

Global Law: The Spontaneous, Gradual Emergence of a New Legal Order

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Abstract

This article argues that the debate over whether international law can apply to non-state actors misses the point. The useful distinction is not between rules that regulate the obligations of states and those that regulate the obligations of non-state actors, but rather between rules that regulate the reciprocal obligations of states to each other (international laws) and rules that set global standards that must be obeyed by all entities, state and non-state alike, regardless of national laws and boundaries. This latter category is the emerging phenomenon of global law. Global laws take varying forms, but they all seek to bind the entire globe to a singular global standard—they do not so much cross national boundaries as ignore them. Global law remains inchoate, but is increasing in both scope and coherence. Those seeking to predict the course that global law will take can look to the current example of international commercial arbitration, which is global law *par excellence*.

Keywords

global law; legal harmonization/unification; transnational legal practice; international arbitration

In recent years, the international law commentariat has been preoccupied with the question of non-state actors as subjects of international law. As classically defined, international law deals only with the rights and obligations of sovereign states; it is the law between – ‘inter’ – nations. And yet, vast fields of law exist that regulate the transnational conduct (i.e., conduct that crosses national borders) of individuals, companies, and NGOs, laws that are clearly not domestic and yet do not concern relations between states. Such laws are not national, but debate persists as to whether they constitute part of the corpus of ‘international law’.

This debate misses the point. The useful distinction is not between rules that regulate the rights and obligations of states and rules that regulate the rights and obligations of non-state actors. Rather, it is between rules that regulate the reciprocal obligations of states *to each other* and rules that set

global standards that must be obeyed by all entities across the globe, state and non-state alike, regardless of national laws and boundaries. For me, it is this latter category that is described by the label ‘global law’.

Global laws take one of two forms: either treaties or model laws adopted simultaneously by several states that uniformly regulate the conduct of their citizens; or the customary practices of transnational groups of non-state actors (including the decisions of non-national tribunals), which are final and binding and employ state laws and legal processes only as enforcement mechanisms. Both forms of rulemaking share one characteristic: they aspire (whether successfully or not) to bind the entire globe to singular global standards. Whereas international law exists to resolve the problems that arise from the conflicting interests of countries vis-à-vis each other, global law exists to resolve problems that arise from conduct (whether public or private) that crosses national boundaries and is not amenable to regulation by individual states. In terms of form and method, global law overlaps with both domestic and international law. It is distinguishable on its object and purpose; global law is global teleologically.

The distinction between international and global law is not an entirely clean one. Laws may be global but not international (such as the *lex mercatoria*), international but not global (such as regional trade agreements or the European Union governance regime), or both global and international. They can even coexist within a single instrument, as in the United Nations Convention on the Law of the Sea (UNCLOS).¹ Part II of UNCLOS deals, *inter alia*, with a paradigmatically international law issue: the delimitation of boundaries between states whose territorial seas are adjacent.² However, Part VII of UNCLOS contains some distinctly global law provisions. It establishes a global obligation for ships’ masters to render assistance on the high seas to persons in distress³ and creates a global standard for what constitutes piracy.⁴ To be sure, UNCLOS does not impose obligations (to render assistance, to not commit piracy) directly upon non-state actors like ships’ masters. Instead, it enlists state legislative processes in furtherance of its global standards by use of such language as ‘every state shall take effective measures to ...’ or ‘every state shall require the master of a ship flying its flag to ...’ But the intention and the effect of Part VII of UNCLOS is to create

¹ The United Nations (UN) Convention on the Law of the Sea A/CONF.62/122; 21 ILM 1261 (1982).

² *ibid* at Articles 3-16.

³ *ibid* at Article 98.

⁴ *ibid* at Article 101.

unified global obligations to which (for example) all masters of ships sailing on the high seas must adhere, regardless of nationality or location.

I do not pretend that there already exists a full-fledged system of global law. We still live in an essentially Westphalian world order, so global law continues to depend on the operation of national legal processes: treaties must be ratified by states and model laws implemented by their legislatures; standards must be adopted by national regulatory agencies; the decisions of international tribunals must be enforced in state courts. However, the endpoint would be for global laws to apply globally the same way national laws apply domestically: they would bind all state and non-state entities regardless of their consent.

