CHAPTER 2
International Law
and the World’s Legal Systems

INTERNATIONAL LAW

The exact origins of international law, and whether it dates to antiquity or to the Middle Ages, is debatable. The ancient Greeks, Chinese, and Romans all recognized some rudimentary concepts of international law. However, the term international law is thought to be derived from the Latin term jura gentium, meaning “the law of nations.” That term was used in reference to Roman law that governed public and private relations with foreigners or with the rulers of foreign lands.

Many legal historians prefer to date the origins of modern international law to 1645 and the Treaty of Westphalia, which followed the Thirty Years’ War. For our purposes it is sufficient to recognize that it was the rise of the European nation-state, first ruled by monarchs and later by sovereign governments, that led to the development of modern international law. In the sixteenth and seventeenth centuries, legal scholars from Spain, Italy, and Holland developed the first modern European concepts of international law. In 1625, Hugo Grotius wrote an important work, On the Law of War and Peace, which brought together various schools of thought on the nature of law and international obligations. He was a jurist, diplomat, statesman, lawyer for the Dutch East India Company, and respected author on the law of the sea. It was a time of colonialism, trade, and the rise of nations. Grotius wrote that the law of nations was not just divinely given, as was commonly believed in his day, but also that law arose by common agreement, by consensus, and by the accepted practice of nations. He premised these ideas on the idea of national sovereignty and on the recognition that all states are equal. To this day, it is accepted that international law arises not from the work of some supranational legislature, but because nations have agreed to follow customary and accepted rules or norms and to comply with treaties and conventions that they sign. This chapter examines customary international law, the law of treaties, and the role of international organizations in fostering international laws and ideals. We will see how international law addresses human rights, criminal law, and transnational crimes like terrorism. We will also see how international law has indirectly affected standards for corporate social responsibility in international business. Finally, we will take a comparative look at three of the major legal systems in place around the world today, including the common law, civil law, and Islamic legal systems.

Defining International Law

International law can be defined as the body of rules applicable to the conduct of nations in their relationships with other nations, the conduct of nations in their relationships with individuals, and rules for international, or intergovernmental, organizations. It can also include crimes and criminal procedures applicable to genocide, war crimes, and offenses against humanity committed by individuals in an official capacity.

International law has several characteristics that distinguish it from a country’s domestic or municipal law. First, instead of being dictated by a legislative body, international law consists of rules that countries agree to follow. It is lawmaking by choice and by consent. Indeed, international law exists because nations agree that it is in their best interests to cooperate and to conform to commonly accepted norms. Second, despite some commonly misunderstood beliefs about the United Nations and other international bodies, there is no global authority for enforcing international law. It is true that international courts and tribunals (such as the International Court of Justice or dispute bodies of the World Trade Organization, for example) do issue judgments against nations. But nations must agree to be a party to these cases, and “hard” enforcement mechanisms do not really exist. There are courts, but no international sheriffs or marshals. International law has only “soft” enforcement mechanisms such as the force of public opinion, diplomacy, the withholding of foreign aid or other assistance, trade and economic sanctions, and political retaliation. Of course, the ultimate sanction
against a country for violating international law is war, or at least the threat of it. In certain cases, where individuals are convicted of having committed international crimes, prison sentences and, in rare cases, the death penalty have been used. Later we will see that domestic and international courts do add to the enforcement capabilities of international law.

Public and Private International Law

There are many ways of organizing a discussion of international law. For the purposes of this textbook, we will refer to two broad categories: public international law and private international law. **Public international law** deals with those rules affecting the conduct of nations in their relationships with each other and with individuals. Just as an example, this might include rules for resolving territorial or boundary disputes, for conducting diplomacy or war, and for how nations treat foreign citizens. **Private international law** deals with the rights and responsibilities of private individuals or corporations operating in an international environment. For example, private international law might include international conventions and rules for international business transactions, including sales contracts, international shipping, or the liability of commercial airlines to passengers. There are even private international law rules for administering the wills and trusts of deceased persons who have owned property in more than one country. Private international law also can include laws enacted by national legislatures (i.e., a Congress or Parliament), usually governing international transactions, that are based on a model code prepared by international organizations. This tends to make national laws more uniform and more predictable—something very important if you are doing business in the far corners of the world. This process of making national laws more uniform is known as the harmonization of law. Private international law is covered in depth in the remainder of this book.

Sources of International Law

The most frequently cited authority for the sources of international law is the *Statute of the International Court of Justice*, the judicial arm of the United Nations. It sets out both primary and secondary sources of international law. According to Article 38, the primary sources of international law are: (1) international treaties and conventions, (2) international custom or customary law, and (3) the general principles of law recognized by civilized nations. Secondary sources, which are subsidiary means for the determination of rules of law, include the judicial decisions and teachings of the most highly qualified jurists of the various nations. Secondary sources provide evidence of what international law might be or how it should be interpreted. These include the judicial decisions of international courts and tribunals, scholarly writings, annual surveys published by international law societies in many countries, and publications of the United Nations. In the United States, the Office of the Legal Advisor of the U.S. Department of State publishes an annual Digest of United States Practice in International Law. In the United States, *The Restatement of Foreign Relations Law*, published by the American Law Institute, is considered a secondary source of customary law. The first source of international law that we will discuss is custom international law.

Customary International Law

Almost all legal systems, past and present, can trace their laws to some form of custom. Custom ruled primitive societies before there was law. It was, and is, the basis of law in tribal societies. It was the basis of the laws of the Cherokee nation and other tribes in precolonial America and included customary rules for dealing with neighboring tribes. It was the law of England prior to the Norman Conquest of 1066. Indeed, the customs of people influenced the early development of English common law. The customs and practices of the early English merchants eventually led to the development of commercial laws-known collectively as the law merchant—and the practices of early shipowners and shippers gave rise to the first laws of international shipping and cargo insurance. Custom has always been at the root of legal development, and that includes international law.

**Customary international law** includes those commonly accepted rules of conduct that, through a consistent and long-standing practice, nations have followed out of a sense of binding obligation. Examples could include rules for the establishment of diplomatic missions, rules for the uniform prohibition against state-sponsored piracy on the high seas, or the right to seize the naval vessel of a foreign adversary during wartime. There is little doubt today that customary international law has become a part of the domestic law of virtually every nation. In the landmark American case *Paquette v. H上有*, the U.S. Supreme Court recognized international law as a part of American law. Notice how the Court discusses the necessity of resorting to "customs and usage" to ascertain international law.
BACKGROUND AND FACTS

During the Spanish-American war, the United States Navy seized two commercial fishing ships that were sailing from Havana. The ships were owned by a Spanish citizen living in Cuba and sailed under Spanish flags. The ships were not armed and not engaging in any hostilities. The owners were unaware of the hostilities between the United States and Spain and of the U.S. blockade of Cuba. The fishing ships were sold by the Navy in Florida as "prizes of war." Their original owner sued for damages in U.S. District Court. The court upheld the seizure and the owner appealed.

JUSTICE GRAY

These two appeals are from decrees of the district court of the United States for the southern district of Florida condemning two fishing vessels and their cargoes as prize of war.

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

The doctrine which exempts coast fishermen, with their vessels and cargoes, from capture as prize of war, has been familiar to the United States from the time of the War of Independence.

Since the United States became a nation, the only serious interruption, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.

In the war with Mexico, in 1846, the United States recognized the exemption of coast fishing boats from capture. International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

This review of the precedents and authorities of the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on consideration of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

Decision. The Supreme Court reversed the district court and held that under an established rule of international law, peaceful fishing vessels are exempt from capture as prize of war. The Court ordered that the owner receive payment for the loss of the ship, along with damages and costs. The Court acknowledged that it was bound to take judicial notice of international law and that international law is a part of American law.

Case Questions
1. What are the sources of international law?
2. Why did the court review the history of the conduct of the nations during wartime?
3. Which international custom applied to this dispute?
in a more expansive manner, opening the doors of U.S. courts to more and more civil lawsuits based on violations of the norms of international law. Proponents of human rights argue the necessity that human rights cases be heard in the United States, supported this view of the statute. Many executives of U.S. multinational corporations were concerned that they could be sued in the United States by non-U.S. citizens who were accusing them of supporting, or participating in, human rights violations such as unfair or abusive labor practices, environmental damage, or worse (such as aiding and abetting foreign government-sponsored torture). The U.S. government supported this narrow reading of the statute. In the following case, Sosa v. Alvarez-Machain, the court addresses the scope of the Alien Tort Statute and answers the question of whether an abduction and arbitrary arrest of a Mexican citizen to stand trial in the United States violates a binding norm of customary international law.

The Law of Treaties

Other sources of international law include treaties and other international agreements of nations. A treaty is a legally binding (in the "international law" sense) agreement, contract, or compact between two or more nations that is recognized and given effect under international law. A treaty between two countries is said to be bilateral, and a treaty between three or more countries is multilateral. One of the most important principles of treaty law is that of pacta sunt servanda ("the pact must be respected"), meaning that treaties are binding on both parties and must be performed by them in good faith. A convention is a legally binding multilateral treaty on matters of common concern, usually negotiated on a regional or global basis and open to adoption by many nations. Many conventions are negotiated under the auspices of the United Nations, the European Union, or the Council of Europe.

Sosa v. Alvarez-Machain

BACKGROUND AND FACTS

Alvarez-Machain (Alvarez), a Mexican physician, was asked by the United States Drug Enforcement Agency for the torture and murder of one of their agents in Mexico in 1985. Alvarez had allegedly administered drugs to the victim over the course of two days to prolong his consciousness during torture. When Mexico would not extradite Alvarez, the DEA employed Sosa and several other Mexican citizens to kidnap Alvarez from his home and fly him by private plane to Texas, where he was arrested by federal officials. Alvarez was tried and acquitted in a U.S. court. After the acquittal, Alvarez returned home and in 1993 brought this civil suit in U.S. District Court against Sosa for damages under the U.S. Alien Tort Claims Act (also called the Alien Tort Statute, or ATS). The ATS was first enacted in 1789, as amended, 28 U.S.C. 1350. Alvarez brought this suit on the theory that the abduction and false arrest were a tort committed in violation of customary international law—law of nations. Alvarez won a judgment against Sosa in District Court, and it was upheld by the U.S. Court of Appeals. Sosa appealed to the U.S. Supreme Court. Issues related to Alvarez's claim against the government under the Federal Tort Claims Act are omitted here.}

JUSTICE SOUTER

Alvarez says that the ATS was intended ... as authority for the creation of a new cause of action for torts in violation of international law. We think that reading is implausible. As enacted in 1789, the ATS ... bespoke a grant of jurisdiction, not power to mold substantive law. The fact that the ATS was placed in Art. III of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature.

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Sosa would have it that the ATS (must have created a right of action) because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. [The 'friend of the court' briefs submitted by several law professors] took a different tack, that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time. We think history and practice give the edge to this latter position.

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When the United States declared their independence, they were bound to receive the law of nations.
in its modern state of purity and refinement.” Ware v. Hylton, 3 Dall. 199 (1786). In the years of the early Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other. There was also a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. (William Blackstone, In his Commentaries on the Laws of England 68 (1768)) referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conduct, infringement of the rights of ambassadors, and piracy. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort. ** **

Still, the history does tend to support two propositions. First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. ** ** The second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors; violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims. As Blackstone had put it, “offences against this law (of nations) are principally incident to whole states or nations,” and not individuals seeking relief. In court, 4 Commentaries 68. ** **

In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of International law violations with a potential for personal liability at the time. ** **

We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conduct, infringement of the rights of ambassadors, and piracy. ** ** Congress has not in any relevant way amended ATS §1330 or limited civil common law power by another statute. ** ** Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms we have recognized. This requirement is fatal to Alvarez’s claim. ** **

Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution. ** **

We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and for this action it suffices to look to the historical antecedents. Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under ATS §1330, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when ATS §1330 was enacted. ** **

(Avarez) attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law. It is this position that Alvarez takes now, that his arrest was arbitrary and as such forbidden by international law not because it infringed the prerogatives of Mexico, but because no applicable law authorized it. Alvarez thus invokes a general prohibition of “arbitrary” detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. Alvarez cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any torture or an alien in violation of the Fourth Amendment... Whatever
may be said for the broad principle Alvarez advances. In the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy. The judgment of the Court of Appeals is reversed.

Decision. The Supreme Court rejected Alvarez’s claim, ruling that Alvarez’s abduction and transfer to the United States did not violate any norm of customary international law that would create a remedy under the Alien Tort Statute. The Court reasoned that the only offenses recognized at the time of passage of the ATS in 1789 were violations of safe conduct, infringing the rights of ambassadors, and piracy on the seas. Recovery under the ATS should be limited to those situations, or to violations of norms of international law that are accepted by the civilized world and defined with a comparable specificity. The abduction and arrest in this case did not meet that standard.

Comment. Since the Sosa decision, there have been a number of cases that have denied the claims of non-U.S. citizens against corporations for wrongful conduct under the ATS. Citizens of Peru were denied recovery in the United States against a Peruvian mining company that had alleged environmental health problems. Iraqi citizens were denied recovery in the United States against private contractors who provided interpreters that were present during military interrogations where torture was allegedly used. Eleven Indonesian citizens were denied recovery against Exxon-Mobil for aiding and abetting members of the Indonesian army accused of committing civil rights abuses where the soldiers had been hired by ExxonMobil to guard their natural gas pipeline.

