal and state systems of justice. There are no “higher authorities” in international law with the authority of the United States Supreme Court (the International Court of Justice has mostly consensual, not compulsory, jurisdiction),<sup>39</sup> but there are international institutions with appellate structures (e.g., the World Trade Organization Dispute Settlement Body), and there are many legal issues about which there are both intra-systemic (the European Court of Human Rights and its effects on national law within Europe) and inter-systemic decisions and rulings (e.g., WTO, ICSID, and international commercial arbitration<sup>40</sup> effects on national courts, government, private policy and contracting) that have to be interpreted, assimilated and synchronized (or not!). As one of the currently contested

<sup>36</sup>.ZWEIGERT & KÖTZ, *supra* note 25, ch. 18, at 7.

<sup>37</sup>.Carrie Menkel-Meadow, *Taking Law and \_\_\_\_\_ Really Seriously: Before, During, and After the “Law,”* 60 VAND. L. REV. 555, 556-57 (2007).

<sup>38</sup>.ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY* (1977); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1976).

<sup>39</sup>.RICHARD J. GOLDSTONE & ADAM M. SMITH, *INTERNATIONAL JUDICIAL INSTITUTIONS* (2009); J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 128-130 (4th ed. 2005).

<sup>40</sup>.For me, as a proceduralist and legal ethicist, there is also the important question of how procedures, processes and ethics rules are developed in multi-national and multi-cultural systems. See, e.g., Carrie Menkel-Meadow, *Are Cross-Cultural Ethics Standards Possible or Desirable?*, in *INTERNATIONAL ARBITRATION IN MÉLANGES EN L’HONNEUR DE PIERRE TERCIER* 883-904 (P. Gauch, P. Picchonaz, F. Werro, eds., 2008). See also *ETHICS AND INTERNATIONAL AFFAIRS: EXTENT AND LIMITS* (Jean-Marc Coicaud & Daniel Warner, eds., 2001).

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 issues of international analysis, scholars and practitioners debate whether there are too many new international tribunals, which are fractionating and dispersing international legal authority, or whether more international tribunals will increase the amount of international law and its overall efficacy in promoting world peace, economic well-being, and human rights.<sup>41</sup> In my field of specialization, international dispute resolution, we look at dispersed and differentiated legal processes in the forms of both formal institutions for prosecution or legal enforcement (e.g., the international criminal tribunals such as Nuremberg, Former Yugoslavia and Rwanda and now the International Criminal Court) and newer forms of tribunals, such as Truth and Reconciliation Commissions (e.g., South Africa, Argentina, and Chile) that offer both different goals (reconciliation) and outcomes (apologies and restorative justice).<sup>42</sup> How these multiple processes and institutions, often working within the same jurisdictions at different levels, may be coordinated or reconciled (or not)<sup>43</sup> is one of the cutting edge issues in our field.

Finally, for me, a modern cosmopolitan,<sup>44</sup> international legal analysis teaches legal *humility*. With all the emphasis on American exceptionalism in studies of the Constitution, the Uniform Commercial Code, or any of the American Law Institute's Restatements, international analysis shows us how others have thought differently about legal problems and what kinds of rights and remedies we might enact to achieve our various goals. We learn when we can do things on our own and when we need others, whether human beings or legal entities. Thus, international and transnational law also teach us about our human *interdependence*. At a normative level,

<sup>41</sup>.YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003); JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* 123 (2003).

<sup>42</sup>.Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work?*, 3 ANN. REV. L. SOC. SCI. 161 (2007); PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITIES* (2001).

<sup>43</sup>.As the International Criminal Tribunals for the Former Yugoslavia and Rwanda come to a close, there is criticism of both these courts that they were biased or tilted toward or against particular parties within the contested countries and have adversely affected local politics. Newer tribunals have sought more of a balance between international and local judicial processes. See JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS?* (2006).

<sup>44</sup>.I am the child of European refugees from World War II atrocities in Germany and was raised with both European and American sensibilities. Cosmopolitanism itself has become a contested subject of philosophical and political inquiry. See, e.g., MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 6-9 (1993); Robin West, *Is the Rule of Law Cosmopolitan?* 19 QUINNIPIAC L. REV. 259 (2000).

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 international analysis shows us how we might act together to make a better and fairer world for as many of our fellow humans as possible. Justice is not “just for us” (Americans) but for the whole world.<sup>45</sup>

## II. WHAT WE MUST STUDY IN TRANSNATIONAL LAW

### A. Formal Law and Interpretation

Traditional study of international (inter-state) law focuses on the formal legal study of treaties and customary law (legal norms so pervasive they become binding on even non-signatory states). Conventional legal documents will be studied including international treaties, international tribunal regulations, policies and procedures, and the judgments, decisions, awards, decisions or “cases” of international tribunals. Study of cases from international tribunals immediately raises questions of systemic interpretation. Are decided cases of international tribunals to be treated as common law case precedent or as civil law non-precedential awards or “simple” judgments?<sup>46</sup> And what are the effects of international treaties or cases on domestic tribunals?<sup>47</sup> Thus, increasingly, almost any study of law which crosses “systems” compels a comparative analysis—whose form of legal reasoning will be used? A common law analysis of case precedent and stare decisis? A civil law perspective on the codified text? Or some new hybridized understanding of what “international” or transnational law is? And, how much should any interpretation of law look at similar laws or legal issues from other systems (whether horizontal—another sovereign—or vertical—an international or regional tribunal)?

<sup>45</sup>.AMARTYA SEN, *THE IDEA OF JUSTICE* (2009). See also Cesar Arjona, Arif Jamal, Carrie Menkel-Meadow, Victor Ramaj & Francisco Satiro, *Senses of Sen: Review Essay*, 6 INT’L J. L. CONTEXT (forthcoming 2011).

<sup>46</sup>.Under international law interpretation principles (and the statute of the International Court of Justice), cases are not precedential in the Anglo-American conception of stare decisis. Nevertheless, increasingly international tribunals of all kinds, including courts and private arbitration panels read, cite and use the reasoning, judgments, awards and opinions of other cases so that what has full precedential authority is itself increasingly variable.

<sup>47</sup>.In recent years, there has been extensive debate about what role the use and interpretation of “foreign” or international law should have in American constitutional jurisprudence. See, e.g., VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Avena & Other Mexican Nationals*, 2004 I.C.J.12 (2004); *Medellin v. Texas*, 552 U.S. 491 (2008); *Lawrence v. Texas*, 539 U.S. 558 (2003). See also *A Respect for World Opinion*, N.Y. TIMES Editorial, August 2, 2010, at A22 (commenting on Republican criticisms of Supreme Court nominee Elena Kagan and the use of foreign law in American jurisprudence).

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All these questions are now complicated by both private international law (literally thousands of private arbitral decisions decided yearly in transnational commercial disputes) and more hybridized forms of justice from tribunals that decide matters involving both states and private parties, such as ICSID, where decisions are published and can be readily seen by interested parties (and used for argument). The proliferation of bodies deciding issues that transcend state borders (including the online arbitration system employed by The Internet Corporation for Assigned Names and Number (ICANN) to adjudicate domain name disputes, which is also “public” as published decisions online)<sup>48</sup> makes the very definition of what is “transnational law” increasingly open-ended.