In the meantime, elements of what may come to be a comprehensive global law do exist. The socio-legal scholar Lawrence Friedman has described ‘a kind of internationalized law, or globalized law, which exists side by side of, or on top of, the national or local sector. It may well represent a minority, even a small minority, of lawyers’ work, but its importance is clearly on the rise.’⁵ These various bits of global law have evolved piecemeal, as specific responses to the needs of different globalized communities. Global law arises spontaneously as an epiphenomenon of globalization; it is the legal response to the increasing interconnectedness of people and organizations across national borders. Just as nature abhors a physical vacuum,⁶ society abhors a legal vacuum.

Accordingly, we should expect to see global laws emerge in areas of law that are amenable to global rulemaking and that do not require a unified global administrative apparatus. These areas are not amenable to the traditional division of laws into public and private. What they have in common is that they involve global interactions. For example, not all commerce is amenable to global rulemaking, but transnational commerce is;⁷ not all aspects of family relationships are amenable to global rulemaking, but their transnational aspects are; there is no burning need for a global law of theft or murder, but global rules regarding transnational criminal enterprises are beginning to emerge.⁸

⁵ Lawrence M Friedman, ‘Erewhon: The Coming Global Legal Order’ (2001) 37 *Stanford Journal of International Law* 347, 355.

⁶ As first proposed by Aristotle in the Book Four of the *Physics*.

⁷ For example, members of the international commercial arbitration community often describe national legal systems as being unable to meet the ‘specific needs’ of international commerce. See, eg, Markus A Petsche, *The Growing Autonomy of International Commercial Arbitration* (QUADIS 2005) at 10; ICC Case No. 9427 of 1998 (2002) XXVII Yearbook Commercial Arbitration 153 [7].

⁸ For example, The UN Convention Against Transnational Organized Crime (‘Palermo Convention’) 2000.

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It is not surprising that the development of global law is most advanced in the commercial arena. Commerce was the earliest and remains the greatest beneficiary of globalization. National boundaries have been described as ‘international merchants’ worst enemy’.⁹ Global commercial law makes cross-border contracting easier and more profitable by making choice of law irrelevant and removing the problem of dealing with foreign law. It reduces uncertainty, lessens risk, promotes accurate pricing of contractual obligations and, in turn, increases the total volume of trade. Globalization of commerce has led to ‘an urgent need for a corresponding legislative policy’ that is consistent globally and independent of national legal systems.¹⁰

Global law is not limited to commerce, just as globalization is not limited to cross border flows in goods, services, and capital. A good example is global family law, exemplified by the four Hague Children’s Conventions: the 1980 Convention on the Civil Aspects of International Child Abduction,¹¹ the 1993 Convention on Intercountry Adoption,¹² the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children,¹³ and the 2007 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.¹⁴ These treaties were enacted because national-level efforts were seen to be inadequate to confront the challenges posed by increasing numbers of cross-border marriages and increasing numbers of migrants with children.¹⁵ Familial globalization could only be addressed by legal globalization.

⁹ Errol P Mendes, ‘The U.N. Sales Convention & U.S.-Canada Transactions: Enticing the World’s Largest Trading Bloc to Do Business under a Global Sales Law’ *Journal of Law and Commerce* 109 at 112 (1988).

¹⁰ Franco Ferrari, ‘The International Sphere of Application of the 1988 Ottawa Convention on International Factoring’ (1999) 8 *International Business Law Journal* 895, 895.

¹¹ Hague Convention on the Civil Aspects of International Child Abduction, 1343 UNTS 89, 19 ILM 1501-05 (1980).

¹² Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, 32 ILM 1134-46 (1993).

¹³ Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 35 ILM 1391 (1996).

¹⁴ Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 47 ILM 257 (2008).

¹⁵ Stephen I Winter, ‘Note: Home is Where the Heart Is: Determining “Habitual Residence” under the Hague Convention on the Civil Aspects of Child Abduction’ (2010) 33 *Washington University Journal of Law & Policy* 351, 351.

Since global law emerges largely as a reaction to socio-economic conditions, its emergence is largely driven by individuals and organizations that are independent of governments. Given the reality of state sovereignty, most existing global law is embodied in forms to which states have given their consent: treaties and model laws. For this reason, the aspects of global law that already exist tend to fall into two categories where states have less incentive to restrict the development of global standards. They either deal with areas of law where states' national rules differ only slightly (e.g., the abduction of children) or where fundamental national interests are not implicated (e.g., private contracts for trade in goods).