Case Questions
1. According to Justice Souter, what is the “relatively modest set of actions” intended by Congress to be encompassed by the Alien Tort Statute?
2. Under Sosa, what is the standard by which federal courts can hear cases under the Alien Tort Statute?
3. If the Supreme Court had permitted Alvarez’s suit, could it have opened the doors of U.S. courts for lawsuits involving almost any wrongdoing committed by an American citizen against a non-citizen anywhere in the world?
4. Suppose that an American multinational corporation permits the release of toxic waste in an area of the Amazon rain forest, resulting in environmental damage and severe illness. Do you think that after the Sosa decision the injured parties could bring an action against the U.S. firm in U.S. federal courts under the Alien Tort Statute?
5. Considering your last answer, if Sosa had been decided differently, do you agree with U.S. industry that it would have discouraged U.S. foreign investment abroad?

There are tens of thousands of treaties and conventions in effect worldwide. They touch on every subject affecting mankind, including peace and security, the military use of force and self-defense, nuclear testing and proliferation, chemical weapons, human rights, the condition of refugees, rights of navigation and passage, global climate change, space, taxation, and the issues of international business and trade that are covered in this textbook.

In the United States, treaties must be ratified by a two-thirds majority of the Senate. Treaties of the United States can be found in the U.S. State Department document, Treaties in Force. For a discussion of the “treaty power” of the United States under the U.S. Constitution, including the functions of the legislative and executive branches of government in making treaties, and the use of executive agreements, see Chapter 8.

Treaties generally take on the common name of the city in which they were finally agreed and completed. Examples of treaty names include “the Vienna Convention,” and “the Montreal Convention.” Many treaties discussed in this book were completed in Madrid, Vienna, Geneva, Budapest, Kyoto, Montreal, Paris, Warsaw, and other cities. Therefore, a word of caution is in order when speaking of a treaty in this way. Some cities have been the site of the completion of many treaties. For example, a reference to the “the Vienna Convention” can mean the Vienna Convention on Diplomatic Relations or it can mean the Vienna Convention on Protection of the Ozone Layer—a big difference. So be careful when abbreviating treaty names by referring only to the city.

Some Other Treaty Terminology. A protocol is an agreement that modifies or adds to a treaty or convention, or that deals with matters less significant than those dealt with in treaties. It is usually used to address matters that are ancillary to a main treaty or convention. A treaty or convention is said to have been adopted when it is completed in its final form ready for nations to ratify.
Ratification is the formal expression of a nation’s consent to be bound by the treaty terms (ratification in the United States requires the vote of two-thirds of the U.S. Senate). Nations that express their willingness to join a treaty are said to be signatories. After the document is adopted by their legislatures or appropriate government bodies, they are said to become contracting parties. A treaty becomes effective on the date set out in the treaty for it to “enter into force,” which is usually after some minimum number of nations become parties. A reservation is an exception to a treaty set out by a signatory country at the time of ratification.

The Vienna Convention on the Law of Treaties. The interpretation of treaties is governed by customary international law rules. The Vienna Convention on the Law of Treaties, which became effective in 1980 in about half of the countries of the world, codified many of the customary rules. Legal scholars today view it as the summary statement of the law governing treaties and conventions in signatory countries. It covers such issues as when treaties enter into force; how they are interpreted, amended, or terminated; the rights and duties of contracting parties; provisions for dealing with conflicts between treaties (i.e., when two treaties are in conflict on a particular matter, the later treaty prevails); or the effect of a fundamental change in circumstances on treaty obligations. According to Article 53 of the Vienna Convention on the Law of Treaties, a treaty is void if it violates a peremptory norm. While the United States is a signatory to the treaty, as of 2007 it had not been ratified by the U.S. Senate. Nevertheless, many U.S. courts apply the treaty’s provisions as customary law.

Self-executing and Non-self-executing Treaties. Treaties can be either self-executing or non-self-executing. In countries with written constitutions, such as the United States, a self-executing treaty is one that has “domestic law effect.” In other words, it needs no further action by a domestic lawmaker, such as a legislature, in order for it to be binding. It vests legal rights and remedies in private parties, in and of itself. One example is the Montreal Convention for the Unification of Certain Rules for International Carriage by Air, which sets out the rights of airlines and airline passengers, and which courts can enforce. On the other hand, a non-self-executing treaty requires some legislative act in order for it to become a part of a country’s domestic law. In the United States, the courts cannot enforce rights under a non-self-executing treaty. An example of a non-self-executing treaty in the United States is the Charter of the United Nations. In Great Britain, all treaties require legislation to put them into legal effect. In the following case, Renkel v. United States, the plaintiff brought an action against the United States alleging rights under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). The court was asked to decide if the Convention against Torture is self-executing or not.

Renkel v. United States
456 F.3d 640 (2006) United States Court of Appeals (6th Cir.)

BACKGROUND AND FACTS
Diana Renkel alleged that she had received substandard medical care while incarcerated in the United States Disciplinary Barracks at Ft. Leavenworth, Kansas. She sued the government, arguing that the government had violated her rights under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention, or Convention against Torture). The district court dismissed her suit, finding that there is no private right of action under the Convention. She appealed to the U.S. Court of Appeals.

MCKEAGUE, Circuit Judge
Renkel squarely presents us with one issue on appeal: whether she has an actionable claim for relief under the Convention against Torture. Under the federal Constitution, all international treaties in which the United States entered become part of the “Supreme Law of the Land.” U.S. Const. art. VI, cl. 2. “Treaties have the same legal effect as statutes.” United States v. Esmiquiami, 268 F.3d 377, 389 (6th Cir. 2001).

Yet treaties, like some statutes, do not always directly create rights that a private citizen can enforce in court. Tel-Oren v. Libyan Arab Republic, 728 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring). As we explained in Esmiquiami, a treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If those fail, its infraction becomes the subject of international negotiations and redress, so far as the injured parties

continue
choose to seek redress, which may in the end be enforced by actual war. It is obvious that with all the three [judicial courts have nothing to do and can give no redress]... see also Foster v. Ninth, 27 U.S. 220 (1829); 307 (1829).["The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is committed; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established."]... "In fact, courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them." Ennauguer, 268 F.3d at 369.

Some treaties may, however, directly provide for private rights of action. "Self-executing treaties" are those treaties which do not require domestic legislation to give them the full force of law. See TWA v. Franklin Min Corp., 468 U.S. 243, 252 (1984) (related to the Warsaw Convention governing the financial liability of airlines to passengers for injuries or loss of life or property during international flights); such treaties can create private rights enforceable in court. On the other hand, "non-self-executing" treaties do require domestic legislation to have the force of law. For a non-self-executing treaty, any private claim must be based on a violation of the domestic law implementing the provisions of that treaty. Raffling v. Cargill, 369 F.3d 900, 903 (8th Cir. 2005). In other words, federal courts "are bound to give effect to international law and to international agreements, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary authority." Bliss v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001) (quoting Restatement (Third) of Foreign Relations Law of the United States (1987)).

"Whether a treaty is self-executing is an issue for judicial interpretation..." Provo v. U.S.S.R., 761 F.2d 370, 373 (7th Cir. 1985). In general, we first look to the express terms of the treaty, and then to the "treaty as a whole" to determine whether it evidences an intent to be self-executing and to create a private right of action. See Tal-Oren, 726 F.2d at 803 (Bork, J., concurring).

Rennikel argues that the government violated her rights under the Convention, and cites several Articles in support, including Articles 1-2 and 13-16. Those Articles are not, however, expressly self-executing. Moreover, in consenting to the treaty's ratification, the United States Senate declared, as recommended by President Reagan, that Articles 1-16 are not self-executing (see 136 Cong. Rec. S17486-01, S17492 (1990)). Thus, it is clear that it was the intent of both the Senate and the President that Articles 1-16 are not to be self-executing. ... As the Articles are not self-executing, they do not create private rights of action; therefore, any private lawsuit seeking to enforce the United States' obligations under the Convention must be based on domestic law.

The domestic law implementing the Convention, however, lends no aid to Rennikel. The Foreign Affairs Reform and Restructuring Act of 1998... fulfills the United States' obligations under Article 3 to prohibit the transfer of aliens to countries where they would be tortured. Rennikel has no claim related to Article 3. The United States also enacted a federal statute to fulfill its obligations under Articles 4 and 5. Yet, those sections criminalize torture outside the United States; they do not provide civil redress for torture within the United States. For the latter, a plaintiff must pursue her claim under some other federal law and meet the jurisdictional and substantive requirements for civil relief.

Finally, Rennikel argues that the Convention embodies a customary norm of international law against torture. Under certain circumstances, a federal court can imply a private right of action for violations of higher, peremptory norms of international law. Rennikel has not shown that the appropriate circumstances exist here.

Decision. Rennikel has no cause of action under the United Nations Convention against Torture because it is not a self-executing treaty. Nor does Rennikel have a cause of action under any domestic law implementing the United States' obligations under the Convention. Judgment for the government is affirmed.

Comment. The U.S. reservations to the Convention declared that it was not self-executing.

Case Questions

1. In the United States, to whom do rights created by treaties belong?
2. What is the difference between self-executing treaties and non-self-executing treaties?
3. What are the factors utilized by courts in determining whether a treaty is self-executing or non-self-executing? Why did the court conclude the Convention against Torture and Other Cruel, Inhuman or Degradign Treatment was not self-executing?
convention creates one widely accepted body of sales law governing contracts for the sale of goods between firms located in countries that have adopted the convention. Another example, in this case a non-self-executing treaty, is the Budapest Convention on Cybercrime.

**Addressing Global Problems: Convention on Cybercrime.**
This is an excellent example of how a treaty can be used to deal with a global problem that truly "knows no borders"—transnational cybercrime. Without international cooperation, the prevention and prosecution of cybercrime would be nearly impossible. The Budapest Convention on Cybercrime (2001), ratified by twenty-one nations as of 2007, calls for signatory countries to cooperate on drafting and enforcing criminal laws dealing with online copyright infringements, computer-related fraud, child pornography, and violations of network security. The convention does not itself criminalize cybercrime or set up an international court. Rather, it puts in place a system for dealing with a global problem that would be impossible for individual nations to stop. The convention was drafted under the auspices of the Council of Europe and included the United States, Canada, Japan, and other countries. It entered into force in the United States in 2007. A protocol to the convention calls for countries to criminalize the publication by computer of racist propaganda or threats (including hatred, discrimination, or violence on the basis of race, color, descent, national or ethnic origin, or religion). It also calls for the criminal prosecution of anyone who uses a computer network to deny, grossly minimize, or approve of acts constituting genocide (including the Holocaust) or crimes against humanity as defined by international law.

**International Human Rights and Humanitarian Law**

No text on international law would be complete without some introduction of human rights. There are many countries, in different regions of the world, whose people suffer from racial, cultural, religious, and ethnic strife, and where discrimination and hatred manifest themselves in crimes of violence against large numbers of people. And there are forms of criminal behavior on a grand scale, some motivated by politics, power, or money, others by ethnic, national, or religious differences, that stretch the bounds of our ability to describe them. Reports appear almost daily in the world's press of crimes committed on a mass scale reflecting the worst horrors of humanity. All people, and surely international businesses, have an obligation to understand how international law treats these human rights issues.

**International Humanitarian Law.** International humanitarian law refers to those rules for how nations treat combatants, noncombatants, refugees, and other civilians during war or civil conflict. Sources of international humanitarian law include the four Geneva Conventions related to the treatment of prisoners and of the wounded and conventions on the use of certain weapons, such as biological and chemical weapons and antipersonnel mines.

**International Human Rights Law.** International human rights law protects individuals and groups from the acts of governments that violate their civil, political, or human rights during times of peace. Examples include the ban on the use of torture in the world's prisons or prohibition of the use of children in military service. Sources of human rights law include the following international conventions. (Parentheses indicate sponsoring organization, United Nations, Council of Europe, or International Labour Organization.)

- 1949 Convention for the Prevention and Punishment of the Crime of Genocide (UN)
- 1948 Universal Declaration of Human Rights (UN)
- 1966 International Convention on the Elimination of All Forms of Racial Discrimination (UN)
- 1966 International Convention on Civil and Political Rights (UN)
- 1981 Convention on the Elimination of All Forms of Discrimination against Women (UN)
- 1954 Convention on Genocide (UN)
- 1959 International Convention on the Rights of the Child (UN)
- 1961 International Convention on the Rights of All Migrant Workers (UN)
- 1960 Rome Statute of the International Criminal Court (UN)
- 1996 Declaration on Fundamental Principles and Rights at Work (ILC)
- 1998 Declaration on the Worst Forms of Child Labour (ILC)
- 2003 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN)

Despite lofty objectives, these human rights conventions have not been adopted by all nations. Several have not been ratified by the United States. As of 2007, the United States has not ratified the Convention on the Rights of the Child. Ratification has not happened because the convention prohibits sentencing juveniles to the death penalty.
penalty or to life imprisonment without parole (which can be done in the United States), because of opposition by some private and religious groups in the United States to certain provisions of the convention, and because of certain possible conflicts with U.S. constitutional law. There are other regional human rights conventions from Africa, Asia, and Latin America. Enforcement of human rights standards in some regions is a distant dream, as the world has witnessed in Myanmar, the Balkans, and in Africa in recent years.