*B. Definitional Issues: How Does International Law Differ from Transnational Law?*

Modern teachers of transnational or international law begin with several definitional and conceptual debates. *What is transnational law and how does this concept differ from the more conventional notion of “international” (inter-state) law?*<sup>49</sup> Former Dean of the Yale Law School and current Legal Advisor to the State Department, Harold Hongju Koh, considers “transnational” law to be a hybrid of international and domestic law; as others describe, it is the law that governs the “gaps” between formal international law and domestic law.<sup>50</sup> In our modern era, transnational law is law that moves back and forth from the international to the domestic and often back

<sup>48</sup>. ICANN RULES FOR UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, 39 I.L.M. 952 (2000), available at [www.icann.org/en/udrp/udrp.htm](http://www.icann.org/en/udrp/udrp.htm).

<sup>49</sup>. See PHILIP JESSUP, *TRANSNATIONAL LAW* 136 (1956) (for the classic definition of transnational law which is “all law which regulates actions or events that transcend national frontiers, [including] public and private international law... [as well as] other rules which do not wholly fit into such standard categories.”) For a more modern discussion of the definitional issues see, e.g., GRALF-PETER CALLIESS, *Law, Transnational*, in *THE ENCYCLOPEDIA OF GLOBAL STUDIES* (Mark Juergensmeyer, Helmut Anheier & Victor Faessel, eds., forthcoming 2010); Peer Zumbansen, *Transnational Law*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 738-754 (Jan M. Smits, ed. 2006); Craig Scott, “*Transnational Law*” as *Proto-Concept: Three Conceptions*, 10 *GERMAN L. J.* 877 (2009); Simon Chesterman, *The Evolution of Legal Education: Internationalization, Transnationalization, Globalization*, 10 *GERMAN L. J.* 877 (2009); Harry W. Arthurs, *Law and Learning in an Era of Globalization*, 10 *GERMAN L. J.* 629 (2009) all in the special issue *TRANSNATIONALIZING LEGAL EDUCATION* (Nadia Chiesa, Adam de Luca & Bernadette Maheandiran, eds.). See also Roger Cotterrell, *Transnational Communities and the Concept of Law*, 21 *RATIO JURIS* 1 (2008).

<sup>50</sup>. Harold Hongju Koh, *Why Transnational Law Matters*, Keynote at AALS Workshop on Integrating Transnational Legal Perspectives into the First-Year Curriculum (January 3-7, 2006), in 24 *PENN ST. INT’L L. REV.* 745 (2006).



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 again, such as when one nation’s legal solutions are “copy-pasted” or “downloaded or uploaded” to the law of another nation or to the international system. Examples include human rights concepts (such as torture, as well as discrimination), definitions of fairness in contracting (e.g., unconscionability), definitions of due process in all procedures, both civil and criminal, as well as trade and business concepts,<sup>51</sup> intellectual property and corporate governance principles. Especially in “newer” areas of law, such as environmental, consumer, trade, intellectual property, refugee and migration, and labor and employment law, where “standards” are important, measures of acceptable behavior (and legal concepts like balancing and proportionality) migrate back and forth from domestic to “global” standards as regulations, best practices, and case decisions are written by a variety of levels of legal tribunals. Dean Koh has called “transnational legal process” as “a blend of domestic and international legal process [which] internalizes norms” from the interaction of international and domestic lawmaking authority.<sup>52</sup> Even private law and rule-making are increasingly transnational, as multi-national corporations develop codes of conduct or best practice codes by which they promise to be governed. These new forms of less formal regulations, often expressed in aspirational terms, include statements of best practices<sup>53</sup> from international bodies, sub-national governmental agencies, industry-wide codes and corporate entity codes.<sup>54</sup>

### C. Convergences or Divergences?

Perhaps the leading question in the study of transnational

<sup>51</sup>.Consider the historical evolution of Roman merchant law to the law merchant (medieval guilds in Europe) to Anglo-American common law, to the Uniform Commercial Code (U.S. UCC), to the United Nations Convention for International Sale of Goods (CISG), 1489 U.N.T.S. 3, to modern development of *lex mercatoria* in international commercial arbitration and now back to regional developments in the European Commission’s proposed Draft Common Frame of Reference for Private Law, and the Lando Principles of European Contract Law. See Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT’L AND COMP. L.Q. 747 (1985); Koh, *supra* note 50, at 747.

<sup>52</sup>.Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

<sup>53</sup>.See, e.g., SLAUGHTER, *supra* note 17, at 53.

<sup>54</sup>.The CEO of Hewlett Packard resigned on August 7, 2010 because he had failed to observe corporate best practice standards even though he claimed no formal legal violations after accusations of sexual harassment and misreporting of business expenses. Other CEOs have resigned for similar (corporate best practices or codes of conduct reasons) in recent years (e.g., Boeing) or because non-legal public relations concerns have had stronger “policing” effects than formal law (e.g. recent removal of CEO of British Petroleum after Gulf of Mexico oil spill).

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and international law and their differences from each other is whether we are observing *convergences* of legal systems in the similarity of treatment of common legal issues or our need to specify legal standards that can travel and govern global activity like the Internet, health, and travel, or whether we are observing great *divergences* in legal treatment of issues marking strong cultural differences between systems (e.g., cross-national family law issues). Related to this issue, and a significant one in modern American constitutional jurisprudence, is to what extent different legal systems look at the law of other systems as binding, instructive, or irrelevant to legal decision-making.<sup>55</sup>

Legal historians, focusing on the *jus commun* or Roman law, philosophers focusing on natural law, and international lawyers focusing on *jus cogens*<sup>56</sup> may all claim a “universal” understanding of basic legal principles that are essential to all human beings or states that do or should govern behavior even before we accede to positive law (the law of formally and legitimately adopted rules). Such “universalists” believe we can uncover essential or fundamental principles of justice or right behavior to which we can all adhere. Such theorists might begin with the excavation of what those universal human understandings might be. Whether framed as imperatives such as “thou shall not kill” or “promises should be kept,” modern universalists or “legal harmonizers” look for the commonality in laws that transcend boundaries as they seek to explicate and advocate for rules and norms of human behavior that can govern across national boundaries and physical locations. Such universalists may be cosmopolitan human rights lawyers, legal and political philosophers, or private law experts seeking to develop universal contract and tort principles to govern modern international transactions.

Comparativists, anthropologists, sociologists and more culturally skeptical legal scholars<sup>57</sup> instead may focus on the

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<sup>55</sup>Harold Koh calls this the conflict between the “transnationalists” and the “nationalists” on the federal bench, Koh, *supra* note 50, at 748-750, while Vicki Jackson describes this as a choice about resistance, convergence, or engagement with “foreign” law, Jackson, *supra* note 47.

<sup>56</sup>*Jus cogens* is a normative concept of universal acceptance of particular principles, recognized by the international community, as fundamental understandings, such as “the right to be free from official torture.” See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992).

<sup>57</sup>See UGO MATTEI & LAURA NADER, *PLUNDER* (2008) (analyzing attempts at globalization or harmonization of law as a product of domineering and dominating illegitimate political and economic forces of global capitalism and American hegemony).

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 great variations that exist across and between legal systems, either to question the possibility of legal harmonization or “legal transplants” and borrowings, or to urge more rigor in the adoption of international compacts, treaties, and other forms of transnational regulation. If legal systems (or “families” or traditions<sup>58</sup> of law) are quite different from each other, then attempts to regulate among, between, and across legal systems will, in fact, be far more complex in their enactment, interpretation, and enforcement.