In the last two decades, we have begun to see areas of global law emerge that butt directly against the interests of sovereign states. The best example is the international law of investment protection. Through the decisions of investment arbitration tribunals and the practice of states and investors (including the provisions included within bilateral and multilateral investment treaties) a coherent global law of investment protection is currently emerging. It is still inchoate; for example, there is general agreement that states may not expropriate the property of foreign investors with impunity, but there is no global agreement on what constitutes expropriation. However, the emerging global investment law is remarkable in that it subordinates the regulatory decision-making processes of sovereign states to global standards of treatment – standards to which states never expressly agreed. The existence, extent, and autonomy of investment law are stark evidence of the expanding reach of global law.

From the above, it may seem that global law, as I have defined it, is simply international uniform law by another name. In fact, the two are related but they are not the same thing, and the difference is instructive about the nature and prospects of global law.

Going back at least to the foundation of the Hague Conference of Private International Law in 1893, the uniform law movement has sought to unify or harmonize disparate national laws. Its primary tools are codifications – 'hard law' instruments like treaties and model laws that are adopted by states into their domestic legal systems—and 'soft law' instruments like the Lando Commission's Principles of European Contract Law that act as exemplars to states and may apply directly in arbitrations or other ADR processes.

In other words, uniform law is fundamentally a centrally managed process, in which experts from around the world meet and agree on a uniform text, then try to persuade states to adopt the text. In contrast, global law develops organically through a gradual accretion of legislation and

adjudicative decisions and a gradual solidification of standard practices. Codifications do play an important role in the development of global law, but it is primarily a supportive one. The most successful codifications have been those that consolidate and rationalize already-prevalent principles and practices (such as the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration, which are now the *de facto* global standard) or principles elaborated in the international case law (such as the UNIDROIT Principles of International Commercial Contracts, whose drafting was informed by international arbitral experience). Berger has evocatively labeled this process 'creeping codification'.¹⁶

On their own, codified international uniform law instruments often fail to achieve true global standardization due to low ratification rates and, more fundamentally, inconsistent application by courts. National courts, in particular, have often displayed a 'homeward trend', infusing domestic notions into their interpretations of uniform law instruments.¹⁷ Globalization is as much a cultural phenomenon as anything else, and legal globalization is no exception.¹⁸

Accordingly, for global legal standardization to become a reality, the adjudicative bodies must not only interpret common text, but must approach the act of interpretation with a common mindset; they must share a

¹⁶ Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer 1999).

¹⁷ The literature on the homeward trend is particularly well developed in international sales law scholarship. See, e.g., Ingeborg Schwenzer and Christopher Kee, 'International Sales Law – The Actual Practice' (2011) 29 *Pennsylvania State International Law Review* 425; Franco Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' [2009] *International Business Law Journal* 333; Camilla Baasch Andersen, *Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG* (The Hague: Kluwer 2007); John O Honnold, 'The Sales Convention in Action – Uniform International Words: Uniform Application?' (1988) 8 *Journal of Law and Commerce* 207.

¹⁸ Scholars now regularly speak of declining legal nationalism and greater acceptance of supranational and transnational decision-making bodies. The literature on so-called 'judicial transnationalism' is vast. See, e.g. Elaine Mak, 'Why do Dutch and UK judges cite foreign law?' (2011) 70(2) *Cambridge Law Journal* 420; Brian Flanagan and Sinead Ahern, 'Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges' (2011) 60(1) *International & Comparative Law Quarterly* 1; Sam Muller and Sidney Richards (eds), *Highest Courts and Globalization* (The Hague: TMC Asser, 2010); Harold Hongju Koh, 'The Ninth Annual John W Hager Lecture, The 2004 Term: The Supreme Court Meets International Law' (2004) 12 *Tulsa Journal of Comparative & International Law* 1; Robert B Ahdieh, 'Between Dialogue and Decree: International Review of National Courts' (2004) 79 *New York University Law Review* 2029; Charles H Koch Jr, 'Envisioning a Global Legal Culture' (2003) 25 *Michigan Journal of International Law* 1; Anne-Marie Slaughter, 'Judicial Globalization' (2000) 40 *Virginia Journal of International Law* 1103.

common adjudicative culture. This is why I believe that global law will not be advanced primarily by the kinds of codified instruments that the uniform law movement has prioritized since the 19th century, but rather by the organic evolution of legal principles in response to the needs of transnational communities.

Moreover, a distinct variety of global legal practice is emerging alongside global law itself. Modern law practice is increasingly specialized, so that practitioners in transnational fields often have more in common with each other than with other lawyers from the jurisdictions in which they were trained. Whenever actors are placed outside existing systems of governance and interact repeatedly with each other, it is not surprising that new cultural norms, specific to the new field of interaction, might develop. Teubner has called this process ‘auto-constitutionalisation’ – the tendency of private governance regimes operating outside the state to develop their own sets of norms.¹⁹ Where economic globalization has given rise to the establishment of a corpus of specialist transnational legal practitioners who work primarily with each other and outside the governance of any one state, professional cultures specific to global legal practice will coalesce – a globalization of the legal profession. The development of a distinct global legal community of practitioners can only strengthen the emergence of a distinct global law.