International Criminal Law

Another body of public international law closely related to humanitarian and human rights law is international criminal law. While international law generally deals with the obligations of nations to other nations, international criminal law deals with the obligations of individuals, who are acting in an official capacity, for crimes committed against other individuals. International criminal law is that body of law and procedure that involves the use of criminal sanctions to prosecute individual offenders responsible for genocide, war crimes, and crimes against humanity. While the concept of international criminal law dates back at least to the early part of the last century, it was not popularized until the Tokyo and Nuremberg military trials that followed World War II. The idea of a permanent international tribunal to try war criminals existed at least as early as 1951. Since that time, millions of innocent civilians have been killed by genocide and “ethnic cleansing,” murders, torture, disappearances, and crimes of sexual violence against women and children. Countries that come to mind are Cambodia under the Khmer Rouge regime, which governed Cambodia during the late 1970s, the former Yugoslavia, El Salvador, Uganda, Sudan, Rwanda, and the Democratic Republic of Congo. However, as was stated by José Ayala Lasso, a former United Nations High Commissioner for Human Rights, “A person stands a better chance of being tried and judged for killing one human being than for killing 100,000.” This is easy to understand, as many of the worst perpetrators of human rights violations have been military strongmen or heads of government regimes that escaped prosecution in the countries where they held power. In the past few decades, there have been calls from a few legal scholars, human rights groups for a permanent body of international criminal law and the creation of a permanent international criminal court to deal with the most heinous offenses against humankind. During the 1990s, the UN Security Council created temporary tribunals to prosecute war criminals from the former Yugoslavia in Eastern Europe and Rwanda in Africa. This finally revived efforts to create a permanent international criminal court.

The International Criminal Court. In 1998 the Rome Statute of the International Criminal Court (the Rome Statute) was adopted (with 111 signatories as of 2010), creating the International Criminal Court, which sits at The Hague, the Netherlands. The court can hear cases where the crime occurs in, or the defendant is a national of, a country that has ratified the treaty, or in limited cases where non-ratifying countries consent to the jurisdiction. All cases must be referred by a national government or by the United Nations Security Council. The court will generally not hear cases that have been heard in national courts. The court does not have exclusive jurisdiction over these crimes, as the right of any nation to prosecute genocide, war crimes, and crimes against humanity still exits under international customary law and domestic law.

Jurisdiction of the International Criminal Court.

The court has authority to hear three categories of crimes: genocide, crimes against humanity, and war crimes. The crimes of terrorism and drug trafficking are not included. Genocide is generally defined as a pattern of conduct intended to destroy a national, ethnic, racial, or religious group by killing or inflicting serious harm, inter-ethnic rape, forcibly preventing births, transferring children from their ethnic group, or similar offenses. Crimes against humanity are widespread and systematic attacks against civilians through murder, slavery, forced deportations, imprisonment in violation of international law, torture, rape and sexual violence, abduction and disappearances, apartheid, and other persecutions on the grounds of religion, race, ethnicity, national origin, political beliefs, or gender. Historically, war crimes have been defined as “grave breaches” of the customs of war, triable in military courts, and have been recognized by international law and by the laws of most nations long before the Rome Statute. A war crime is defined under the Rome Statute as an offense in violation of the international law of armed conflict, including the wrongful killing, torture, or inhumane treatment of a person protected by the Geneva Convention of 1949. It also includes a host of internationally recognized violations of the rules of war, such as intentionally attacking civilians, hospitals, museums, religious buildings, etc.; enlisting children as soldiers; using chemical or biological weapons; rape as a weapon of war, pillaging; denying quarter; and many others. It also includes knowingly causing excessive incidental death or injury to civilians or damage to the natural environment in relation to the overall military objective. It is also a crime to attack those providing
humanitarian assistance during a time of civil war. Interestingly, neither terrorism nor drug trafficking were included in the court’s jurisdiction because of the widespread magnitude of those problems. While it is intended that the court will have jurisdiction over a country that wages a war of aggression, jurisdiction is pending an international agreement on a legal definition of aggression. Good examples are Adolf Hitler’s invasion of Poland in 1939 or Saddam Hussein’s Iraqi invasion of neighboring Kuwait in 1990, neither of which was based on national self-defense.

The crimes set out in the Rome Statute of the International Criminal Court apply regardless of whether they were committed by someone in an official capacity, and even apply to heads of state. Military commanders are responsible for crimes committed by those under them where they knew or should have known of the crimes or did not take reasonable measures to prevent them. Subordinate are not excused from prosecution because they were “just following orders.” There is no statute of limitations on these crimes—perpetrators can be apprehended and tried at any time during their lifetime. Penalties include imprisonment and reparations.

Criticisms of the International Criminal Court. The Rome Statute has not been ratified by the United States, Russia, China, India, or many other countries. While almost everyone agrees with the motivations for creating the Court, it is not without criticism. Many governments and critics believe that the Court impinges on national sovereignty, that it could subject government and military leaders to prosecutions solely on political grounds, and that it lacks fair procedures and appeal mechanisms. The United States has taken a number of legal and diplomatic steps to ensure that American citizens will not be subject to prosecution before the International Criminal Court.

Basic Principles of International Criminal Jurisdiction

Jurisdiction is a word of many meanings. In the context of this chapter, it means the power of a nation to create laws that prescribe conduct and to act over individuals, corporations, or their property in the application or enforcement of those laws. When used in reference to a court, it is the power of a court to hear a case—to adjudicate. The court must have “subject matter” jurisdiction over that type of case, as well as personal jurisdiction over the parties. Jurisdiction is necessary whenever a court hears any case, whether it is civil or criminal, and regardless of whether it is a domestic case or an international one. While we will deal with jurisdiction in civil cases in the next chapter and later in the book, in this chapter we will focus our discussion on criminal jurisdiction.

The Extraterritorial Reach of Domestic Law. In a world where national political and economic interests span the globe, it has become increasingly important for countries to be able to protect their interests, and the interests of their individual and corporate citizens, wherever they are at risk. One example is combating transnational crimes—crimes that typically cross national borders or that are committed by or against a citizen traveling in a foreign country or that are committed from outside a country and harm interests within a country. Examples might include drug smuggling, hijacking, terrorism, counterfeiting, violations of banking laws, bribery of foreign government officials by businesspeople, attacks on computer systems and global information networks, theft of nuclear materials and technology, violations of customs and immigration laws, and on and on. Consider a few examples:

- A Mexican citizen standing in Mexico along the U.S. border fires a weapon into the United States killing an American citizen. Surely, the perpetrator can be prosecuted in Mexico where the act occurred and the perpetrator is found, but can he or she also be prosecuted in the United States where the harm occurred?
- Now consider two conspirators, of Middle Eastern nationality, who attempt to blow up an American passenger aircraft in the Philippines. If captured and returned to the United States, can they be tried in U.S. courts?
- Imagine an American businessman doing business in, say, Kuwait, who pays a cash bribe to a Kuwaiti government or military official to obtain business. Can the U.S. government arrest and prosecute the American on his or her return home?
- An executive of a Canadian corporation knowingly causes the discharge of toxic waste into a river that runs into the United States. It poisons more fish in the river for miles downstream and renders the water unsuitable for use. Can the business executive be prosecuted in both countries?
- A citizen of Russia, living in London, attacks and disrupts a major computer network in the United States. Where can he or she be tried?
- A Canadian in Thailand is caught by local authorities in possession of child pornography. In what countries can he or she be tried?

What would happen in these cases? There are several issues raised here. May a country pass laws affecting conduct outside its territory? May it exert jurisdiction over individuals or corporations outside its territory? And
if so, does this include jurisdiction only over its own citizens who commit crimes abroad, or also over foreign individuals and foreign corporations? The answers to these questions are usually "yes," although it does depend on the facts of the case and the countries involved.

The principle that a nation can project its laws beyond its territorial borders is known as extraterritoriality. It applies to both civil and criminal statutes. All countries have different views toward the use of extraterritoriality. Some countries, such as the United States, are more willing to project their laws to individuals in foreign countries than, say, Canada or the countries of Europe. Any attempt by one country to enforce its laws against a citizen of another country might be very controversial and viewed as a violation of a country's sovereignty. For example, China might view the American use of extraterritoriality against Chinese nationals, or even against non-Chinese citizens living and working in China, as a matter of America "sticking its nose" into China's internal affairs. It can even prompt diplomatic or trade retaliation. There are problems of enforcement too. How does one country enforce its laws against foreign citizens unless they can be brought before their own courts? As a result, courts considering the extraterritorial application of a statute often say that there is a general rule that there is a presumption that national laws do not have extraterritorial reach, particularly where they conflict with international law or the laws of another nation. This helps to avoid conflicts in foreign relations. Extraterritoriality is least controversial when it is done by international agreement. For example, there are conventions that approve of the extraterritorial prosecution of many transnational crimes, such as international trafficking in drugs or child pornography, terrorism, slavery and forced prostitution, counterfeiting, aircraft hijacking, the unlawful sale of nuclear or radioactive materials, and piracy (yes, this is still a big modern-day problem).

In the United States, a number of statutes affecting business have been applied to areas outside U.S. territory, including statutes on discrimination in employment, price-fixing and antitrust violations, bribery and other criminal statutes, and more. It has also been applied to violations of the Trading with the Enemy Act during a time of war, violations of the Export Administration Regulations (regulating exports, particularly of technology or military shipments, to potential adversaries or terrorists), some financial and banking regulations and others. It is important to recognize that we are not speaking of any one country becoming the world's police force. No country, under the guise of extraterritoriality, has the right to run roughshod over individual rights, the sovereignty of foreign governments over their people and territory, or principles of international customary law. Extraterritorial jurisdiction does not mean that one nation's law enforcement officials can enter another to make arrests. Normally, it requires a measure of compromise and mutual assistance in law enforcement. All countries agree that extraterritoriality must be based either on a treaty or international agreement, or on one of the five basic principles of jurisdiction:

- territoriality
- nationality
- the protective principle
- passive personality
- universality

Territoriality. Territoriality or territorial jurisdiction refers to jurisdiction over all persons (citizens and noncitizens), places, and property within the territory, airspace, or territorial waters of a country. Jurisdiction over foreign-flag ships within the territorial waters of the United States is generally limited to matters involving the "peace of the port," where the interests of the United States and U.S. citizens are at stake, and with a few possible exceptions does not apply to the internal operations of the vessel. In the case of jurisdiction over crimes, subjective territorial jurisdiction exists where a crime was actually committed within the territory. Subjective territorial jurisdiction is the least controversial form of exerting state power because it does not directly interfere with the sovereignty of other nations. Objective territorial jurisdiction, also called the "effects" principle, exists where the act was committed outside a country's territory, but had a substantial effect inside the country. An example of objective territorial jurisdiction in criminal law would be the prosecution of foreign citizens in U.S. courts for attempting to smuggle illegal drugs into the United States aboard a foreign-flag ship in international waters.

Nationality. Under the principle of nationality jurisdiction, individual and corporate citizens owe a duty to comply with the laws of their country of nationality no matter where they are in the world. It is considered one of the obligations of citizenship. An American businesperson in Hong Kong must comply with Hong Kong banking laws and with certain banking regulations and executive orders of the President of the United States that might apply to him. For instance, if that executive order states that no funds may be transferred to an account of a party believed to support international terrorism, then the American in Hong Kong is bound just as though he or she were in the
United States. Another example of nationality is that a country may tax the income of its citizens earned anywhere in the world, subject of course to certain rules set out in international treaties on income taxation.

Under the principle of nationality, a country may prosecute its citizens for crimes committed anywhere in the world. This includes economic and business crimes as well as crimes such as treason. Virtually all nations accept nationality as a basis for jurisdiction. An extension of this principle permits nations to exert jurisdiction over ships that fly their flag even when they are outside territorial waters. A crime committed aboard a ship anywhere in the world can be prosecuted by the country of the ship's flag. A special U.S. statute gives the United States jurisdiction over U.S.-flagged aircraft operating anywhere in the world.

The Protective Principle. The protective principle allows jurisdiction over noncitizens for acts done abroad on the basis of a country's need to protect its national security, vital economic interests, and governmental functions. Protective jurisdiction has been used as a basis of extraterritorial jurisdiction to prosecute terrorism, espionage, counterfeiting, making false statements to customs and immigration officers, and falsifying U.S. government documents (such as passports and visas). In one reported case, it was the basis for prosecuting a foreign citizen who conspired with an American to set up a sham marriage for the sole purpose of gaining entrance to the United States.

Passive Personality. Passive personality jurisdiction can give a country the right to hear cases stemming from crimes committed against their own citizens by foreign citizens outside of their own territory. Passive personality jurisdiction is controversial because the only connection to the prosecuting nation may be the nationality of the victim. This raises the question of whether one nation should attempt to criminalize and prosecute acts occurring by foreign citizens in foreign countries. Most countries, including the United States, have been reluctant to rely only on passive personality for jurisdiction and are willing to exercise it only in the case of heinous crimes. It could be used, for example, to prosecute a national of a Middle Eastern country for a terrorist attack on an American in London. Of course, crimes other than terrorist acts are also covered, although usually only where there are significant ties to the United States. One case, United States v. Roberts, 1 F. Supp. 2d 601 (E.D. La. 1998), involved a sexual assault of an American minor aboard a cruise ship in international waters by a non-U.S. citizen working aboard. The ship was registered in Panama and was flying the flag of Liberia. The court held that there was passive personality jurisdiction because the ship had departed on its cruise from Miami; the ship's corporate offices were located in Miami; the company's stock was traded on the New York Stock Exchange; and a trial in the United States would not infringe the sovereignty of any other nation.

