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# TRANSNATIONAL LAW AND PRACTICE

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# Transnational Law and Practice

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*In loving dedication to Lisa, Jacob, Caleb, and Shana; to my parents, Donald Earl Childress, Jr. and Joan Ann Childress; and to my entire family, whose love and support has known no bounds.*

Donald Earl Childress III

*To Harry and Anne Ramsey.*

Michael D. Ramsey

*To my sister, Betsy, a teacher who inspires her students and inspires me.*

Christopher A. Whytock

# PREFACE

The goal of this casebook is to help students learn how to solve the types of transnational legal problems they are likely to encounter in practice, regardless of their field of practice and regardless of whether they think of themselves as practicing international law. Therefore, this casebook is different from traditional public international law casebooks. Like them, it covers the sources of international law and introduces students to international courts. Unlike traditional public international law casebooks, however, this casebook urges students not to be "international law-centric" or "international court-centric" when analyzing transnational legal problems, and gives them the resources to learn how to use national law and national courts, and private norms and alternative dispute resolution methods, to solve transnational legal problems on behalf of their clients.

We believe that this casebook's approach makes it especially well-suited for required courses on international or transnational law, since it focuses on problems that all students are likely to encounter in the present-day practice of law regardless of their practice area and regardless of their preexisting interest in international law. It is also well suited for both first-year and upper-division students. Much of the material deals with the transnational dimensions of first-year law courses like Civil Procedure, Contracts, Constitutional Law, and Torts, and thus will provide a less intimidating point of access to the field while also reinforcing learning across the first-year curriculum. The casebook also includes advanced material on transnational litigation in U.S. courts, making it an excellent choice for upper-division elective courses in international civil litigation. Put simply, this book is designed to prepare students for law practice in a globalized world and to equip them with the knowledge and skills they need to solve transnational legal problems, regardless of whether they plan to practice international law as such.

Donald Earl Childress III
Michael D. Ramsey
Christopher A. Whytock

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We have edited the cases and other legal materials in this casebook. Where we have judged that citations, footnotes, or internal quotations are not essential for student learning, we have omitted them without indication. Otherwise, we indicate omitted text with ellipses. Footnotes in cases and other legal materials retain their original numbering. Our own footnotes appear as asterisks.

# INTRODUCTION

Welcome to the world of transnational law and practice! In an increasingly globalized world, individuals, businesses, and governments are interacting more and more frequently across national borders. Individuals — tourists, businesspeople, government officials — routinely travel from one nation to another. Even when they do not travel, they engage in transactions that cross international borders. Businesses buy and sell goods and make investments all over the world. And nations, through the application of laws and regulations — and sometimes unfortunately through armed force — also participate in transnational interactions, often attempting to govern or otherwise influence activity that takes place beyond their borders. International organizations and private actors are also among today's "global governors." *See generally* WHO GOVERNS THE GLOBE? (Deborah D. Avant et al. eds., 2010). If you doubt that we live in a transnational world, pull out the smartphone in your pocket or look at the computer you are using. Both were likely designed in one nation, assembled in another, and perhaps shipped to you in yet another nation.

All of this means that you as a lawyer are increasingly likely to encounter legal problems that involve individuals, businesses, or governments of more than one nation or activity that crosses international borders. A 2007-2008 survey of lawyers who passed the bar in 2000 suggests that almost half of U.S. lawyers are called upon to solve transnational legal problems for their clients, and in some types of practice the number is considerably higher:

> Forty-four percent (44%) of attorneys reported . . . work [that involved clients from outside the United States or cross-border matters]. The lawyers most likely to report doing international legal work were those in the largest law firms, where two thirds reported doing it, and inside counsel, where almost as many (65%) reported work that involved non-U.S. clients or cross-border matters. Among legal services and public defense lawyers, work that involved non-U.S. clients or non-U.S. law was also common, with 61% of attorneys reporting they had done some such work during the past year. The international work in large corporate firms mainly serves foreign corporate clients, while the work of legal services and public defense lawyers likely involves individual clients who are facing immigration issues.