#### *D. Enforcement Issues: “Hard” vs. “Soft” Law?*

We must confront both theoretical and practical concerns. Do we share an understanding of what law is, what it should regulate (both permissively and prohibitively), and how it should be enforced? Even if we agreed on universal (or consensual) legal principles, who enforces these understandings? To put it most directly, does law require the state (and its enforcement mechanisms, still largely non-existent in the international arena)<sup>59</sup> to be law?<sup>60</sup> In modern treatments of such issues, distinctions are made between “*hard*” law (state enacted, enforced and sanctioned law) and “*soft*” law<sup>61</sup> (non-legally enforceable normative regulation and enforcement by non-governmental organizations or through such social and political processes as economic sanctions, “shaming” and reputational effects). International lawyers and political scientists now speak of “global governance,” which is

<sup>58</sup>.See GLENN, *supra* note 25.

<sup>59</sup>.The efficacy of world government, in the form of its principal institution, the United Nations, remains quite controversial. See, e.g., JANE STROMSETH, ET AL., *CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (2006).

<sup>60</sup>.Simon Roberts, *After Government? On Representing Law Without the State*, 68 *MODERN L. REV.* 1 (2005); *GLOBAL LAW WITHOUT A STATE* (Gunther Teubner ed. 1997).

<sup>61</sup>.Examples of soft law include the Universal Declaration of Human Rights, G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) and the United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc A/CONF.151/26/Rev.1(Vol. I) (Aug. 12, 1992). See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNITED NATIONS DECLARATION OF HUMAN RIGHTS* (2002), for an argument that Eleanor Roosevelt (as one of the drafters of the Declaration of Human Rights) explicitly wanted only soft law treatment for the Declaration as a result of the American failure to formally ratify the League of Nations). Evaluating the efficacy of both formal (hard) and soft law on the international community is one of the concerns of empirical international legal scholarship, see, e.g., Tom Ginsburg & Gregory Shaffer, *How Does International Law Work?*, *OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* (P. Cane and H. Kritzer, eds., 2010); Gregory Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 *MINN. L. REV.* 706 (2009-2010).

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 a hybrid of hard and soft law as global networks of governmental officials (including regulators, judges, ministers and heads of state) make and enforce international and regional policy through both formal and informal networks that operate parallel to both domestic and international governmental institutions.<sup>62</sup> Enforcement of standards of various kinds may entail formal legal proceedings, but also less formal modes of regulation, including self-regulation<sup>63</sup> and reputational effects, which present incentives for adherence to legal and other norms beyond those of formal law enforcement. Those who are more cynical in terms of formal law enforcement see the perhaps greater power of the coordinated actions of private multi-national corporations and industry wide “conspiracies.” These aspects of differing incentives and variable enforcement may be particularly significant in the transnational arena and should be studied by modern law students.

Conventional studies of international law often begin with the question of whether international law is really “law” at all since what international law does (treaties, customary law, etc.) depends on consent and has no formal and efficacious governance structure at all—there is no international legislature, general and final authoritative court, nor an executive or army<sup>64</sup> to enforce rulings. Separate from questions of the structure and effectiveness of the UN, treaties allow reservations, and countries (such as the United States) to withdraw from or renounce international undertakings<sup>65</sup> that turn ultimately on power, not rule of law.

The status of international law as binding within a nation is also complex. In what is in reality a more complicated dynamic, nations are considered “*monist*” if their domestic legal regimes fully incorporate international obligations (such as the Argentinean Constitution which now fully incorporates international and regional human rights conventions in its text) or “*dualist*” if domestic law and international law are not automatically linked. Treaties in the United States must be

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<sup>62</sup>.SLAUGHTER, *supra* note 17.

<sup>63</sup>.Jodi L. Short & Michael W. Toffel, *The Causes and Consequences of Industry Self-Policing*, *YALE ECON. REV.* 33 (Summer 2008).

<sup>64</sup>.UN Peacekeeping “armies” have, in fact, very little power to enforce laws generally. See *BUILDING PEACE: PRACTICAL REFLECTIONS FROM THE FIELD* (Craig Zelizer & Robert A. Rubinstein eds., 2009).

<sup>65</sup>.Concerning Military and Paramilitary Activities in and Against Nicaragua [Nicaragua v. United States of America], 1986 I.C.J. 14 (June 27); *Medellin v. Texas*, 552 U.S. 491(2008); See Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 *AM. J. INT’L L.* 1 (1987).

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 ratified by the Senate, and there are distinctions in the American Constitution between self-executing and other forms of treaties. Thus, international law, such as it is, has "existential" issues at both international and domestic levels of regulation. In the United States, international law and the study of treaties and other international obligations are now important components of constitutional law study.<sup>66</sup>

#### *E. Sources of International or Transnational Law*

The *sources of international law* are many and varied. The often cited source on sources is Article 38 of the Statute of the International Court of Justice, which provides that sources of international law include formal law and international agreements, such as treaties or conventions, international customs, general principles of law as recognized by civilized nations (*jus cogens*) and "other" legal materials (including cases of other courts), and "teachings of the most highly qualified publicists of various nations"<sup>67</sup> (scholars and others). Increasingly, however, sources of international law also include arbitral decisions (from a variety of private, but formal, tribunals that manage selection of private individuals to arbitrate international commercial, investment and even formal governmental disputes) which may or may not be published, drafted and adopted "restatements" of law including joint efforts of private organizations like the American Law Institute, UNIDROIT, and the Trento Commission;<sup>68</sup> decisions of regional legal bodies like the European Court of Justice or the Inter-American Court of Human Rights; as well as formal enactments of regional bodies, such as the Directives and Regulations of the European Union.<sup>69</sup> As noted above, international law sources also include the domestic constitutions of every nation as one must learn what authority international law does or does not have on domestic citizens (and non-citizens, as well, as both domestic and international "rights" affect non-citizens in any particular domestic state).

<sup>66</sup>. See JACKSON, *supra* note 47.

<sup>67</sup>. Statute and Rules of Court, 1940 P.C.I.J. (ser. D) No. 1, 4th ed., at 22.

<sup>68</sup>. A private effort of European law professors to develop a uniform or harmonized statement of European private law.

<sup>69</sup>. Formal European Union law is now so complex and covers so many subjects that it is a large and mandatory subject in virtually all European law schools (and taught in many American law schools). Is this "regional" law, international? Yes, in that it is law that governs more than one state but no, in that it is not binding on a larger "international" community—it has, so far, only "regional" force. ALINA KACZOROWSKA, *EUROPEAN UNION LAW* (Milton Park, Abingdon, Oxon, 2010).

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 The International Law Commission (a “voluntary” internationally representative body of the UN) writes “laws” in draft treaties, conventions and other international documents and many UN subject matter commissions, whether “permanent” or “ad hoc,” such as the UN Commission on International Trade Law (UNCITRAL), the World Health Organization, or the UN Conference(s) on the Law of the Sea, draft model laws and conventions, some of which are adopted as international treaties by consent or as domestic law (as enacted by domestic legislatures). UNCITRAL’s Model Arbitration Law, for example, has served as the model for domestic arbitration legislation in many countries in Latin America and Eastern Europe.<sup>70</sup> Thus, students studying modern international law will learn from a wide range of legal materials and will have the difficult task of analyzing not only complex meanings (in documents often drafted in many languages) but also what the relationships of different kinds and sources of law are to each other. This is *the problem of pluralistic legal authority*.