Universality. Finally, the universality principle (also called universal jurisdiction) permits any country to prosecute perpetrators of the most heinous and universally condemned crimes regardless of where the crimes occurred or the nationality of the perpetrators or victims. One famous case of universality was Israel's 1961 trial of Nazi war criminal Adolf Eichmann for atrocities committed in Europe during World War II. However, in more recent years, universality jurisdiction has not been widely used.

Jurisdiction over International Terrorism: United States v. Ramsey Yousef. One recent case illustrates the application of these principles to fighting international terrorism. In United States v. Ramsey Yousef, 327 F.3d 56 (2d Cir. 2003), cert. den., 540 U.S. 933 (2003), the defendant was convicted of conspiracy to bomb American-flagged airliners in Southeast Asia (and of the 1993 bombing on the World Trade Center). On appeal, he argued that the U.S. criminal statute on the destruction of aircraft could not be applied to acts outside the United States. The court rejected this argument, stating that jurisdiction is consistent with the United States' obligations under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation and with three of the five principles of customary international law criminal jurisdiction—objective territorial, protective, and passive personality. The court stated:

First, jurisdiction ... is consistent with the "passive personality principle" of customary international law because [this] involved a plot to bomb United States-flagged aircraft that would have been carrying United States citizens and crews and that were destined for cities in the United States. Moreover ... jurisdiction is appropriate under the "objective territorial principle" because the purpose of the attack was to influence United States foreign policy and the defendants intended their actions to have an effect—specifically, on and within the United States. Finally, there is no doubt that jurisdiction is proper under the "protective principle" because the planned attacks were intended to affect the United States and to alter its foreign policy.

Yousef was also charged with the bombing of a non-U.S. airliner in the Philippines. It was not flying to or from the United States, and no American citizens were injured or apparent targets. With regard to universality, the court stated...
The historical restriction of universal jurisdiction to piracy, war crimes, and crimes against humanity demonstrates that universal jurisdiction arises under customary international law only where crimes (1) are universally condemned by the community of nations, and (2) by their nature occur either outside of a State or where there is no State capable of punishing, or competent to punish, the crime (as in a time of war). ** Unlike those offenses supporting universal jurisdiction under customary international law—that is, piracy, war crimes, and crimes against humanity—that now have fairly precise definitions and that have achieved universal condemnation, “terrorism” is a term as loosely deployed as it is powerfully charged. ** ** We regretably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phase “state-sponsored terrorism” proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law. Moreover, there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism, nor have we shaken ourselves free of the cliché that “one man’s terrorist is another man’s freedom fighter.” We thus conclude that… terrorism—unlike piracy, war crimes, and crimes against humanity—does not provide a basis for universal jurisdiction.

In 1993, Belgium enacted a law based on universal jurisdiction to prosecute cases of war crimes, genocide, and crimes against humanity. In the following case, Democratic Republic of the Congo v. Belgium, Belgium issued an arrest warrant for the foreign minister of the Democratic Republic of the Congo ("Congo") alleging the Democratic Republic of Congo, not its neighbor, Congo-Brazzaville) for crimes against humanity that occurred in the Congo. The judgment of the International Court of Justice addressed universality and other important issues of international criminal law.

**Case Concerning the Arrest Warrant of 11 April 2000**

(Democratic Republic of the Congo v. Belgium)


**BACKGROUND AND FACTS**

In 1993, Belgium enacted a statute giving Belgian courts jurisdiction over those who commit crimes against humanity, genocide, and war crimes. The law was based on the principle of universality and extended jurisdiction over those who commit such crimes regardless of their nationality or that of the victims, or of where the crimes were committed, or where the perpetrator may be found. In 2000, a Belgian court issued an international arrest warrant against Yorodka, who was at that time the foreign minister of the Congo. Yorodka was charged with violations of the Belgian law in that he made various speeches inciting racial hatred and encouraged the population to attack people of the ethnic Tutsi tribes, leading to massacres, executions, and disappearances. The warrant requested any nation arresting Yorodka to extradite him to Belgium for trial. They brought this action before the International Court of Justice arguing that Yorodka, as foreign minister of a sovereign state, was entitled to diplomatic immunity. The Court’s judgment addressed this claim. The validity of Belgium’s attempt at universal jurisdiction was not properly raised by the Congo, and not addressed by the Court. An instructive concurring opinion discusses the history and modern status of this principle today.

**THE COURT DELIVERS THE FOLLOWING JUDGMENT:**

** ** **

In customary international law, the immunities accorded to Ministers for Foreign Affairs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States...He or she is in charge of his or her Government’s diplomatic activities and generally acts as its representative in international negotiations and intergovernmental meetings. Ambassadors and other diplomatic agents carry out their duties under his or her authority. He or she may bind the State represented, and there is a presumption that a Minister for Foreign Affairs, simply by virtue of that office, has full powers to act on behalf of the State (1969 Vienna Convention on the Law of Treaties). In the performance of these functions, he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise. He or she must also be in constant communication with the Government, and with its diplomatic missions around the world, and be capable at any time of communicating.
with representatives of other States. ** ** The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties.

In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an "official" capacity, and those claimed to have been performed in a "private capacity," or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. ** **

The Court will now address Belgium's argument that immunities accorded to incumbent Ministers for Foreign Affairs can in no case protect them where they are suspected of having committed war crimes or crimes against humanity. In support of this position, Belgium refers to various legal instruments creating international criminal tribunals, to examples from national legislation, and to the jurisprudence of national and international courts. ** ** The Court has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. ** **

The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity. ** ** First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy any of the immunities accorded by international law in other States. ** ** Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under...the United Nations Charter, and the...International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides that "[t]he immunities of a National or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person." ** **

Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia's diplomatic activity, constituted a violation of an obligation of Belgium toward the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability enjoyed by him under international law.

Separate Opinion of President Judge Guillaume. I fully subscribe to the Judgment rendered by the Court. I believe it useful however to set out my position on one question which the Judgment has not addressed: whether the Belgian judge had "extraterritorial" jurisdiction. ** I believe it worthwhile to provide such clarification here.

In order to assess the validity of Belgium's jurisdiction, the fundamental principles of international law governing States' exercise of their criminal jurisdiction should first be reviewed. The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offences can most often be gathered, that is where the offences generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1937 that "in all systems of law the principle of the territorial character of criminal law is fundamental." ["Lotus," Judgment No. 9, 1927, P.C.I.J.]

The question has, however, always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation of Europea of the major modern States. Some writers, like Cavris and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge. In their view, that country was under an obligation to arrest, followed by extradition or prosecution....

Beginning in the eighteenth century, however, this school of thought favouring universal punishment was challenged by another body of opinion, one opposed to such punishment and exemplified notably by Montesquieu, Voltaire, and Jean-Jacques Rousseau. Their views found expression in terms of criminal law in the works of Beccaria, ...
who stated in 1954 that "Judges are not the avengers of mankind in general... A crime is punishable only in the country where it was committed." (citations omitted) * * *

Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners.

Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy. In more recent times... the Geneva Convention on the High Seas of 1958 and... the Montego Bay Convention of 1982 have provided that (universal jurisdiction) is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes... (unless they are the subject of treaty or international convention). * * *

A further step was taken in this direction beginning in 1970 in connection with the flight against international terrorism. To that end, States established a novel mechanism: compulsory, albeit subsidiary, universal jurisdiction. This fundamental innovation was effected by The Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970. The Convention places an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or prosecute him. * * *

The system adopted was repeated with some minor variations in a large number of conventions: the court then cited sixteen modern conventions dealing with international terrorism. Thus, a system corresponding to the doctrines espoused long ago by Grotius was set up by treaty. Whenever the perpetrator of any of the offenses covered by these conventions is found in the territory of a State (italics added), that State is under an obligation to arrest him, and then extradite or prosecute. It must have first conferred jurisdiction on its courts to try him if it is not extradited. Thus, universal punishment of the offenses in question is assured, as the perpetrators are denied refuge in all States. By contrast, none of these conventions has contemplated establishing jurisdiction over offenses committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction in absentia is unknown to international conventional law. 

Belgium classifies the development of international criminal courts. But this development was precisely in order to provide a remedy for the deficiencies of national courts, and the rules governing the jurisdiction of international courts as laid down by treaty or by the Security Council of course have no effect upon the jurisdiction of national courts. [Belgium cannot rely on the custom of states] and I will give some... examples of this. In France, the Code of Criminal Procedure provides: "Pursuant to the international conventions referred to in the following articles, any person, if present in France (italics added), may be prosecuted and tried by the French courts if that person has committed outside the territory of the Republic one of the offences specified in those articles." * * *

Numbers of other examples could be given, and the only country whose legislation and jurisprudence appear clearly to go the other way is the State of Israel, which in this field obviously constitutes a very special case.

To conclude... International law knows only one true case of universal jurisdiction: piracy. Further, a number of international conventions provide for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. Universal jurisdiction in absentia as applied in the present case is unknown to International law. * * *

Decision. The Court held that the Belgian warrant must be canceled because Yerodia, the Foreign Minister of the Congo, was protected by diplomatic immunity. In a concurring opinion, Judge Guillaume noted that according to history and practice of international customary law, there is no universal jurisdiction over crimes other than piracy on the high seas, unless the prosecuting country has a close connection to the commission of the crimes through territoriality, nationality, or passive personality principles, or unless the crime is the subject of a treaty or international convention granting jurisdiction. Most treaties on terrorism refer to "compulsory" or "mandatory" jurisdiction. Guillaume is saying that if a signatory country has a terrorist in custody, it must either extradite him to a country with a closer (jurisdictional) connection to the crime, or try him.

Comment. In 2003, Belgium succumbed to International pressure and clarified its laws on diplomatic immunity. Other amendments to its laws now permit prosecutions of extraterritorial war crimes, genocide, and crimes against humanity only where the crime was committed in Belgium, the perpetrator or victim was a Belgian national, or the perpetrator can be found in Belgium. The perpetrator can be extradited to a state with a closer connection to the crime. Belgium's extraterritorial jurisdiction is probably less important since the creation of the International Criminal Court.
Case Questions
1. Why is diplomatic immunity important?
2. Under what circumstances may a diplomat be subject to prosecution?
3. What is concurrent jurisdiction?
4. Why is universal jurisdiction applied to cases of piracy on the high seas, and why do you think this would or would not be appropriate. What are the advantages? The difficulties?
5. In recent years, pirates off the coast of Somalia have seized cargo vessels, stolen cargo, kidnapped sailors, and disrupted shipping. Many nations have coordinated an international naval response. If captured, where do you think the pirates should be tried, and why?

Today, several treaties confer universal jurisdiction. Examples include United Nations conventions on terrorism and the financing of terrorist organizations, hijacking and other violence aboard aircraft, maritime piracy, slavery, and a few others. The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, in which about three-quarters of the nations of the world have joined, recognizes universality. It calls on member countries to enact laws punishing those who commit torture. It permits countries to take jurisdiction if the victim was their citizen, if the act occurred in their territory, or if the offender is later found in their country (universality). The United States committed only to prohibit “cruel, inhuman and degrading treatment or punishment” if it is a violation of the Fifth, Eighth, or Fourteenth Amendments of the U.S. Constitution (thus avoiding the issue of whether the use of the death penalty in the United States would violate the treaty).

Mutual Legal Assistance and Extradition

Mutual legal assistance treaties are agreements for law enforcement cooperation. They include the powers to summon witnesses, to compel the production of documents and other evidence, to issue search warrants, and to serve process. The United States has over fifty mutual assistance treaties in force. Generally, U.S. courts have ruled that U.S. law enforcement agents investigating traditional crimes in foreign countries must comply with all constitutional protection afforded the accused. However, U.S. courts have not held foreign officers to the same standard when they are obtaining evidence in criminal cases for delivery to U.S. law enforcement agents. For instance, foreign officers are not expected to comply with American constitutional standards when searching a suspect's home or office outside of the United States, or when obtaining a voluntary confession, unless they use conduct that "shocks the conscience."

Extradition is where one country surrenders a person to the officials of another country to stand trial in a criminal case. The idea of extradition existed long before there were nations, when society and legal rights revolved around the tribe, clan, or family (such as the early Roman familiae, the early Anglo-Saxons, and even the first native North Americans). Clan members who committed crimes against other clans could be surrendered for punishment. Outraged and placed "outside" the protection of their clan, they were the first "outlaws." Today, extradition rights are created by treaty. The United States has extradition treaties with most countries of the world.

SOME GENERAL CONCEPTS OF PUBLIC INTERNATIONAL LAW

Three closely related concepts of international law will be briefly introduced here: comity, sovereign immunity, and act of state. The one thing that these three concepts have in common is that they have the effect of avoiding conflicts in foreign relations. They will be discussed in more detail in later chapters.

Comity

Comity refers to the willingness of one court or department of government to respect the rules or decisions of another or to grant it some privilege or favor. International comity is a judicial doctrine, not an international law, based on the desire for courtesy and reciprocity between countries. It also serves to prevent courts from embroiling themselves in matters of foreign affairs and thereby helps to avoid diplomatic conflicts. Comity allows the courts of one country to recognize the laws and court decrees of another country or to defer hearing a case that is more appropriate for hearing in the courts of another country. Under comity, for example, a court that otherwise might be entitled to hear a case may allow it to be transferred to a court in a foreign country with a greater interest in the case. As an example, assume that there is a breach of contract for the sale of goods between two parties, the buyer residing in the United States and the seller in Japan. Assume that the contract does not mention where disputes should be
resolved and that jurisdiction in the case would be appropriate in the courts of either country. If the seller files suit for payment in the courts of Japan, and subsequently the buyer (not wanting to defend the case in a foreign country) files suit in a U.S. court alleging damages for defective goods, the U.S. court will likely dismiss the case on the basis of comity to avoid a conflict with the courts of Japan.