THE AMERICAN BAR FOUNDATION AND THE NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION, AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 35 (2009). Some lawyers will encounter transnational legal problems at a much higher rate — such as lawyers working for multinational businesses, nongovernmental human rights groups, international organizations, or

a nation's foreign ministry (such as the U.S. State Department), or those specializing in fields such as international family law or immigration law. In addition, many law firms have groups of lawyers focused specifically on transnational practice, such as transnational business transactions, transnational commercial arbitration, and investor-state arbitration. But as the data suggests, you are likely to face transnational legal problems *regardless* of the focus of your practice.

Unlike traditional international law casebooks, which typically focus somewhat narrowly on international law and international courts, this casebook is designed to help you develop the knowledge and skills that you will need to solve the kinds of transnational legal problems you are most likely to encounter in practice. To be sure, this casebook will give you an excellent introduction to international law and international courts — but they are only the tip of the iceberg. For most U.S. lawyers, the most common transnational legal problems are likely to be those that arise when representing U.S. or foreign clients not in international courts, but in U.S. courts, in the courts of other nations, or in arbitration or other alternative dispute resolution processes; or when representing U.S. or foreign clients in disputes or business transactions governed not by international law, but by U.S. law or the law of another nation. Specifically, this casebook focuses on three sets of questions that pervade transnational practice:

- What are the applicable rules? Does national law, international law, or private rules apply? If national law applies, *which* nation's law? Lawyers in transnational practice must be sensitive to the question of what rules apply to a given activity or dispute.
- What transnational dispute resolution methods are available and most appropriate? National courts? If so, *which* nation's courts? How does service of process and discovery work in transnational practice? And what legal doctrines apply specifically to disputes in national courts that have a transnational dimension? Beyond national courts, when are international courts available? And when might noncourt dispute resolution methods, such as mediation or arbitration, be most appropriate? A transnational lawyer must be aware of a variety of possible forums and appreciate how forum selection may influence the outcome.
- If the other party does not voluntarily comply with a dispute resolution outcome, how might that outcome be enforced? Under what circumstances will one nation enforce dispute resolution outcomes reached in another nation? How do considerations of enforcement shape other decisions about a case or a business transaction, such as the selection of a dispute resolution method?

Each set of questions entails many complexities that will be explored in this casebook. By the end of this course, we hope that you will be able to analyze these issues effectively in a wide variety of factual settings. These questions certainly do not capture all the issues that can arise in transnational law and practice. There is much more you can learn both in more specialized courses and in practice. Nevertheless, if you learn to tackle these three basic sets of pervasive issues, you will have a solid foundation for solving transnational legal problems in the real world, and for furthering your study of international and transnational law. Indeed, we believe that by focusing on these questions you will be better equipped

to tackle the everyday questions you will face in your law practice generally, even if you do not face transnational legal problems on a regular basis.

This casebook includes in-depth discussions of international law and international courts (Chapters 2 and 5). But a theme of the casebook is that lawyers should not be "international law-centric" or "international court-centric" when dealing with transnational legal problems. To the contrary, today's lawyers need to understand the crucial role that national law and national courts play in solving transnational legal problems (Chapters 1 and 4). This central insight was captured long ago by Philip Jessup — a lawyer, diplomat, professor, and judge on the International Court of Justice — when he coined the term "transnational law" to refer to "all law which regulates actions or events that transcend national frontiers" — not just international law, but also national law. PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956). Yet even understanding national law and international law is not enough. Private methods of governing transnational activity, including contracting and arbitration (Chapters 3 and 6), are among the most important and fast-growing parts of transnational practice today. Thus, when we refer to transnational law, we mean not only national and international law that applies to transnational legal problems, but also the private forms of regulation and dispute resolution that lawyers and their clients use to address those problems.