#### *F. Parties in International Law*

As conventionally conceived, international law was meant to apply to *state actors*. Today international law clearly includes *international organizations*,<sup>71</sup> as well as *individuals*.<sup>72</sup> Perhaps the greatest contribution of modern post World War II lawmaking (sadly necessitated by grievous harms and wrongs committed during that war and for decades afterward) was the recognition of international human rights for individuals in international and regional charters, conventions and treaties, which now provide tribunals and venues for rights vindication, such as the European Court of Human Rights in Strasbourg and the Inter-American Court of Human Rights, as well as many domestic courts. Many nations now incorporate these international human rights in their own domestic law. Like the ever expanding inclusion of different groups and individuals in American equality jurisprudence, the study of international law demonstrates the growing recognition of claims to basic human rights of survival, freedom from torture, discrimination

<sup>70</sup>.CHRISTIAN LEATHLEY, INTERNATIONAL DISPUTE RESOLUTION IN LATIN AMERICA: AN INSTITUTIONAL OVERVIEW (2007).

<sup>71</sup>.Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L. J. 2347 (1991); Jenny Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 520-23 (2003) (discussing international court’s responsibility to monitor international organizations).

<sup>72</sup>.INTERNATIONAL LAW STORIES 45-77 (John E. Noyes et al. eds., 2007); HUMAN RIGHTS ADVOCACY STORIES (Deena Hurwitz et al. eds., 2009).

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and in some cases, more positive rights of humans, flourishing  
in economic, social, cultural and political rights.<sup>73</sup> As the  
number of people who can assert legal claims continues to  
grow, the study of international law, like domestic law, will  
continue to grow, and rights and legal claims will continue to  
expand. Recognition and enforcement of those claims is  
another issue.

*G. Jurisdiction and Power – Choice of Law, Choice of Forum,  
and Choice of Process*

Modern international law study is also a study of  
*jurisdiction* and *power*. With plural sources of law and many  
locations and types of institutions to enforce those laws and  
legal rights, students and international lawyers must learn the  
rigors of *choice of law* (what law applies to a dispute or  
transaction) and the strategies of *choice of forum* (what  
tribunal is most likely to have the power to give a party what it  
needs, both in terms of legal power, and the power to execute  
on assets in a jurisdiction or make an order that can be  
executed). And with multiple parties to a dispute or transaction  
making similar choices, there will be issues of *res judicata*,  
double jeopardy, the effects of multiple rulings or judgments in  
the same case in different locations, and other issues of  
international litigation and dispute settlement.<sup>74</sup>

In international dispute resolution, a modern international  
lawyer will also have to choose *form of process*—should an  
international matter be taken to a court for *legal* treatment,  
*diplomatic* or private negotiation or mediation, or *political*  
formal or informal action. *International dispute settlement* or  
process, like substantive international law, has expanded from  
consideration of state-only avenues of redress, like diplomacy,  
war (use of force), and formal adjudication, to recognition of an  
increasingly plural set of process options, ranging from the  
formal and public to the private and informal, and involving a  
broader range of possible parties, including state

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<sup>73</sup>.International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360.

<sup>74</sup>.See, e.g., ANDREAS LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION: SELECTED TREATIES STATUTES AND RULES (Thomson West 3d ed. 2005); MARY ELLEN O’CONNELL, INTERNATIONAL DISPUTE RESOLUTION, TEACHER’S MANUAL (Carolina Academic Press, 2006); GARY BORN & PETER RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (4th ed. 2007); DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 133-499 (2009). Robert O. Keohane, Andrew Moravesik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, in LEGALIZATION & WORLD POLITICS (Judith Goldstein et al. eds., 2001).

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 representatives, organizations, groups, and individuals.

While learning substantive law, modern students of international law will also learn to choose among a range of processes including negotiation, inquiry, fact-finding, conciliation, mediation, arbitration, diplomacy, adjudication, and use of force. In addition to the older formal institutions in international law, there are now a wide variety of hybrid and new kinds of tribunals and institutions that handle matters involving more than one state or the aftermath of conflicts, whether inter-state or intra-state (civil wars, genocides, and transitions from dictatorships or other illegitimate regimes). A study of the new courts in Cambodia and East Timor, which combine elements of the older international criminal tribunals for the former Yugoslavia and Rwanda with efforts to build capacity in new domestic legal regimes,<sup>75</sup> demonstrates that international legal ordering is an iterative process—we learn something for institutional change and development from each new national or world crisis. And while conventional international law has focused on situations of conflict, modern international processes are also forward looking and seek to build on international cooperation, as much as or more than on older notions of sovereign competition.<sup>76</sup> Disaster aid, environmental crises, and future planning have produced an increase in international meetings, negotiations, and cooperative efforts requiring management and governance and providing many more sites of lawmaking.

*H. Beyond the State in Transnational Law: Legitimacy, Democracy, Private Law and Transnational Justice*

The recent turn to the term “transnational,” rather than international, law connotes a conceptual change in how we look at what we are studying in law (as well as in political science and economics).<sup>77</sup> Ideas, people, services, and goods cross borders so “international” law is no longer a subject for only the regulation of inter-state activities. From the beginning of the twentieth century when there was a huge increase in transnational trade and commerce, organizations, like the

<sup>75</sup>.STROMSETH, WIPPMAN & BROOKS, *supra* note 43, at ch. 6, 7, 8 and 9; Goldstone & Smith, *supra* note 39, at 106-110.

<sup>76</sup>.As exemplified in the classic advice of Machiavelli’s *The Prince*. NICCOLO MACHIARELLI, NICHOLAS MACHIARELLI’S PRINCE (De Capo Press Theatrvm Orbis Terrarvm LTD. Amsterdam 1968) (1640).

<sup>77</sup>.For one view of how the discipline of international law has changed its orientation and intellectual constructs, see David Kennedy, *My Talk at the ASIL: What is New Thinking in International Law?* 94 AM. SOC. INT’L L. 104 (2000).



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International Chamber of Commerce, were founded (in 1919 in Paris) to provide services to international businesses, even if their home nations had not yet quite figured out "how to get along." Private, cross-national bodies developed both rules of engagement and processes for dispute resolution. International commercial arbitration stands as a model of what "transnational" law is.<sup>78</sup> As private administering bodies (the International Chamber of Commerce, the London Court of International Arbitration, the International Center for Dispute Settlement (the American Arbitration Association's international arm), the International Institute for Conflict Prevention and Resolution) developed formal rules of procedure, and then formal legal recognition for "foreign" arbitral awards became formal law by adoption (by over 140 countries) of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, international commercial arbitration has become the most common form of adjudication of disputes between parties of different nations in commercial (and increasingly in other) matters. The international commercial arbitration "community" of lawyers, businesspeople, and arbitrators has created a modern "*lex mercatoria*"<sup>79</sup> of substantive law (and procedures through arbitral procedural rules) that "transcend" the law of any one nation. Whether these thousands of private arbitral decisions have, in fact, created an international "common law" of commercial or even industry-wide rules and precedents, there is no doubt that commercial disputes involving multi-national corporations and multi-national citizens are most often resolved "outside" of formal state institutions. The operation of the quite successful international commercial arbitration regime (over 95% of arbitral awards are complied with)<sup>80</sup> demonstrates the existence of a legal regime that "transcends" conventional sovereign understandings of legal power.

On the other hand, as we arbitration scholars often point

<sup>78</sup>Jan Paulsson, *Arbitration in Three Dimensions, Lecture at London School of Economics*, (LSE Law, Society and Economy Working Papers February 2010) available at <http://www.lse.ac.uk/collections/law/wps/wps.htm> and <http://ssrn.com/abstract=1536093>; YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

<sup>79</sup>KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* 9-112 (1999); *LEX MERCATORIA AND ARBITRATION* (Thomas E. Carbonneau et al. eds., rev. ed., Juris Publishing 1998).