Now assume that the seller wins a money judgment in Japanese courts, but the buyer has no assets there to satisfy the judgment. The seller can take the judgment to U.S. courts to be enforced. (Keep in mind that U.S. courts will only enforce civil judgments from countries who guarantee fair trials and due process. U.S. courts will not enforce foreign tax liens or verdicts in foreign criminal cases.)

The Charming Betty. The Charming Betty concept derives from a U.S. Supreme Court case of the same name, Murray v. The Schooner Charming Betty, 6 U.S. 64 (1804). It is a rule of statutory interpretation. As the Court noted, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." For example, for reasons of comity, a U.S. court will not apply a federal statute to conduct committed outside the territory of the United States unless it is clear that Congress intended that result. An application of this concept can be seen in Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119 (2005). In that case, a disabled, wheelchair-bound passenger sued a cruise line for inaccessible accommodations aboard a ship. The U.S. Supreme Court ruled that the Americans with Disabilities Act applies to foreign-flag cruise ships in U.S. waters, but does not require the removal of physical barriers if it would conflict with a treaty or with other international standards for ship safety.

Sovereign Immunity

Sovereignty is defined as the supreme and absolute power that governs an independent state or nation. Of course, in reality, sovereignty can have a range of meanings. For example, in the United States, sovereignty can be shared between the federal government, the states, and even Native American tribes. In Europe, some national sovereignty had to be sacrificed by countries that joined the European Union. For our purposes, we should recognize that all independent countries are equal with one another and that each has the exclusive right over its citizens, its territory, all property within that territory, and its internal affairs. It follows that the doctrine of sovereign immunity states that the courts of one country cannot hear cases brought against the government of another country and that courts cannot involve themselves in the internal affairs of a foreign country. In English law this is derived from the feudal notion that the "king can do no wrong." This principle was firmly established in the United States in Schooner Exchange v. McFadden, 11 U.S. 116 (1812). In that case, an American merchant ship was seized by Emperor Napoleon and pressed into service with the French navy. When the ship docked at Philadelphia, its original owners filed suit to have it returned. The U.S. Supreme Court ruled that under sovereign immunity, a warship of a foreign nation was not subject to seizure by U.S. courts. Today, sovereign immunity is recognized by most nations of the world and defined by statute in many.

In the United States, the jurisdiction of U.S. courts over foreign nations is defined by the Foreign Sovereign Immunities Act of 1976. This takes a somewhat restrictive view of immunity by creating exceptions to be considered by the courts. These exceptions generally are waiver (by statute or by agreement in a contract); commercial activity; certain violations of international law such as torture, terrorism, and unlawful expropriation of private property without payment of compensation; and lawsuits for money damages for torts committed within the United States. Examples might include a lawsuit by the victim of state-sponsored terrorism or a lawsuit against a foreign government for negligence in the operation of a motor vehicle within the United States.

Commercial Activity Exception. Sovereign immunity protects foreign governments from suit when they are acting as a political entity. When foreign governments or their agencies enter the commercial field, engaging in business for profit, as would a private company, or engaging in essentially private functions, they can be sued in the courts of a foreign country. When agencies of government buy and sell goods or services, they become liable for damages for breach of contract. An example would be a contract between a private company in the United States and a government-owned company in China for the supply of raw materials. If the Chinese government is acting as a private company in mining, marketing, and selling raw materials, it is liable to suit in the United States (assuming other jurisdictional requirements are met) for delivering materials that do not conform to the contract specifications.

Act of State

The Act of State doctrine is a principle of domestic law (not international law) that prohibits the courts of one country from inquiring into the validity of the legislative or executive acts of another country. It was first announced in the United States in the case of Udall v. Hernandez, 168 U.S. 250 (1897) where it was held that "...[T]he courts of
one country will not sit in judgment on the acts of the
government of another done within its own territory.
Address of grievances by reason of such acts must be
obtained through the means open to be availed of by
sovereign powers as between themselves."

Many of the U.S. cases discussing the Act of State
discipline involve the confiscation of American-owned
property by foreign governments without the payment of
compensation, such as occurred with Fidel Castro's
communist takeover of Cuba in 1959 and with the Islamic
revolution in Iran in 1979. As a general rule, subject to
exceptions discussed later in this book, the Act of State
discipline prohibits courts from embroiling themselves in
such politically charged issues. The doctrine is based on the
idea that courts should not intervene in matters of foreign
affairs. These matters are best left to the executive branch,
which has the benefit of a diplomatic corps, foreign
embassies, and the ability to talk directly to foreign
governments. There is also the practical reason that it may
very well be impossible for domestic courts to enforce their
decisions against foreign governments, as it certainly would
have been in the case of both Cuba and Iran. In the latter
case, a treaty between the United States and Iran led to the
creation of an impartial tribunal in the Netherlands to
resolve outstanding claims between U.S. citizens and the
Iranian government. The Act of State doctrine is recognized
by courts in the United States, the United Kingdom,
Germany, France, Italy, Japan, and many other countries.

INTERNATIONAL
ORGANIZATIONS

There are a number of international organizations that
affect our study of international law. The most important
of these is the International Court of Justice. We will also
discuss other agencies of the United Nations that directly
impact our area of study—the law of international trade,
investment, intellectual property, and labor standards. The
role of the World Trade Organization and of European
organizations will be covered in later chapters. At this
point, we will have to leave the discussion of the World
Bank and the International Monetary Fund to other texts
and courses in the field of international finance.

The Role of the United Nations in International Law

As of 2007, the United Nations had 192 member nations.
Most of us are familiar with the work done by the major
organs of the UN, including the General Assembly, the
Security Council, the Economic and Social Council, and
the International Court of Justice. We are also aware of
the UN role in peacekeeping and humanitarian assistance
to innocent victims of civil wars and to millions of
refugees. Every day we see the work its agencies do in
fighting hunger and poverty in developing countries, in
fighting AIDS, malaria, and other diseases, and in fighting
for the world's children. What we seldom see are the UN
efforts in bringing nations together to develop interna-
tional public and private law. During the last sixty years,
the UN has coordinated over five hundred multilateral
treaties and international conventions that not only affect
world peace and security, but also affect issues like climate
change and the protection of the environment; the
prevention and control of crime, drug trafficking, and
terrorism; rules for Antarctica and the seabeds of the
world's oceans and more. The UN has also been
responsible for the development of many areas of
international private law that directly affect commerce
and business, such as legal rules for the international
sale of goods. The UN has also helped to provide standards
of conduct for multinational corporations operating in
developing countries and around the world. We will
examine some of these here. First, we will look at the
judicial arm of the UN, the International Court of Justice.

International Court of Justice

Earlier in this chapter, you read a decision of the
International Court of Justice (ICJ) involving a dispute
between Belgium and the Democratic Republic of the
Congo. The ICJ, commonly called the World Court, was
formed in 1945 as the primary judicial body of the United
Nations. The ICJ sits at The Hague, the Netherlands, and
uses its work on the Statute of the International Court of
Justice. The fifteen judges are selected from the leading jurists
and scholars of international law on a worldwide basis.

Jurisdiction of the International Court of Justice. The
court hears cases brought by nations, against nations.
Individuals and private corporations are not parties to cases
before the court (although one nation may bring an action
against another nation alleging a violation of an individual's
rights under international law). The court has jurisdiction
over all cases brought by nations under the UN Charter or
involving treaties, conventions, international obligations, or
questions of international law. Jurisdiction is not compul-
sory; each nation must agree to submit to the court's
jurisdiction. Many treaties and conventions state that the
parties agree that the court will hear any disputes that may
later arise. The decisions are made public, and there is no
appeal. The decisions are binding only on the parties to the case, and not to all nations of the world.

**Enforcing Judgments.** Judgments of the court are enforced primarily on the basis of public opinion, diplomatic pressure, and good faith of the countries involved. In a principle established in the *Case Concerning the Factory at Chorzów (Poland v. Germany*, PCIJ, 1927), decided by the now-defunct Permanent Court of International Justice, the overrider of the modern IJC, any violation of an international obligation requires the payment of financial reparations.

**Typical Cases.** Typical cases heard by the court have included land and maritime boundary disputes (e.g., the dispute between Cameroon and Nigeria over the oil-rich Bakassi peninsula)

- unlawful denial of consular rights e.g., Iran holding U.S. diplomatic hostage in 1979
- violations of sovereignty by neighboring armies e.g., Uganda’s plundering of the Democratic Republic of the Congo and the killing and torture of civilians from 1992 to 1998
- violations of humanitarian law (e.g., Bosnian and Serbian from 1992 to 1998)
- violations of human rights (e.g., the court’s 2000 decision holding that the United States had violated the rights of fifty-one Mexican citizens on death row in the United States by not permitting them to have the assistance of the Mexican embassy in their defense).

Many of these decisions are highly controversial and, as would be expected, subject to criticism from many quarters. Many decisions cannot be enforced. For instance, in the above example, Uganda will probably never pay the $10 billion in reparations that were ordered, and the United States did not overturn the sentences of the Mexican nationals and, indeed, withdrew from the treaty on which the court’s decision was based.

The following case, *Lichtestein v. Guatemala*, illustrates that while only states may be parties before the International Court of Justice, the court can ultimately address individual issues affecting even just one citizen.

**UN Agencies Affecting International Business Law**

In this part, we will discuss selected UN agencies that directly affect our study of international business law. Although there are many more that are worthy of mention, such as UN agencies working in the areas of environmental protection, world health, and economic development, the following were chosen for their relevance to international business, trade, intellectual property, and foreign investment.

**International Labour Organization.** The International Labour Organization (ILO), located in Geneva, was founded in 1919 and became a part of the UN system in 1946. It has 181 member nations. The objectives of the ILO are to bring together government, industry, and labor groups, with a focus on developing countries, to help promote the rights of workers, create decent and beneficial employment opportunities, eliminate child labor, and help foster ideas and the means for the economic and social protection of the poor, the elderly, the unemployed, women, and children. The governing body of the ILO is made up of individual representatives of government, industry, and labor.

Perhaps the most important function of the ILO has been the creation of international labor standards, embodied in 188 conventions and almost two hundred “recommendations” for minimum standards of basic workers’ rights. These include the right of workers to freely associate, the right to organize and bargain with employers collectively, abolition of forced labor and child labor, creation of a safe working environment, protection of migrant workers and workers at sea, elimination of discrimination at work, equality of opportunity and treatment for men and women workers, and other standards addressing workplace health and safety. ILO conventions are legally binding on a member nation only when ratified by its government. Not all countries have ratified all conventions. For example, the United States has ratified fourteen ILO conventions.

ILO “recommendations” are not binding and are not up for ratification. Many of the standards are quite detailed (e.g., standards on night work, minimum wage, protection of mine workers, maternity protection, protection from exposure to hazardous substances, and so on) and are already a part of the laws of virtually all highly industrialized countries. Of course, even those conventions that are not adopted, and those recommendations that do not get implemented, do represent a set of ideals—a moral code—for treating workers, especially by multinational corporations employing labor in developing countries.

**UN Commission on International Trade Law.** The UN Commission on International Trade Law (Vienna), or UNCITRAL, is responsible for coordinating the development of several legal codes, embodied in international conventions, which are of great importance to international business. We will study many of them in later chapters. These include codes related to the sale of goods, arbitration of disputes, the movement of money and...
goods across national borders, and rules for using electronic communications in international business. UNCITRAL also is responsible for developing conventions and codes related to the carriage of goods by sea, the arbitration of disputes, and electronic funds transfer by banks.

UN Conference on Trade and Development. The UN Conference on Trade and Development (Geneva), or UNCTAD, is an agency responsible for providing research, policy analysis, coordination, and technical assistance for aiding developing and least-developed countries in their socioeconomic development. Their annual trade and investment reports are widely used for information on the business and economic climate in these areas of the world.

The World Intellectual Property Association. The World Intellectual Property Association (Geneva), or WIPO, is a specialized agency of the UN with 184 member nations and almost one thousand employees. Its role is to help foster and protect intellectual property rights in patents, industrial designs, trademarks, and copyrights. WIPO administers a total of twenty-four treaties, including one on the copyright protection of literary and artistic works and one that works to expedite the process of filing patent applications in more than one country. (There is no single worldwide or international patent on industrial property.) The Madrid System facilitates the international registration and protection of trademark rights by providing for the registration of a trademark in all signatory countries by filing in one. A similar system exists for registering industrial designs (referring to the "look and feel" of products ranging from automobiles to watches—think Apple iPod). There is also a registration for appellations, geographical names used in reference to products originating there (such as "Idaho potato"

or "Scotch whiskey"). WIPO administers a dispute resolution service open to private individuals and corporations (including a service for arbitrating domain name disputes). Many WIPO services to the public are fee-based and paid for by the people and companies who use them.