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If rules change fundamentally without an accompanying change in culture, parties and adjudicators will resist the new rules and will subvert them in a variety of ways. Therefore, if global law is to evolve toward a comprehensive, internally consistent system, it will have to develop organically, and not through negotiations at international conferences or scholarly drafting committees. These processes are already underway. Discrete fields of global law have already spontaneously emerged and are gradually evolving. The patchwork character of existing global law ‘matches the one experienced in the first stages of judicial development described by legal historians and anthropologists ... law percolates up from the bottom’.²⁰

¹⁹ Gunther Teubner, ‘Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?’ in Karl-Heinz Ladeur (ed), *Public Governance in the Age of Globalization* (Ashgate 2004).

²⁰ Florian Grizel, ‘Control of Awards and Re-Centralisation of International Commercial Arbitration’ (2006) 25 *Civil Justice Quarterly* 166, 168.

It is difficult to predict what global law will look like once it has evolved into a mature legal system,²¹ or even whether it will in fact become a comprehensive system. However, there is at least one solid source of information about the likely future development of global commercial law: the decisions and practices of international commercial arbitral tribunals. International commercial arbitration is global law *par excellence*. It is a global system of dispute resolution that exists outside the legal system of any state. It aspires to eliminate the legal significance of state boundaries ('delocalization') and to establish global rules, both procedural and substantive, for the resolution of cross-border commercial disputes.

Of course, arbitration requires the cooperation of states – the international arbitration system is undergirded by treaties such as the New York Convention,²² which obliges contracting states to enforce valid arbitral agreements and arbitral awards, and by national laws that regulate arbitrations (which must of necessity take place within *some* state). However, the role of states in international arbitration – or at least the role that the arbitration community sees for states – is simply to enforce the decisions of arbitral tribunals. To a large extent, states have agreed that 'arbitration-friendly' policies are advisable and have pledged not to interfere unless state mandatory laws are contravened.²³ Thus, when international arbitrators apply national laws, they may not do so in the same way as national courts, but their decisions generally cannot be overturned for errors of law.²⁴

The effect of these developments is that all of the dynamism in international arbitral rulemaking comes from outside the state context. Rules of international arbitration are not generally made by states, or on their behalf, or even by reference to them. In addition to interpreting national laws in

²¹ I attempt this with respect to contract law in a forthcoming book, *The Culture of International Arbitration and the Evolution of Contract Law* (OUP 2013).

²² Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) 330 UNTS 4739.

²³ The phrase often used is that international arbitration has become progressively 'delocalized'- detached from the laws and courts of the countries in which arbitrations are conducted. Of course, arbitration cannot be entirely delocalized so long as national courts are needed to enforce arbitral awards.

²⁴ For concrete examples of divergences between arbitral and judicial applications of the same national laws, see Joshua Karton, 'Interpretation of Contracts in International Commercial Arbitration' (2012) 28(4) *International Business Law Journal / Revue de Droit des Affaires Internationales* 383; Joshua Karton, 'Contract Law in International Commercial Arbitration: the Case of Suspension of Performance' (2009) 58(4) *International & Comparative Law Quarterly* 863.

ways that may be inconsistent with national jurisprudence, arbitrators may apply non-national rules of law, including free-floating 'general principles'. Arbitration is also radically decentralized – no arbitral tribunal is bound by the legal determinations of another (although tribunals do regularly cite each other, especially in investor-state disputes). Finally, arbitration is more flexible than national court proceedings and more sensitive to changes in commercial practice.

Whenever an arbitral tribunal applies an international instrument or recognizes a general principle of international private law, it helps to develop global law. International arbitration is currently the most dynamic source of new global commercial law. Present trends in arbitration may well presage the future evolution not just of international arbitral practice, but of global commercial law more generally. As Pierre Karrer put it, 'Arbitration may not be a window to the future. But it is a good seismograph. It registers what is moving down the road. It gives us a glimpse of what the law tends to become.'²⁵

²⁵ Pierre A Karrer, 'The Alexander Lecture 1998: Is Arbitration a Window to the Future?' (1999) 65(3) *Arbitration* 170, 176.