<sup>80</sup>Gary Born, *Arbitration and Litigation: The Principle of Judicial Non-Interference in International Arbitral Proceedings*, 30 U. PA. J. INT'L L. 999 (2008-2009).

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 out to practitioners, the New York Convention actually makes national courts the ultimate enforcement agent. Scholars debate whether this means that international arbitration is dependent on national court sovereignty and enforcement or whether (since few courts overturn arbitral awards)<sup>81</sup> national courts have become the agents of a new form of transnational law enforcement.<sup>82</sup> Some fear that national state policy is submerged in this form of state-less (and often, private) adjudication; others suggest that this form of dispute settlement encourages more practical problem solving that facilitates economic activity.

Whether there should be public accountability for such private regimes (and who that “public” is) is one of the leading issues in transnational legal study at the moment. Practitioners in this elite form of transnational legal practice like to report they are successfully resolving cases more effectively than are more public and rigid state forms of justice. Critics claim that there should be more transparency and accountability to labor, environmental, and other social interests, as well as representation of more than the immediate parties. Critics also suggest that as citizens of the world, we are responsible for making sure there is “international justice”—equality of justice for all world citizens and our political responsibility to advocate for “global justice.”<sup>83</sup>

In addition to the responsibility and accountability issues, many worry that both conventional international law and the “newer” transnational law suffer from democracy deficits—who “elects” both the private law makers of arbitration panels, the professors engaged in legal harmonization projects, or even the foreign ministers or technocrats who populate the growing number of transnational networks. While Professor Anne-Marie Slaughter argues that at least domestically elected officials are now “dually” responsible for both their domestic and international agendas in domestic elections,<sup>84</sup> we might still worry about both the sources of legitimacy of international law

<sup>81</sup>.Christopher Whytock, *The Arbitration-Litigation Relationship in Transnational Dispute Resolution: Empirical Results from the Federal Courts*, 2 *WORLD ARB. & MEDIATION REV.* 39, 56 (2009) (a 2003 survey on the post-award experience of claimants in 205 transnational arbitration cases filed with the AAA between 1999 and 2002 found only one out of the 205 arbitral awards was vacated by a court).

<sup>82</sup>.See Sweet, *supra* note 15; Christopher A. Whytock, *Private-Public Interaction in Global Governance: The Case of Transnational Commercial Arbitration*, 12(3) *BUSINESS AND POLITICS*, 2010 available at <http://www.bepress.com/bap/vol12/iss3/art10>.

<sup>83</sup>.Iris Young, *Responsibility and Global Labor Justice*, 12 *J. POL. PHIL.* 365 (2004).

<sup>84</sup>.SLAUGHTER, *supra* note 17, at 216-260.

201x] *Why and How to Study “Transnational” Law* 127 (e.g., natural law, *jus cogens*) when it is “made” and what democratic controls there are on its interpretation and enforcement. This remains a crucial question in the legitimacy and acceptability of all levels of transnational law and governance.

I do not aim to resolve these issues here,<sup>85</sup> but I suggest that the issue of what constitutes “transnational justice” in these increasingly plural locations of legal activity is precisely the kind of question that the modern law student should be prepared to confront. What are the criteria of a just legal proceeding that involves private or public actors from different legal regimes? Who should participate in convention drafting, transaction planning, and dispute settlement? Who should decide disputes between people or entities of different countries? By what rules or principles should the wide variety of modern dealings be governed? How should “non-parties” (but those affected by cross-national disputes) be represented in transnational legal proceedings?

As these questions of transnational justice are pursued more generally, transnational legal scholars and practitioners are also engaged in efforts to create substantive laws which are truly transnational. As the American Law Institute has “restated” and “harmonized” the law of contracts, torts, property, trusts, and now employment and criminal law, similar organizations in Europe seek to harmonize or make more “uniform” the law of contract, torts and employment across national, not just state, lines. Whether vast differences in civil and common law understandings of key legal principles can in fact be reconciled in the Draft Common Frame of Reference (Codification of European Private Law)<sup>86</sup> is one of the most contested topics among comparative law scholars and lawyers

<sup>85</sup>.For my treatment of some of these issues in the domestic context see Carrie Menkel-Meadow, *Whose Dispute is it Anyway? A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L. J. 2663 (1995). For some of the issues of public transparency in an international context see *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006).

<sup>86</sup>.See also Pascal Pichonnaz, *Codification of European Private Law: Has Europe Forgotten the Old Principle That Rules Cannot Precede the Law? or How to Achieve More Uniformity With Less Rules*, Paper Presented at Center for Transnational Legal Studies, (Jan. 2010) (explaining that where courts, academics, and lawyers all read rules in different ways, European law may gain more uniformity with fewer rules). *Referencing* STUDY GROUP ON A EUROPEAN CIVIL CODE & RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP), *PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE* (Christian von Bar & Eric Clive eds., European Law Publishers 2009) (a collaborative work of jurists from thirty European jurisdictions provides extensive reflection on private law in principles, definitions, and model rules).

in Europe.

This brief review of some of the key issues in both more traditional international law study and more modern “transnational” law suggests some important themes and questions for how transnational law will be taught at UCI School of Law:

- ❖ What is “transnational” law, both in its jurisdictional sweep, and in the meaning of “law”?
- ❖ What legitimates the making, interpretation and enforcement of transnational law? If not direct democracy, then what? Universal principles? Natural law? From where are these principles derived?
- ❖ Who are the principal actors in transnational law—states, organizations, groups, businesses, or individuals? Are they multi-national actors (e.g., corporations, NGOs) or single sovereign actors?
- ❖ What are the issues that bring transactions and disputes to the attention of law? Facilitative, building, cooperative issues? Competitive, conflicting issues?
- ❖ What processes do parties use to form international cooperative/trade/human rights enhancing activities? What processes do parties use to resolve disputes that cross borders?
- ❖ What rules of engagement or regulation do parties (states, groups, and individuals) appeal to?
- ❖ What enforcement mechanisms are there for agreements that are reached or judgments that are issued?
- ❖ What goals do actors in the world of transnational dealings aim for? Economic profit, world peace, human flourishing, or political power and aggrandizement or harm?
- ❖ What means will best accomplish those goals?
- ❖ Whether pluralism or diffusion of legal authority is advantageous for an international legal order?
- ❖ How do “transnational” legal issues affect seemingly (or actual) domestic legal issues?

### III. HOW WE SHOULD STUDY TRANSNATIONAL LAW

It would be conventional legal education to study these questions through a variety of cases, legal documents, treatises, and scholarly debates about these contested issues

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 in transnational and international law. Many law schools have now incorporated the teaching of international or transnational law in a variety of different ways. A few have begun, as has UCI, to require international law or analysis, as we call it,<sup>87</sup> in the first-year required curriculum;<sup>88</sup> others use the “pervasive” method, urging all first year courses to add a “transnational” component to contracts (multi-national ventures), torts (mass disasters), civil procedure (Alien Torts Claim Act rules and procedure, transnational jurisdiction and discovery, enforcement of foreign judgments, and international commercial arbitration as transnational legal process), criminal law (international criminal law, law of torture, terrorism, drug and human trafficking), property (international intellectual property issues, multi-national ownership issues, international environmental law) and constitutional law (treaty law, use of foreign law, comparative constitutional law)<sup>89</sup>. Still others (probably most law schools) continue to leave the treatment of international issues to the upper level curriculum with general courses in Public or Private International Law or now, more specialized courses in International Trade Law, International Intellectual Property, Comparative Law, National Security Law, International Criminal Law, Comparative Constitutional Law, International Human Rights Law and the like.