**Liechtenstein v. Guatemala**

**BACKGROUND AND FACTS**

Nestleboh was born in Germany in 1881. He moved to Guatemala for business reasons in 1905 and lived there until 1935 except for business trips and visits to his brother in Liechtenstein. One month after the start of World War II, while visiting Liechtenstein, Nestlebohn applied to be naturalized as a citizen and asked Liechtenstein to waive the three-year residency requirement. He paid taxes to Liechtenstein and filed the requisite forms, and in 1939 Liechtenstein waived the required time period, swore him in as a citizen, and issued him a passport. In 1943, Guatemala entered World War II, siding with the United States. When Nestlebohn returned to Guatemala, he was arrested as a German enemy and turned over to the United States for internment. His property was seized by Guatemala. Nestlebohn was released in 1946, but his property was not returned. Liechtenstein filed a "memorandum," as the complaint is called, before the International Court of Justice, claiming that Guatemala had violated international law and was obligated to pay damages.

**JUDGMENT**

Guatemala has referred to a well-established principle of international law, which it expressed in Court-Martial, where it is stated that "It is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection." Counsel for Liechtenstein said: "The essential question is whether Mr. Nestlebohn, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States."

The Court does not propose to go beyond the limited scope of the question which it has to decide, namely, whether the nationality conferred on Nestlebohn can be relied upon as against Guatemala in justification of the proceedings instituted before the Court. It must decide this question on the basis of international law. International arbitrators have ... given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved.

The character thus recognized on the international level as pertaining to nationality is in no way inconsistent with the fact that international law leaves it to each State to lay down the rules governing the grant of its own nationality. At the time of his naturalization, does Nestlebohn appear to have been more closely attached to his State of origin?
tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future to Liechtenstein than to any other State?

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's relationship to the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State with that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala, and its claim must, for this reason, be held to be inadmissible.

Decision. The International Court of Justice held that Guatemala was not required to recognize the citizenship granted by Liechtenstein in a way that did not follow well-established principles of international law.

Comment. Under international law, an individual may not bring an action against a nation before the International Court of Justice to redress a wrong. This case illustrates that only an individual's country of nationality (in this case, Liechtenstein) has the legal right to bring an action before an international tribunal to protect the interests of its citizens. An individual cannot force his or her country to bring such an action.

Case Questions
1. May individuals bring an action against a nation at the ICJ?
2. On what basis did Liechtenstein file this action?
3. Does it interfere with Liechtenstein's sovereignty to have a court disregard its conferment of citizenship on Nottebohm?
4. What was the basis of the court's decision? Was it based on treaty law or customary international law?

UN Office on Drugs and Crime. The UN Office on Drugs and Crime (Vienna), or UNODC, is responsible for fostering research and providing policy recommendations and technical assistance to UN member countries on dealing with illicit drugs, terrorism, and a range of crime issues—from violent crimes to economic crimes that affect international business. The latter includes work to combat money laundering, organized crime, bribery and corruption, crimes against the environment, cybercrime, and other transnational crimes. For example, the work of the UNODC led to the development of the 2003 UN Convention against Corruption (signed by 140 nations and ratified by the United States in 2006). This convention received broad political support because the effects of bribery and corruption can be felt worldwide. In developing countries, corruption breeds contempt for government officials and the rule of law and resentment by the people toward Western businesses, and has even led to the overthrow of governments whose corrupt leaders had been friendly to Western democracies.

The convention calls for nations to (1) criminalize the offering or giving of a bribe or undue advantage to a public official, including a foreign official, in order to influence his or her official acts or to obtain business; (2) criminalize the "laundring" of money, including passing it through otherwise legitimate businesses or banks in order to disguise its illicit origins and improve enforcement by changing national bank secrecy laws so that the illicit proceeds of crimes can be tracked, identified, and seized; and (3) establish criminal liability for corporations and other legal entities, as well as for individuals.

Since 1977, American citizens have been bound by the U.S. Foreign Corrupt Practices Act wherever they are, anywhere in the world. This law makes it illegal to corruptly offer or pay anything of value to a foreign government official in order to obtain business or receive favorable treatment.

ETHICS, SOCIAL RESPONSIBILITY, AND CORPORATE CODES OF CONDUCT

In this chapter we have seen how international conventions can form a sort of "mosaic code" of human rights standards. Many of these establish a moral code for the treatment of labor and create proposals to eliminate bribery and corruption. Therefore, we believe that a chapter on international law is the perfect place to discuss the social responsibility and accountability of multinational corporations. Here we will focus on one of the most widely accepted methods of setting standards for business—the code of conduct.
Corporate Social Responsibility in Developing Countries: A Tale of Two Worlds

While business ethics and social responsibility are of concern to all businesspeople, we ask you to think particularly about the operations and impact of multinational corporations in developing countries. Few areas of international business have been more controversial and politically charged than this. It pits those who view large, powerful corporations as something to be tamed, controlled, and regulated for the benefit of poor countries against those who realize that the investment, productivity, wages, and taxes paid by multinational corporations in developing countries are primarily possible with a more laissez-faire, pro-business attitude. It pits those who view that the primary responsibility of a multinational business is the maximization of global profit for its shareholders against those who say that multinationals should do more for the people and environment in the poorer countries and take a more active role in promoting social justice there. It pits countries in the Northern Hemisphere, home to many multinationals, against those in the Southern Hemisphere, where many developing countries are located. After all, many policymakers in the developing countries of Latin America and Africa still recall the era of their colonization by European countries, and some still view the presence of multinational corporations as a remnant of that time when colonial powers did exploit labor and natural resources. Keep in mind that many developing countries have a history of socialist economics and even Marxist ideology. So it is, perhaps, to be expected that there would still be some resentment toward the presence of rich multinational corporations in some parts of the world. These arguments came to a head politically during the 1970s, when the social responsibility of corporations was at the forefront of the United Nations agenda. There was an international movement toward greater controls over multinationals by developing countries. However, their demands for regulation gradually calmed in the 1980s when they realized that burdensome regulations would simply drive multinationals away. It was the time of U.S. President Ronald Reagan and British Prime Minister Margaret Thatcher, who promoted free-market principles worldwide. Eventually the communist Soviet Union was gone. Most developing countries quickly realized that multinationals could bring investment, technology, good jobs, and improved living standards.

Today, there are still concerns in developing countries about the treatment of workers in farms and factories, global warming, the destruction of forests, and pollution of the air and water, and other issues. Industry is seen as both a part of the problem and a part of the solution. Many of these issues are addressed by international conventions and national laws. In recent years, voluntary codes of conduct have become very popular. One can argue whether voluntary regulation is sufficient, or whether it just diverts attention from the real problems.

Codes of Conduct

Today, one of the most widely used means of setting standards for corporate conduct in developing countries is the voluntary code of conduct. Various types of codes have been proposed or adopted. Some have been prepared by intergovernmental organizations, by industry trade groups, or by corporations themselves. By studying codes of conduct, we get a sense of some of the most universally accepted values that international businesspeople are expected to have.

The OECD Code of Conduct. The Organisation for Economic Co-operation and Development (Paris), or OECD, is an intergovernmental organization whose members consist of national governments, with non-governmental organizations joining as observers. The OECD comprises thirty industrialized countries. Members include the United States, Canada, Mexico, Japan, and the European countries. Some of the formerly communist countries of Eastern Europe are members.

In 2007, Russia was invited to join. The OECD Guidelines for Multinational Enterprises are a set of voluntary recommendations to multinationals encouraging responsible business conduct covering the entire range of business ethics and social responsibility issues. They are not legally enforceable, but are well known and reflect the consensus of many governments. They encourage self-enforcement through accountability, reporting, and internal controls, such as encouraging "whistle blowing" by employees who become aware of corporate violations. The guidelines were first issued in 1976 and revised in 2000. Here are a few representative standards.

Employment—Observe standards of employment and industrial relations no less favorable than those observed in the host country take adequate steps to ensure occupational health and safety in their operations; to the greatest extent practicable, employ and train local personnel.

Environment—Minimize environmental damage and encourage sustainable development; do not use the lack of full scientific certainty as a reason for postponing
measures to prevent or minimize serious damage to the environment.

**Bribery**—Do not offer, or give in to demands, to pay bribes to public officials.

**Consumer Interests**—Meet all required standards for consumer health and safety; respect consumer privacy and provide protection for personal data.

**Science and Technology**—Encourage the diffusion of technology, where practical, perform science and technology development work in host countries as well as employing host country personnel for that purpose.

The OECD is also responsible for having developed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), adopted by thirty-seven nations. It calls for adopting countries to criminalize the bribery of foreign government officials by individuals and corporations and sets up a method for nations to monitor each other's compliance with the convention. This is discussed in detail in a later chapter.

**United Nations Global Compact.** During the 1970s and 1980s, the UN attempted to develop a code of conduct for multinational corporations. That effort failed for political reasons, and in 1993, the UN agency charged with developing it was ultimately disbanded. In 1999, then Secretary-General Kofi Annan called for a new initiative—the UN Global Compact. Rather than being a purely governmental effort, this is a partnership of international companies, public interest groups, and UN agencies who pledge to support a set of voluntary principles on human rights, labor standards, the environment, and corruption.

The ten core principles are presented in very general terms. For instance, one states that "Businesses should make sure that they are not complicit with governments in human rights abuses." Of course, the Global Compact is not without criticism from those who are generally critical of all UN activities. However, the core principles are merely a statement of the most basic, universally recognized principles of environmentalism and corporate social responsibility. According to the UN, as of 2007 there were 3,800 participants, including over 2,000 businesses in 100 countries around the world.

**Codes of Conduct from Trade Associations and Private Organizations.** Some codes of conduct are developed by trade associations and organizations representing industry, private citizens, or public interest groups. There are industry codes for the oil, apparel, electronic, and chemical industries, to name a few.

The Coalition for Environmentally Responsible Economies, or CERES, is a private, mostly American network of environmental groups, socially conscious investors, and companies committed to following the CERES Principles of environmental and social accountability. One provision of the CERES Principles requires the appointment of at least one member of senior management and one member of the board of directors to represent environmental interests.

**Corporate Codes of Conduct**

In recent years, many companies have had an increased interest in enacting their own codes of conduct. There are sure many reasons for a company doing this. It might be seen as good business, in that it creates goodwill with customers and investors. It might be seen as an opportunity to foster an ethical and responsible attitude in their employees. It might be viewed as an opportunity for self-regulation that could forestall the enactment of more restrictive national laws and regulations. In the United States, the guidelines for sentencing corporate offenders allow for reduced fines and sentences if a defendant can show that it has had a code of conduct and compliance program to reduce the likelihood of criminal conduct. Here are a few examples of corporate codes related to international business.

**Levi Strauss & Co. Global Sourcing and Operating Guidelines.** The Levi Strauss & Co. Global Sourcing and Operating Guidelines are discussed here because they are generally recognized as the first code of conduct created by a multinational corporation and made applicable to its foreign suppliers. While they address certain issues important to an apparel company like Levi Strauss, their basic ideas could be applicable to any firm that does business through a global supply chain or with a supplier or contractor in a developing country. These guidelines include the Business Partner Terms of Engagement. They represent an effort by Levi Strauss to control the activities of its more than five hundred overseas contractors and suppliers. In the 1990s, the company discovered (as did many U.S. apparel and footwear makers) that 25 percent or more of its subcontractors had abused employees in some fashion. One plant in Bangladesh was found to be using child labor. The company not only reacted quickly to stop the practice but also developed guidelines to ensure that its contractors could not do it again. The Terms of Engagement sets out, in more than seventy pages, the minimum standards for the protection of the environment and for the fair treatment of workers that must be met by any foreign firm wishing to supply or contract with Levi Strauss. It addresses specifics such as wages, working hours,
the use of corporal punishment, and how workers should be treated on the factory floor. For instance, the guidelines state, “Use of child labor is not permissible. Workers can be no less than 14 years of age and not younger than the compulsory age to be in school.” Levi Strauss provides its suppliers with manuals and training programs to implement their standards. The company has also developed its Country Assessment Guidelines—factors to be considered in deciding in which countries they will do business, including whether the human rights record of the country would be damaging to the Levi Strauss corporate reputation or brand image. The company also makes public its list of all overseas factories producing Levi Strauss products.

Other apparel companies have similar codes. These include The Gap (Code of Vendor Conduct), The Limited (What We Stand For), Sara Lee (Global Business Standards and Global Standards for Suppliers'), Wal-Mart (Ethical Standards Program), and many others. It is generally agreed that for any company's code of conduct to be effective it must be communicated to its employees, become a part of its corporate culture, include disciplinary measures and other methods for ensuring compliance, include a system for measuring its effectiveness, and provide a means of shareholder and public accountability.

**COMPARATIVE LAW: DIFFERENCES IN NATIONAL LAWS AND LEGAL SYSTEMS**

The study of “comparative law” refers to the study of differences in national laws and legal systems. These differences cover the entire range of law—marriage and family law, business law, liability for wrongful torts, crimes, and more. There are also differences in legal procedures, the role of legislation and case law, the function of judges, the conduct of trials, the use of legal remedies in civil cases, and punishments in criminal cases. These differences are rooted deep in national culture, politics, economics, and especially history and often are the result of centuries of gradual evolution, combined with rapid change caused by wars, revolution, and political turmoil. Even the opening of world markets for commerce and trade—globalization—has influenced the development of law. There is no better example of how legal systems adapt to change than the case of modern Japan.