No casebook can do everything. This casebook's approach — like any approach — entails trade-offs in coverage. First, we focus on issues that arise in planning for and resolving transnational disputes more than we focus on transnational business transactions. Understanding the former is, however, essential for understanding the latter. Dispute resolution provisions are an important part of almost every business agreement. More generally, expectations about the applicable legal rules and the methods by which disputes arising out of a transaction will be resolved are both major influences on the planning, negotiation, and performance of business transactions. We therefore believe that a course using this casebook can provide an excellent foundation for a subsequent course on transnational business transactions.

Second, the casebook's focus is more systemic than substantive. The national, international, and private dimensions of the transnational legal system that today's lawyers need to be familiar with are treated in depth, but we have not devoted chapters to specialized substantive fields of international law typically covered in traditional public international law courses (such as international trade, the use of force, or the law of the sea). We believe that a student who masters the fundamentals of the transnational legal system will be well equipped to learn and use particular substantive fields of international law, and that a course based on this casebook will be an excellent foundation for advanced courses in public international law — and for legal practice.

Third, this casebook's dominant perspective is U.S. legal practice. The primary reason is simple: we expect that most students using this casebook will practice primarily in the United States or advise clients based in the United States. We also have found that emphasizing the kinds of transnational problems that U.S.-based lawyers commonly encounter in practice has significant pedagogical advantages — particularly in international law courses — compared to more

abstract and theoretical approaches. Nevertheless, we believe in the value of comparative perspectives. Encounters with foreign law and foreign legal systems are an important part of transnational practice. We also believe that policy perspectives can enhance student understanding. Therefore, although the casebook takes a predominantly U.S. practice perspective, we have incorporated comparative and policy material throughout.

In summary, this casebook introduces you to national law and international law, as well as private rules and nonbinding norms; to national courts, international courts, and nonlitigation dispute resolution methods such as mediation and arbitration; and to the techniques that can be used to enforce dispute resolution outcomes, including the enforcement of court judgments and arbitral awards. Unlike many courses, you will find that this course brings together your work in diverse areas such as constitutional law, statutory construction, torts, contracts, and civil procedure, and provides new twists to help you put those courses in perspective and push their boundaries.

This legal diversity can be messy — but that messiness is part of the real-world practice of law in today's globalized world. Legal scholars call this legal diversity "global legal pluralism." As one scholar puts it, "The irreducible plurality of legal orders in the world, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position transcending the differences — all of these topics of legal pluralism [appear] on the global sphere." Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 1 (2009). Another scholar emphasizes the "complex overlapping legal authority" that characterizes legal pluralism. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1162 (2007). One way of thinking about this course is as an introduction to some of the basic methods that lawyers use to grapple with legal pluralism in practice.

This introduction sets the stage for this casebook's exploration of transnational law and practice. Section A explains what this casebook means by transnational law and practice. Section B is a brief overview of the transnational legal system and its main parts, including national legal systems, international legal systems, and private ordering. Section C provides a roadmap for the rest of the casebook. Section D uses a real-world case to give you a first look at some issues that pervade transnational law and practice and to make more concrete the themes raised in this introduction.

## A. What Is Transnational Law and Practice?

Let's begin with some definitions. "Transnational law" is the law that governs transnational activity and disputes arising out of transnational activity. By "transnational activity" we mean activity that involves the citizens or governments of more than one nation or takes place or has effects in the territory of more than one nation. A terminological note is important here: In international law, "state" is a term of art that is generally used instead of "nation." Specifically, "a state is an entity that has a defined territory and a permanent population, under the control of

its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987). This casebook generally uses the term "nation" to avoid confusion with references to U.S. states. But throughout this course you should remember that when the term "state" is used in international law or international courts, it ordinarily refers to what this casebook calls a "nation," not to one of the 50 states of the United States.

Transnational law includes, but is not limited to, international law. "International law" is the law made among nations by treaty, through custom, or in the form of general principles common to the world's major legal systems (Chapter 2). Traditionally, international law mostly governed relationships among nations (such as diplomatic relations and the use of military force). Since World War II, however, international law has also increasingly addressed the rights and duties of individuals (as in the case of human rights law and international criminal law). But it is important not to be international law-centric, because other types of rules can also govern transnational activity: national law, contractually agreed-upon private rules, and nonbinding norms. As you will learn in Chapter 1, under some circumstances a nation's law may apply to activity outside its territory. And as you will learn in Chapter 3, parties routinely use privately negotiated contracts to govern their cross-border interactions, and nonbinding norms — like declarations of principles or corporate codes of conduct — also play an important role in governing transnational activity even though they are not legally binding.