But, as I have never taught conventionally,<sup>90</sup> and UC Irvine

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<sup>87</sup>.This is an important distinction for me. Conventional international law in the first-year curriculum may add to the conception of learning law as learning a lot of substantive details. I am more interested in having students learn that international or transnational *analysis* means a different way of thinking about law, in its variability, as well as about researching and looking for different legal treatments of the same issue. The lessons I hope to impart are about legal pluralism and choices (which should inspire attention to reasoning about legal variability, rather than learning (or memorizing) a lot of legal rules, which in my view, can always be researched when necessary for a particular problem).

<sup>88</sup>.One interesting way to study the changes and developments in legal education is to trace the few areas in which first-year courses have been added to the steady diet of private common law subjects that have dominated legal education since the time of Christopher Columbus Langdell in the late 19<sup>th</sup> century. Constitutional law is now required in many law schools, some schools have added statutory analysis, regulatory or administrative analysis and in the past some schools have required different forms of lawyering process, dispute resolution or other substantive courses. A growing trend is also to allow first-year students at least one elective course in their first year. For the most part, however, legal education has not changed much, in the first year, from 1870. See WILLIAM SULLIVAN ET. AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

<sup>89</sup>.See, e.g., VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006).

<sup>90</sup>.As a legal educator for the last thirty-five years, I have always taught with experiential methods (from my early days as a clinical and legal research and

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 was founded to be an innovative school for lawyers of the 21<sup>st</sup> century, I am interested in how this material can be taught differently, meaning both *substantively* and *experientially*. How then to teach first-year law students about complex, multi-jurisdictional, multi-cultural, and interdisciplinary legal problems? For me, the answer, as always, is a good combination of theory and substantive problem-oriented content which stimulates questions about *how and what to think*, with experiential learning which situates and contextualizes difficult intellectual issues in their real world concreteness for real world legal problem solving about *what to do and what needs to be learned to solve legal problems*.

Here I describe how transnational law will be taught (by me) at UCI.<sup>91</sup> In my view, students learn transnational law best when they are put in the role of a lawyer who must advise a client, perform a lawyering task, or otherwise “solve” a

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writing instructor to a professor of conventional legal subjects including civil procedure, labor law, employment discrimination, jurisprudence, feminist theory, legal ethics and the legal profession, to all forms of dispute resolution, and now international law and globalization subjects). I have always used role-plays, simulations, problems, collaborative activities, class exercises, writing assignments, journals, real cases and student facilitated learning and client representation in my courses (not all at once of course!). As an old Indian saying has it, “Tell me and I will forget, show me and I may remember, involve me and I will understand.” That is my theory of pedagogy. I thank, as always, my mentor in this Professor David Filvaroff, who taught the Hart & Sacks based Legal Process course at the University of Pennsylvania Law School. See HENRY M. HART & ALBERT M. SACKS, LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, (W. Eskridge, Jr. and Philip Frickey eds., 1994) (focusing on different legal processes, beyond appellate cases). We learned about legal process by enacting the roles, sequentially, of a court, a legislature and an administrative agency as the class tried to “enact” and “enforce” a law, making slumlordism a tort. (Thanks also to Joseph Sax, whose substantive writings, see e.g., Sax, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967), were the source of this exercise, long remembered from a distance of almost 40 years). In the last fifteen years I have applied these pedagogies to teaching law, ethics, dispute resolution, and globalization subjects in twenty different countries on five continents to undergraduate and graduate law students, lawyers, judges, politicians, diplomats, government officials, and business professionals.

<sup>91</sup>.This essay focuses on my own approaches to the teaching of transnational law experientially. Two preliminary points are important. First, these descriptions are based on my own previous experience teaching transnational law experientially in other programs at Georgetown University Law Center and at the Center for Transnational Legal Studies in London, as well as at various other law schools at which I have taught throughout the world in the last fifteen years and which inform my course at UCI. Second, there are and will be other teachers of transnational law at UCI who will and are using different approaches to teaching international analysis. See Syllabi for Professor Joseph F.C. Di Mento (International Legal Analysis, spring 2010, Law 505) and Professor Beatrice Tice (International Legal Analysis, spring 2010, Law 505) (on file with the UC Irvine Law Review).

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 transnational legal problem from being in the middle of it. To paraphrase one of my intellectual mentors, Donald Schön, in *The Reflective Practitioner*, professional students learn best from being “inside” a problem or in “the valley” of the problem, as contrasted with standing on the mountain and seeking abstract answers “from the sky.”<sup>92</sup> To this end, I have developed a variety of experiential problems for teaching transnational legal analysis, which draw on international law, the law of multiple jurisdictions, “soft” or private law, and a variety of possible legal processes for legal problem solving which I will briefly describe here. For the last fifteen years I have been teaching a variety of law-related subjects in a variety of transnational settings (with mixed student groups from a variety of nations and legal systems),<sup>93</sup> which informs how I think students may learn most effectively.

For the last five years I have been teaching and developing problems for a new and required program at Georgetown Law Center called Law in a Global Context.<sup>94</sup> In this program all first year students work for a concentrated week (the first week of the second semester) on a complex legal problem that transcends legal jurisdictions. The students are placed in roles, including counsel, judge, mediators, arbitrators, and other legal professionals, and asked to perform lawyering tasks that require them to make sense of legal materials that come from different legal jurisdictions and cross traditional substantive boundaries. For example, the problem I developed (with Georgetown colleagues Professors Michael Gottesman and

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<sup>92</sup>.DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* (1983); DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS* (1987).

<sup>93</sup>.This includes courses on globalization generally and in Latin America (Argentina), international commercial arbitration and international dispute resolution (UK, Switzerland, France, Italy, Paraguay, Argentina, Brazil, Chile, Australia, Japan, and China), legal ethics and professional responsibility (Australia, Canada, France, the UK, Israel, the Netherlands, and Belgium), feminist theory and women’s rights (UK, Canada, Mexico, and Switzerland,) skills courses in conflict resolution including mediation, negotiation, consensus building, and arbitration (Norway, Belgium, the Netherlands, Italy, Argentina, Brazil, Paraguay, Chile, Canada, Israel, Costa Rica, Nicaragua, Japan, France, Mexico and China) and courses and training sessions in experiential legal pedagogy in China, Israel, Canada, Mexico, Australia and the UK. Legal educator, Richard Wilson, gives his thoughts about why Europe is so late to come to experiential and clinical learning. See Richard Wilson, *Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Education*, 10 *GERMAN L. J.* 823 (2009), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=1124>.

<sup>94</sup>. T. Alexander Aleinikoff, *Law in a Global Context: Georgetown’s Innovative First-Year Program*, 24 *PENN. ST. INT’L L. REV.* 825 (2006).