**Modern Japan: An Example of Legal Change**

Japan's earliest legal records date back to at least 500 A.D., and for most of its history it was a feudal system whose laws were based on early Confucian and Buddhist principles taken from China. (Recall the image of the Japanese warrior, or samurai.) Japan had been largely closed to Westerners and Western trade, except for some trade with the Dutch. However, in 1853 Commodore Perry sailed American Navy gunships into Tokyo harbor and demanded safe harbor for American whaling ships and rights to trade with Japan. He also demanded protection for Americans there, by insisting on the extraterritorial application of American law to American citizens. This infuriated and embarrassed the Japanese. Soon other European nations followed. The Japanese recognized that a modern legal system, one on an equal footing with those of the Americans and Europeans, was necessary to trade with them and would enhance their bargaining position in negotiating trade agreements. In response, during the 1860s, the Japanese started a national effort to modernize their legal system. So began a new interest in developing modern legal codes. New law schools opened in Japan, and law professors were exchanged with foreign institutions. Japan sent out legal scholars around the world, primarily to Europe, to study foreign legal codes and to find ways to adapt these to Japan. By the end of the nineteenth century, Japan had remade its legal system largely in the image of the European countries, primarily of Germany. The result was the adaptation of German legal principles to Japanese culture and society. These included written codes in commercial law, real property law, family law, criminal law, and others, as well as procedures for trials and deciding cases.

For the first half of the twentieth century, the influence of German law on Japan continued to mature. Then came World War II. Japan's terms of surrender were dictated by the United States. The United States mandated the rewriting of Japan's constitution, creating a parliamentary democracy and bill of rights, while preserving the symbolic role of the Emperor. The United States also revised many of Japan's business laws. To this day, it is safe to say that Japan's laws are an amalgamation of German civil and criminal law, American constitutional and administrative law, and Japanese cultural values.

We began this section by mentioning some of those forces that influence legal change—war and history, culture, religion, globalization, and international trade. In the case of Japan, we see all of these forces at play.

**Modern Legal Systems of the World**

While it is obvious that laws can differ from country to country, the differences in legal systems are largely differences in the role of legislatures in enacting statutes or codes, the role of judges and the courts in applying and interpreting the law, and in legal procedures. Let's briefly
describe the most widespread modern legal systems found in the world today. These are the common law, civil law, Islamic law, and mixed systems that incorporate characteristics of more than one.

**Origins of Civil Law Systems**

Civil law systems include most of Eastern and Western Europe, Scandinavia, Latin America, Japan, and Russia. Mixed civil law systems include much of Africa (mixed with tribal law). China's system is largely civil, mixed with principles of socialist economic law and traditional Confucian values.

While the term "civil law" can have several different meanings, the most common meaning to Americans is in reference to the laws affecting private rights and remedies, such as contract law, family or inheritance law, or tort law. However, in this chapter, civil law refers to those modern legal systems that are derived from ancient Roman law.

**Early Roman Law.** The early Romans, going back to hundreds of years B.C., had a penchant for writing, or most likely carving, very simple laws into bronze or marble tablets and placing them in public places. These became the earliest written Roman codes. Rome's conquering armies carried Roman law far and wide. Eventually, Rome had amassed thousands of law books containing edicts, rules, and penalties created by generations of emperors. Over the centuries, they had become unwieldy and outdated. By 329 A.D., Rome had long ceased to be the capital of the Roman Empire, and the Emperor Justinian ruled the Eastern Roman Empire from his seat of government in Byzantium (modern Istanbul). In that year, Justinian presided over the rewriting of Roman law, which was condensed and compiled into one code, known as the **Justinian Code**. It classified legal rules and organized them into a logical system that created a "body" of law, in a form that could be learned, understood, and applied. However, Rome had already been overthrown by Germanic hordes in the West. The Roman Empire had been lost, and in time, Justinian's code was forgotten—some say lost—almost forever.

**The Revival of the Justinian Code.** Hundreds of years later, around 1100 A.D., copies of Justinian's long-lost code were discovered. Legal scholars from Italy and around the world began to take great interest. They were impressed by how comprehensive it was and how it had arranged legal principles in an orderly and systematic manner. For centuries, Roman law was taught only as an academic discipline, primarily in Italian universities.

Centuries later, the Emperor Napoleon found the clarity and organization of the Roman system to be very appealing, and in 1804, he used Roman principles as the basis for consolidating all French law into one code. The Napoleonic Code was soon translated into almost every language, and adaptations of it spread throughout Europe and the world. It was the model for the new legal systems of Latin America on their independence from Spain in the years after 1804.

Later in the century, Germany started work on a uniform code, also closely based on the organization of Roman law. In 1900, it enacted its Bürgerliches Gesetzbuch, the German civil code, as well as codes of commercial law and criminal law. The Bürgerliches Gesetzbuch is still the codified law of Germany to this day, having been amended through the twentieth century, and most recently in 2002. These two codes have been an important influence on the growth of civil law internationally. Earlier we saw the influence of German law on Japan. The German code also influenced the legal systems of China, Portugal, and Brazil. Today, the civil law system is the predominant legal system in the world.

We can still see evidence of Napoleon's work in North America. Louisiana, unlike most of the United States, still owes much of its law to French (as well as Spanish) civil law. Quebec's legal system also draws from French civil law traditions, mixed with common law concepts. Official versions of Quebec's legal codes are written in both French and English. Thanks to the Napoleonic Code of two hundred years ago, modern civil codes still have their distant roots in Roman law. It was a Napoleonic victory that has lasted long after his military defeat at Waterloo.

Despite common heritage, there are many differences in the civil law systems of France, Germany, Switzerland, China, Russia, and other countries. Scotland, South Africa, and the Scandinavian countries have variations of the traditional civil law system.

**Origins of Common Law Systems**

When most American students are asked about the origins of English law, the answers usually range from the Greeks to the Romans, the Egyptians, or even the Bible. They are always amazed when they learn that the answer is the Normandy region of France. While many English and American legal terms come from French and Latin (after all, the Romans had conquered Gaul and Britain), the revival of Roman law in the eleventh and twelfth centuries that occurred on the European continent completely skipped Britain, which by then was branching off on its own legal track.
The job of describing one thousand years of English legal history in a few paragraphs is not easy. But it is an interesting tale. Anglo-Saxon law governed much of Britain from the fall of the Roman Empire until the Norman Conquest in 1066. Law came partly from the early kings and their councils and partly from local custom. By 1066, legal disputes were being heard by Anglo-Saxon courts. The shire courts were administered by a "shire-reeve," the modern day "sheriff." There were early forms of trial, called "modes of proof" but there was no evidence or factual proof offered. There were no witnesses (which were probably not needed anyway, since most legal acts were performed in public). One type of trial was by "outh helper." The accused and his "helpers" would all recite a ceremonial oath of the accused's truthfulness. One mistake in reciting the formal oath, one slip of the tongue, and the accused was deemed to have lied, or to be guilty by divine intervention. In some cases, the accused would have had to submit to trial by ordeal—by being submerged in water or placing his hand in fire. Again, by divine intervention, if the person floated or if the hand became infected, he had lied. If he sank, or if the hand healed, he had told the truth. It was primitive and archaic.

Then, in 1066, the last Saxon king, Harold, was killed when an arrow pierced his eye and his army was defeated at the Battle of Hastings by William, the Duke of Normandy. The course of English law was changed forever. William the Conqueror, as we all know, introduced a political and economic system known as feudalism. All land was parcelled out to his closest followers, the lords, who in turn gave parcels to subtenants, who in turn did the same. Each took their land with certain rights and in return for certain duties owed to the tenant above, or to their lord. The duties might be farming, knight service, or castle guard, for example. Even the church received land in return for prayers. Indeed, the very first laws developed by William were created to enforce feudal rights in land.

European feudalism no longer exists, although the legal system that William and the kings that followed introduced to England does. They decreed that all justice flowed from the king, and from the King's Court, or Curia Regis (the king's closest advisors, sitting at Westminster). Soon traveling judges were sent into the countryside to hold court. Eventually, the king's judges brought with them a new concept, trial by jury.

As one would expect, the popularity of trial by jury over trial by ordeal led to the eventual demise of the old Anglo-Saxon courts. As these eminent judges decided cases, they wrote down their decisions and shared them with other judges of the King's Court. Judges could now justify their decisions by citing the decisions of other judges in similar cases. A "common" body of law resulted. Thus began the common law system that we know today—where the reasoned decisions of judges become the law of the case, a legal precedent that binds judges in deciding similar cases in the future. This is expressed in the common law doctrine of stare decisis, meaning that courts should "set the decision stand" unless it is overruled by a higher authority.

The common law spread with the British Empire. Examples of common law countries today include Australia, Canada, Ghana, Great Britain, the United States, and many Caribbean island nations. India has a mixed system that is largely based on the common law. Even many civil law nations have adopted common law principles.

**Differences between Modern Civil Law and Common Law Countries**

Civil law and common law systems today have many differences and many similarities. Both systems rely on legislative codes, or statutes, as the primary source of law. However, in civil law countries the legal codes are more comprehensive, establishing general principles that are interpreted by judges and applied to the case before them. Where there are gaps in the code law, the judge will draw from the code's principles and doctrine to decide a case. The courts in both systems issue judicial decisions. While civil law judges often cite earlier court decisions that they consider representative of settled law, they are not bound to follow them. Civil law judges do not render opinions that make new law in the form of binding precedent, as do common law judges. It can be said that civil law lawyers are more trained in the interpretation of code law, while common law lawyers are more skilled in using case precedent to develop legal arguments for their clients. It is probably true that researching case law is far more difficult in common law systems, where lawyers must find and piece together common law principles from unrelated cases and justify the application of those principles to their client's case. Of course, in common law countries, case decisions can always be overridden by statute, as long as the statute does not violate a constitutional doctrine.

The role of judges is also different in civil law countries. The professional judge is schooled for a career as a judge, not as a lawyer. In criminal cases, civil law judges take a more inquisitorial role, as do the lawyers for both sides, in an investigative search for the truth. The process is less adversarial than in common law countries. In other legal matters, such as contract or tort cases, civil law judges do the work that both judge and jury would do in common law countries. Unlike common law judges, they can undertake their own investigation of the facts and decide what
Islamic Law

Over 20 percent of the world's population is Muslim. They are located in some of the very richest and very poorest countries on earth, in the Middle East, Northern Africa, and Central and Southeast Asia. The largest Muslim populations are in Indonesia, Pakistan, India, Bangladesh, Turkey, Iran, and Egypt. In less than fifty years, the Muslim countries of the Middle East have gone from the age of antiquity to the modern age of information, technology, and oil wealth.

The poorer Muslim countries are undergoing tremendous social and political change. Some have adopted Western practices in business, society, and to a lesser extent, family life. Others have returned to strict Islamic principles. Some Muslim countries give limited rights to women; others abide by strict fundamentalist principles. For example, in Saudi Arabia unmarried women are the wards of their fathers, and widowed women are the ward of their sons.

All Muslim countries seem caught in the political, social, and religious struggle between the Western nations and Islamic fundamentalism. Because of the importance of the Muslim countries today, business students should have some understanding of their basic laws.

Most Muslim countries today have modern legal systems, based on civil law or common law, mixed with principles of Islamic law. Islamic law is known as Shari'a (or Shariah), meaning "divine law." It is derived from the Koran (Qu'ran), and from the sunna. The Koran is the main religious book of the Islamic religion that expresses fundamental Islamic values. The sunna is the written record of the teachings and actions of the prophet Muhammad. In addition, Islamic jurists and scholars qualified to interpret the scriptural sources have produced opinions known as fiqh. An understanding of the Shari'a requires reference to the fiqh for guidance. Islamic judges do not issue written opinions with the force of law, and they are not bound by the precedents of other courts. They are attempting to seek the truth, the divine word of God.

Saudi Arabian Legal System. An example of a strict Muslim country that is governed by Shari'a is Saudi Arabia. It is a monarchy and all laws are decreed by the King, in consultation with his highest ministers, in accordance with Shari'a. All citizens must be Muslim. The basic law sets out very general legal principles. For example, Article 41 states, "Foreign residents in the Kingdom of Saudi Arabia shall abide by its regulations and shall show respect for Saudi social traditions, values, and feelings."

All Saudi citizens must be of the Muslim faith. Serious crimes are punishable by capital punishment, stoning, amputations, or floggings. Rape, theft, the possession or use of alcohol, fornication, and adultery are serious crimes. Drug smuggling can be punishable by death. The Shari'a courts hear cases involving crime, family matters, property, and torts. In the last few years, Saudi Arabia has enacted new business regulations on product labeling (2002), insurance (2003), foreign investment (2000), corporate income tax (2004), trademarks (2002), and others. These are considered to supplement Islamic law and must never conflict with it. Commercial and business disputes are heard by special commissions for grievances appointed by the King.

Pakistan Legal System. Other Muslim countries that had been colonized by Western nations in past centuries, such as Pakistan, have closer historical ties to Western legal systems. Pakistan's legal system has been influenced by the British, but is governed by Islamic principles. Today, Pakistan has a modern, written constitution, with a bill of rights that has some language that is similar to the American Constitution. It does declare Islam as the state religion.

Pakistan has secular civil and criminal courts, as well as a Federal Shari'at Court, which has the power to invalidate any public law if it violates Islamic law. Appeals go to the Supreme Court of Pakistan.