Transnational practice refers to any work of a lawyer to help a client solve a transnational problem. For most lawyers today, transnational practice is not a distinct field of practice. Some law firms, businesses, nongovernmental organizations, international organizations, and government agencies do have groups of lawyers dedicated to transnational practice. But most lawyers called upon to help clients solve transnational legal problems are not "international lawyers" and do not perceive themselves as practicing "international law." They practice business law, family law, intellectual property law, personal injury law, criminal law, and so on. They work as solo practitioners and in small firms, as well as in large international law firms, government offices like the U.S. State Department's Office of the Legal Advisor, or international organizations like the United Nations. What they have in common is that regardless of practice area, and regardless of whether they consider themselves "international lawyers," they are likely to be called upon to help clients solve transnational legal problems.

In fact, one result of globalization is that transnational legal problems pervade virtually all fields of legal practice. U.S.-based business lawyers routinely represent U.S. clients entering into business transactions with non-U.S. parties, and vice versa. When disputes arise out of those transactions, U.S.-based lawyers help clients resolve those disputes, through litigation in U.S. courts or abroad, or through various alternative dispute resolution methods such as arbitration. U.S.-based intellectual property lawyers routinely represent clients in licensing transactions with parties in other countries, and in efforts to protect intellectual property globally. U.S.-based family lawyers represent clients in cross-border

adoptions, marriages, and other relationships between citizens of different nations, and child custody, child support, or spousal support matters involving parties in different nations. U.S.-based lawyers routinely represent U.S. clients seeking compensation for injuries suffered in other nations, or non-U.S. clients seeking compensation for injuries caused by U.S. parties. For all of these activities and disputes, lawyers must confront the basic questions we posed earlier: What are the applicable rules? Where can disputes be resolved? How can dispute resolution outcomes be enforced?

To make the point as emphatically as possible: this casebook is *not* only for students interested in or expecting to practice international law. It is for *all* law students. It is designed to expose you to the sorts of transnational legal problems you are likely to encounter in real-world practice, and to help you become a better lawyer generally, *regardless* of your field of practice. Among other things, the benefit of studying transnational practice is that you will learn about a host of legal doctrines — civil procedure, antitrust law, securities law, transnational human rights, to name just a few — all within one course. You will learn how to approach these problems as a lawyer and not just as a student. To this end, practice-oriented notes and questions are included throughout the casebook.

## B. The Transnational Legal System

It is important to understand the system in which transnational law is made, applied, and enforced, and in which transnational practice takes place. The transnational legal system has three basic parts: national legal systems, international legal systems, and private ordering. This section provides a brief overview of these parts. In the chapters that follow, you will learn about them in greater depth.

National legal systems are the legal systems of individual nations. National legal systems include the U.S. legal system (a "domestic" legal system, from a U.S. perspective) as well as the legal systems of other nations ("foreign" legal systems, from a U.S. perspective). Among the basic building blocks of a national legal system are institutions for lawmaking (such as legislatures), adjudication (such as courts), and law enforcement (such as regulatory agencies and police). There are more than 190 nations in the world. This means that there are more than 190 national legal systems in the world. Moreover, in some nations, there are legal subsystems — for example, in the United States, there are both state and federal legal systems.

Although there are similarities across different national legal systems, there also is considerable diversity. To try to make sense of this diversity, comparative legal scholars have long tried to categorize national legal systems. Although many different approaches to categorization have been proposed, "civil law" and "common law" are perhaps the most enduring categories for comparison. Among the differences between these two legal traditions, three stand out: history, sources, and the role of the judge. Historically, the civil law tradition has its roots in Roman law, whereas the origins of the common law tradition can be traced to England.