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Richard Diamond)<sup>95</sup> involves a venture to buy special ships to navigate a river in Southeast Asia for the building of a dam. Materials for the shipbuilding came from one group of countries, the ship was to be manufactured by a French company, and purchased by an American contractor for use in Southeast Asia. When world conditions (including environmental, fuel shortages and pricing changes) interrupt parts of the performance of the contracts students must confront how the parties should resolve their many disputes. At the beginning the various contracts have no choice of forum clauses and ambiguous choice of law clauses. Students then must study the different laws (domestic French, American, Chinese, and Laotian contract remedies and international (CISG) provisions) for determination of substantive legal rights. They must also study what (national) courts would have jurisdiction over such disputes and where each party (students are assigned roles on each “side” of the dispute) would be best served in a legal claim of *force majeure* or impossibility of performance. When the solutions to these dilemmas prove complex (and surprising<sup>96</sup>) the students realize the importance of good drafting of contracts. And so, we turn to negotiation of a dispute resolution or choice of forum clause, armed with the knowledge of what will happen if the parties don’t consider this at the beginning of their relationship. Thus, there are choices of law, forum, and consideration of substantive law, legal strategy and problem solving issues (e.g., do the parties want to try to preserve their relationships for future deals or will this be a “one-off” piece of international litigation, and what are the corporate goals of the respective parties?). During the full week of the program (in which students attend plenary class sessions, small group discussions of substantive law and legal strategy issues, as well as perform lawyering roles, like negotiation, drafting, and legal arguments, and receive feedback on their performances), students perform several different transnational legal tasks—they analyze statutes and cases, write strategy memos, interview clients, get instructions for legal actions, conduct a negotiation session, draft contract clauses, and then argue in a court for enforcement or vacatur

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<sup>95</sup>.The problem is called “Hoosier v. Seabarge.” Professor Gottesman teaches, among many other subjects, contracts; Professor Diamond is an international law expert; and I am a dispute resolution expert. Thus, this complex experiential exercise, consisting of about 150 pages of case, statutory, factual, article, and role-play materials, was created with multiple legal expertise and collegial collaboration.

<sup>96</sup>.The “home” nation of each disputant is not necessarily the most favorable to litigate in. (I won’t say more because I am still teaching with this problem).



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of an arbitral award (using the formal law of the UN New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards and its case law in a variety of potential sites of litigation). In a short period of time students are exposed to a variety of transnational legal issues from inside the role of a legal professional, including:

- ❖ What law applies to a transnational transaction/contract/dispute?
- ❖ What are the appropriate jurisdictions or who are the best (strategic) decision-makers for resolving a transnational dispute?
- ❖ What are the best processes for resolving transnational legal disputes (litigation, negotiation, arbitration, informal or formal proceedings)?
- ❖ How do different legal systems (civil and common law) process claims (differences in procedural rules, e.g., discovery and use of experts, as well as in substantive issues, e.g. remedies for breach)?
- ❖ Where can awards, judgments, contracts, and decrees affecting different national parties be enforced?
- ❖ What is the relation of international law (the New York Convention) to domestic law and policy (Article V of the New York Convention allows national policy to affect the enforcement of a foreign arbitral award)?
- ❖ What legal skills are necessary for transnational practice?<sup>97</sup>
- ❖ How do lawyers collaborate across national, legal, and cultural divides?<sup>98</sup>
- ❖ How can transnational transactions be designed to minimize unproductive conflict or disruption? What legal problems can be anticipated in advance and drafted for in documents which create transnational relationships?

Regardless of what might be remembered substantively, students learn from such intensive engagement with actual

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<sup>97</sup>.For first-year students this kind of problem prepares them to read, analyze, negotiate, think strategically, and make formal legal arguments. I have not discussed in this essay the importance of competence in other languages which I also regard as essential for those who will actually be engaged in global or transnational legal practice.

<sup>98</sup>.Aside from the values of teaching transnational law, one of the key goals of such exercises is to teach students to work collaboratively, not always an explicit goal in conventional legal education.

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legal problems and materials what kinds of questions they will need to ask and research with respect to other transnational legal problems they might encounter. The learning is, as I like to pun, “meta-learning” (Meadow-learning). It is not the substance of the law that matters (alone) but the reflection on *how* one learns it—the law and procedure and how to use them to further particular (client or social) objectives. The sessions for this intensive learning are taught by core faculty, participating full-time and adjunct faculty (practicing lawyers from relevant fields), and each year a group of rising 2Ls has served as teaching assistants to provide feedback and close instruction for each student. Thus, the learning is multi-layered and participatory; students learn from each other, from senior professors and from practitioners with experience in the relevant fields. We end the problem with a career panel of lawyers who work in international transactions and disputes to advise students about work opportunities in transnational legal work.

In addition to the problem described above, other problems have involved international criminal issues (extradition for capital crimes, involving the European Convention on Human Rights), cross-national defamation issues (defamatory commercial remarks posted on websites involving California and French winemakers), cross-national drug testing standards (different drug safety standards in the US and Europe), and international environmental problems.<sup>99</sup> For the Center for Transnational Legal Studies in London (a consortium of 14 law schools), I wrote and taught a problem, called the Global Practice Exercise<sup>100</sup> (loosely based on a real situation), in which a corporate executive of a multi-national corporation was dismissed from his job after holding a press conference to protest the environmental, labor and corrupt practices of his company, where his employment contract required arbitration of any and all disputes. The discharged employee justifies his actions based on both international and corporate codes of conduct to which his employer is a signatory and he seeks damages and reinstatement through

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<sup>99</sup>.All of the Week One problems at Georgetown were developed collaboratively with groups of professors from different fields and are taught by at least half of the total faculty each year, as faculty members volunteer to assist in the small group and experiential components of the program.

<sup>100</sup>.Center for Transnational Legal Studies, <http://ctls.georgetown.edu> (last visited Sept. 20, 2010) (containing a full description of the program); Cornelia T. L. Pillard et. al., *Why Transnational Legal Education?*, [http://ctls.georgetown.edu/documents/CTLS\\_Why\\_Transnational\\_Education.pdf](http://ctls.georgetown.edu/documents/CTLS_Why_Transnational_Education.pdf) (last visited Nov. 9, 2010).

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 the arbitration processes provided for in his employment contract. To highlight the differences in legal treatment of common issues, students learn that most nations, outside of the United States, prohibit the use of arbitration for employment claims,<sup>101</sup> and thus both international arbitral bodies and courts in which enforcement of an arbitral award might be sought have to deal with and reconcile competing legal policies. In addition, because of the multi-national nature of the students at the Center for Transnational Legal Studies (CTLS), students learn from each other about the differences in both substantive and procedural law from their respective legal systems, providing short courses in comparative law and collaboration at the same time.<sup>102</sup>

At CTLS I also co-taught a core course, required of all students, called Transnational Legal Issues and Theories of Comparative Law, with my co-director Franz Werro of Switzerland (a civil law country) and an expert in private and comparative law, which surveyed the panoply of issues reviewed in this essay. We developed several exercises for the students to work on in nationally diverse groups (drafting international privacy standards for the Internet, developing a language policy for the multi-national CTLS program, describing elements of legal systems and descriptions of different forms of legal education throughout the world, among others). In any ideal form of transnational legal education, the teaching would be done by a multi-national (and multi-legal system) faculty.<sup>103</sup> I have taught this way in several other venues as well, including a course in international arbitration in

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<sup>101</sup>.Matthew W. Finkin, *Privatization of Wrongful Dismissal Protection in Comparative Perspective*, 37 *INDUS. L. J.* 149, 149-53 (2008); Jean R. Sternlight, *Is the U.S. out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 *U. MIAMI L. REV.* 831 (2002).

<sup>102</sup>.In my favorite example of informal student learning, a group of students and I were in an elevator in our building in London where the American students complained about having to pay a few pence for their ketchup and mayonnaise for their sandwiches. As a transnational, comparative law professor, seeing a "teaching moment," I asked them if they would rather pay for health care (free in the National Health Service in the UK) or ketchup. To which the Canadian student in the elevator responded, "In Canada, both the ketchup and the health care are free." Different strokes for different folks (national legal and economic policies)!

<sup>103</sup>.Where possible, courses at CTLS are co-taught with law professors from different legal systems (e.g., civil and common law, European and Asian). For example, one course in Global Governance was co-taught by Canadian and Singaporean professors to students from several different continents who could critically explore together the issues in transnationalism from the differing perspectives of hegemon and former colonies. See generally *supra* note 102.

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 France and Switzerland (with students from over 10 countries)<sup>104</sup>, a course in globalization studies in Argentina (with French and American instructors and students from the United States, Argentina and Brazil)<sup>105</sup>, and a course in international dispute resolution that I teach every other year in a transnational university (INCAE)<sup>106</sup> in Central America that draws its graduate law students from all over Central America (and parts of South America) with faculty from the region and the United States.

In recent years I have taught International Dispute Resolution in a variety of countries, either with a colleague from the region (as in Israel)<sup>107</sup> or alone, but always with role-plays and simulations. In a multi-national setting it is especially interesting to teach problems with multiple-parties and multiple forms of interaction (diplomatic negotiations,<sup>108</sup> legal transactions and lawsuits, or simulated intergovernmental policy meetings, e.g. environmental, security, and cultural) to explore multiple legal and cultural issues.<sup>109</sup> Whatever the concrete substantive or procedural issues, students always report they remember what they have learned (including their thinking processes, their assumptions, and their “new” learning) from these exercises, more than they remember from more traditional classes.

<sup>104</sup>.See Menkel-Meadow, *supra* note 42.

<sup>105</sup>.In 2007, Dean Bryant Garth, French Sociologist of Law, Yves Dezalay, and I were faculty for the Southwestern Summer Program in Argentina. See *generally* Summer Abroad: Buenos Aires, Argentina, SOUTHWESTERN LAW SCHOOL, <http://www.swlaw.edu/academics/international/summer/argentina> (last visited Sept. 27, 2010).

<sup>106</sup>.INCAE is an international school of business founded by a consortium, including Harvard Business School and now Georgetown University, during President Kennedy’s Alliance for Progress initiatives. It now offers courses in business and law in executive and other formats on two campuses, Managua, Nicaragua and San Jose, Costa Rica. Much of the teaching at INCAE is based on Harvard Business school case methods and law school simulation and role-plays in a wide variety of subjects. See INCAE BUSINESS SCHOOL, <http://www.incae.edu> (last visited Sept. 20, 2010).

<sup>107</sup>.Carrie Menkel-Meadow & Irena Nutenko, *The Next Generation: Creating a New Peace Process in the Middle East*, 25 NEGOTIATION J. 569 (2009).

<sup>108</sup>.For an example of such role-plays and simulations, see the COBIA international peace negotiation simulation, available from the Harvard Program on Negotiation Simulation and Role-Play Clearinghouse. Arms Control on Cobia, PON Clearinghouse, [http://www.pon.org/catalog/product\\_info.php?cPath=32&products\\_id=4](http://www.pon.org/catalog/product_info.php?cPath=32&products_id=4) (last visited Sept. 20, 2010).

<sup>109</sup>.Simulations and case studies for such problems are available with many casebooks in relevant areas. See, e.g., CARRIE MENKEL-MEADOW ET AL., DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL, TEACHER’S MANUAL (2006); MARY ELLEN O’CONNELL, INTERNATIONAL DISPUTE RESOLUTION: CASES AND MATERIALS, TEACHER’S MANUAL (2006). Additionally, there are many casebooks and other websites maintained by the international law and political science teaching communities.

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As another model of experiential transnational learning, I was fortunate to participate in a specially organized comparative law seminar hosted by two Swiss law schools (University of Fribourg and the University of Basel).<sup>110</sup> Advanced students from both schools (with multi-lingual competence in German, French, and English) studied a variety of topics in comparative law to learn how different jurisdictions treated similar legal problems of public and private relations, ranging from human rights violations, privatization, governmental regulation and funding of religious activities, freedom of contract and state protection of private contractual relations, and terrorism. Each student was required to research different treatments of particular issues (e.g., state restrictions on freedom of contract through such doctrines as unconscionability) and present to other students (usually in a second or third or fourth language of competence). Thus, students, not professors, were the teachers, treated as professionals presenting to each other on both convergences and divergences in legal treatment of current issues of legal regulation and demarcation of the lines between public regulation and private action.

So, I will teach transnational, international, and comparative law through a series of problems that students will work on experientially. Whether as a lawyer advising a client, whether individual or organizational, or serving as a delegate to an international convention on the drafting of a treaty,<sup>111</sup> or advising a governmental official, or lobbying an international body to change its rules,<sup>112</sup> or forming a new NGO to deal with a new transnational issue, students in International

<sup>110</sup>.Markus Schefer & Franz Werro, *Blockseminar Bridging Public and Private in European and U.S. Law* (May 2003) (unpublished article) (on file with author).

<sup>111</sup>.A group of delegates in The Hague has been working for years on a convention for mutual recognition of foreign judgments, parallel to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The United States has not signed this convention. There are many legal issues, including reciprocity (many nations will not give full faith and credit to United States judgments because of our punitive damages practices, while the United States disputes the standards of due process in other countries), American constitutional issues of supremacy and state rights to recognize judgments in their own courts, and policy issues in recognition of other legal systems' judgments in our courts. This will make an ideal in-class experiential exercise with students taking the roles of delegates from different countries. See, e.g., AMERICAN LAW INSTITUTE PROJECT ON RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (Proposed Final Draft 2005); Convention on Jurisdiction and the Recognition of Foreign Judgments (1971) (since 1993, thirty-five countries have been negotiating for a revised convention).

<sup>112</sup>.Currently hot topics here include expanding participation rights (class actions, amici) and appellate processes in a variety of international tribunals.

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Analysis will not only study transnational law—they will do it! From these experiences I hope they will learn that law is plural, governing law is chosen (both by states and by private contracting parties), and that law may still be an important tool for making the world a more just place for all of its inhabitants. With our already quite diverse student body and faculty, and our location in the Pacific Rim and the American hemisphere, I have no doubt that we will be able to use transnational legal analysis to focus on how we might solve some social and legal problems that are not cabined by national boundaries. As Merlin taught the young King Arthur (by changing him into a bird so he could see the earth from the sky)<sup>113</sup> and John Lennon taught us all,<sup>114</sup> you can't see national boundaries from above — a lesson the law is beginning to learn.

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<sup>113</sup>.T. H. WHITE, *THE ONCE AND FUTURE KING* (1958).

<sup>114</sup>."Imagine there's no Heaven / It's easy if you try / No hell below us / Above us only sky / Imagine all the people / Living for today / Imagine there's no countries / It isn't hard to do / Nothing to kill or die for / And no religion too / Imagine all the people / Living life in peace / You may say that I'm a dreamer / But I'm not the only one / I hope someday you'll join us / And the world will be as one / Imagine no possessions / I wonder if you can / No need for greed or hunger / A brotherhood of man / Imagine all the people / Sharing all the world / You may say that I'm a dreamer / But I'm not the only one / I hope someday you'll join us / And the world will live as one." JOHN LENNON, *IMAGINE* (Capitol Records 2000) (1971).