The case of M. Aslam Khaki v. Syed Muhammad Hashim (2000) illustrates the great differences between banking and finance in Western nations and Islamic law nations. The Muslim countries have both international banks and Islamic banks. Islamic banks abide by Shariah law that prohibits the payment of interest on loans and deposits (although they do have alternative forms of compensation that substitute for interest). In its decision, the Supreme Court of Pakistan struck down the use of interest on all loans and bank deposits (including personal loans, commercial and corporate loans, and interest paid by the government on foreign loans). In 2002, the same court reconsidered its opinion, citing errors, and ruled that invalidating the payment of interest to non-Muslims would "pose a high degree of risk to the economic stability and security of Pakistan." As of 2007, the issue was again being considered by Pakistani courts. Given that there are now
Chapter 2: International Law and the World's Legal Systems

M. Aslam Khaki v. Syed Mohammad Hashim
Supreme Court of Pakistan (2000) Shariah Appellate Bench PLD 2000 SC 225

BACKGROUND AND FACTS

This case illustrates a classic case of the conflict between Islamic law and modern business. In 1991, the Federal Shariah Court of Pakistan declared the payment of interest (riba) by banks on loans and deposits to be contrary to Islamic law. During the 1990s, Pakistani banks adopted many banking techniques to avoid the payment of interest, such as equity investments, profit sharing, and service charges. The government, together with several banks, brought this appeal to the Supreme Court of Pakistan. The court's entire opinion was 1,100 pages long. Below are excerpts from the individual opinions of Maulana Justice Taqi Usmani, an Islamic scholar trained in strict Shariah law. As you read, consider the political overtones of the opinion and the economic analysis of interest that would be considered contrary to Western, capitalist economic theory.

MAULANA JUSTICE TAQI USMANI

40. Imam Abu Bakar Al-Jassas (D.380 AH) in his famous work Ahamal Qur'an has explained riba in the following words: "And the riba which was known to and practiced by the Arabs was that they used to advance loan in the form of Dirham (silver coin) or Dinar (gold coin) for a certain term with an agreed increase on the amount of the principal advanced."

133. Although riba has itself decided what is injustice in a transaction of loan, and it is not necessary that everybody finds out all the elements of injustice in a riba transaction, yet the evil consequences of riba are so evident in the past and they are today. Injustice in a personal consumption loan was restricted to a debtor only, while the injustice brought by the modern interest affects the economy as a whole. A detailed account of the rationale of the prohibition of riba would, in fact, require a separate volume...

134. On pure theoretical ground, a world would like to focus on two basic issues; firstly on the nature of money and secondly on the nature of a loan transaction.

135. One of the wrong presumptions on which all theories of interest are based is that money has been treated as a commodity. It is, therefore, argued that just as a merchant can sell his commodity for a higher price than his cost, he can also sell his money for a higher price than its face value, or just as he can lease his property and can charge a rent against it, he can also lend his money and claim interest thereupon.

136. Islamic principles, however, do not subscribe to this presumption. Money and commodity have different characteristics. And the way they are treated differently. * * *

138. First, money (of the same denomination) is not held to be the subject-matter of trade, like other commodities. Its use has been restricted to its basic purpose, i.e., to act as a medium of exchange and a measure of value.

139. Secondly, if for exceptional reasons, money has to be exchanged for money or it is borrowed, the payment on both sides must be equal, so that it is not used for the purpose it is not meant for, i.e., trade in money itself.

140. Imam Al-Ghazzali (d.515 AH) the renowned jurist and philosopher of the Islamic history has discussed the nature of money in an early period when the Western theories of money were non-existent. He says: "... And whoever effects the transactions of interest on money is, in fact, discarding the blessing of Allah and is committing injustice, because money is created for some other things, not for itself. So, the one who has started trading in money itself has made it an objective contrary to the original wisdom behind its creation, because it is injustice to use money for a purpose other than what it was created for..." If it is allowed for him to trade in money itself, money will become his ultimate goal and will remain detached with him like hoarded money. And implementing a ruler or restricting a postman from conveying messages is nothing but injustice."

151. This is exactly what Imam Al-Ghazzali had pointed out nine hundred years ago. The evil results of such unnatural trade have been further explained by him at another place. In the following words: "Riba is prohibited because it prevents people from undertaking real economic activities. This is because when a person having money is allowed to earn more money on the basis of interest, either in spot or in deferred transactions, it becomes easy for him to earn without bothering himself to take pains in real economic activities. This leads to hampering the real interests of the humanity, because the interests of the humanity cannot be safeguarded without real trade skills, industry and construction.

153. Another major difference between the secular capitalist system and the Islamic principles is that under the former system, loans are purely commercial transactions meant to yield a fixed income to the lenders. Islam, on the other hand, does not recognize loans as income-generating transactions. They are meant only for those lenders who do not intend to earn a worldly return through them. They, instead, lend their money either on humanitarian grounds to achieve a reward in the Hereafter, or merely to save their
money through a safer hand. So far as investment is concerned, there are several other modes of investment like partnership ..., which may be used for that purpose. The transactions of loan are not meant for earning income.

158. Thus, financing a business on the basis of interest creates an unbalanced atmosphere which has the potential of bringing injustice to either of the two parties in different situations. That is the wisdom for which the Shari‘ah did not approve an interest-based loan as a form of financing.

159. Once the interest is banned, the role of “loans” in commercial activities becomes very limited, and the whole financing structure turns out to be equity-based and backed by real assets. In order to limit the use of loans, the Shari‘ah has permitted to borrow money only in cases of dire need, and has discouraged the practice of incurring debts for living beyond one’s means or to grow one’s wealth. The well-known event that the Holy Prophet, Sall-Allahu alayhi wa Sallam, refused to offer the funeral prayer of a person who died indebted was, in fact, to establish the principle that incurring debt should not be taken as a natural or ordinary phenomenon of life. It should be the last thing to be resorted to in the course of economic activities. ***

160. Conversely, once the interest is allowed, and advancing loans, in itself, becomes a form of profitable trade, the whole economy turns into a debt-oriented economy which not only dominates over the real economic activities and disturbs its natural functions by creating frequent shocks, but also puts the whole mankind under the slavery of debt. ***

164. Since in an interest-based system funds are provided on the basis of strong collateral and the end-use of the funds does not constitute the main criterion for financing, it encourages people to live beyond their means. The rich people do not borrow for productive projects only, but also for conspicuous consumption. Similarly, governments borrow money not only for genuine development programmes, but also for their lavish expenditure and for projects motivated by their political ambitions rather than being based on sound economic assessment.

204. The basic and foremost characteristic of Islamic financing is that, instead of a fixed rate of interest, it is based on profit and loss sharing. We have already discussed the horrific results produced by the debt-based economy. Realizing the evils brought by this system, many economists, even of the Western world are now advocating in favor of an equity-based financial arrangement.

213. Apart from this, an Islamic economy must create a mentality which believes that any profit earned on money is the reward of bearing risks of the business. ***

Decision. Interest on the use of money is unjustified and unearned income. A financial system based on the lending of money for interest is unjust and contrary to Islamic law. Equity investments are lawful where all parties share the risk of profit and loss.

Comment. In 2002, this decision was reconsidered by the Supreme Court of Pakistan In United Bank Limited v. Faraq Brothers and Others (PLD 2002 SC 800). It held that the decision was based on errors, that it was not feasible to implement, and that the rules against interest could not be made to apply to non-Muslims. As of 2007, a lower court was considering alternative solutions.

Case Questions
1. What is riba? Why is riba not permitted pursuant to the Shari‘ah law?
2. The Islamic banking community in many countries has been innovative in developing lending and banking programs that they feel are both in keeping with Islamic principles and adaptive to modern banking, economics, and trade. Research this, and tell some of the ways that Islamic banking functions in international commerce.
3. In what other ways have culture and religion influenced modern legal systems?

CONCLUSION

Although international law is rooted in centuries of customary law and treaties, it affects modern international relations and international business every day. It affects the movement of people, goods, and money across national borders. Virtually every area of international trade, foreign investment, and intellectual property rights is governed by at least one international convention. International law offers solutions to some of humankind’s greatest challenges: human rights abuses by rogue governments, pollution that knows no national boundaries, transnational crimes, international terrorism, and more. However, international solutions depend on the willingness of nations to cooperate, and that is not always politically possible. One can only hope that humankind is up to that challenge.
Chapter Summary

1. **International law** includes public and private international law. **Public international law** governs the conduct of nations with other nations or the conduct of nations in their relationships with individuals. It can also include rules for international organizations, such as the **Charter of the United Nations**. **Private international law** governs the rights and responsibilities of private individuals or corporations operating in an international environment, such as international sales contracts or international shipping. International law relies primarily on "soft" enforcement mechanisms: the force of public opinion, trade and diplomatic sanctions, and the withholding of foreign aid. The ultimate sanction is war.

2. **Customary international law** is derived primarily from the widespread and long-standing practices of nations. International law also arises from agreement. A treaty is a legally binding agreement between two or more nations that is recognized and given effect under international law. A **treaty** is a multilateral treaty on a topic of broad international concern.

3. **International humanitarian law** refers to those rules for how nations treat combatants, noncombatants, refugees, and other civilians during war or civil conflict. Sources of international humanitarian law include the four **Geneva Conventions**. **International human rights law** protects individuals and groups from the acts of governments that violate their civil, political, or human rights during times of peace. Examples include bans on the use of torture in the world's prisons, slavery, forced labor, forced prostitution, and the use of children in military service. All have been widely reported in recent decades.

4. **International criminal law** is that body of law and procedure that involves the use of criminal sanctions to prosecute individual offenders responsible for genocide, war crimes, crimes against humanity, terrorism, and other transnational crimes. The International Criminal Court (the Netherlands) has authority to hear three categories of crimes: genocide, crimes against humanity, and war crimes.

5. **Jurisdiction** is a word of many meanings. Here it means the power of a nation to create laws that prescribe conduct and to act over individuals, corporations, or their property in the application or enforcement of those laws. When used in reference to a court, it is the power of a court to hear a case—to adjudicate. There are four doctrines of international criminal jurisdiction: territoriality, nationality, the protective principle, passive personality, and universality.

6. **Comity** refers to the willingness of one court or department of government to respect the rules or decisions of another or to grant it some privilege or favor. **Soevereignty** is the supreme power of a nation over an independent state or nation. Sovereign immunity protects foreign governments from lawsuits when they are acting as a political entity, although not when a government agency enters the commercial field to perform essentially private functions. The **Act of State doctrine** is a principle of domestic law (not international law) that prohibits the courts of one country from inquiring into the validity of the legislative or executive acts of another country.

7. The United Nations and its agencies have coordinated over five hundred multilateral treaties and international conventions that affect not only world peace and security but also such important issues as climate change and the protection of the environment, the prevention and control of crime, drug trafficking, and terrorism; rules for Antarctica and the seabeds of the world's oceans and more.

8. The **International Court of Justice** hears cases brought by nations against other nations. Individuals and private corporations are not parties to cases before the court. The court has jurisdiction over all cases brought by nations under the **UN Charter** or involving treaties, conventions, international obligations, or questions of international law. Jurisdiction is not compulsory; each nation must agree to submit to the court's jurisdiction.

9. In recent decades, there has been a debate over the impact of multinational corporations in developing countries. While it is almost universally accepted that MNCs have contributed greatly to socioeconomic development there, a few detractors argue that MNCs exploit developing country natural resources and labor, and return profits to shareholders in their home countries. International standards and voluntary codes of conduct have influenced the role of
MNCs in developing countries and the conduct of MNC managers.

10. Comparative law refers to the study of differences in national laws and legal systems. These differences cover the entire range of law—marriage and family law, business law, torts, crimes, and more. There are also differences in legal procedures, the role of legislation and case law, the function of judges, the conduct of trials, the use of legal remedies, and punishments in criminal cases. This chapter looked at the development of the common law, civil law, and Islamic law systems.

**Key Terms**

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**Questions and Case Problems**

1. What is public and private international law? What is international business law?
2. What types of issues lend themselves to international solutions through International law?
3. You overhear someone say, "International law does not exist." What do they mean? What evidence can you provide to persuade them that they are mistaken?
4. Explain how international conventions tend to unify, or harmonize, national laws. Why would this be important to international business?
5. Do you think corporate codes of conduct can have an effect on making firms more socially responsible? Are they a substitute for government regulation or do they complement it?
6. To whom are corporations accountable—the government of their home country, their host country, consumers, investors, or the public? What ideas do you have to set up an accountability system to ensure compliance with codes of conduct and other ethical and social responsibility standards for business?
7. Why do corporations have to be concerned about human rights issues when doing business internationally?
8. The United States and other countries have refused to sign the treaty for the International Criminal Court. Why?
9. Describe the five theories of international criminal jurisdiction. How have these been made applicable to international terrorism? What types of crimes are covered under the principle of universality? Do you think that terrorism should be a universal crime? How would you justify that in terms of legal history of universality? How is universality applied in the United Nations Convention on Torture?
10. Do you think the creation of the International Criminal Court will have an effect on the enforcement of human rights law, genocide, or war crimes? Why?
11. El-Hadad was an accountant and citizen of Egypt working for the government of the United Arab Emirates embassy in Washington, where he was an auditor and supervising accountant in the cultural attaché's office. In 1994, he was promoted and commended for his work. In 1995, he...
employment was wrongfully terminated. El-Hadad sued the U.A.E. and its Washington embassy for breach of his employment contract and defamation. The defendants claimed that El-Hadad was a government "civil servant" and thus they were immune from suit under the U.S. Foreign Sovereign Immunities Act. El-Hadad had supervised eight other accountants. He did not have full civil servant benefits common to other U.A.E. governmental employees. He was not involved in policy-making. Was his employment "commercial" or "governmental"? Was he a "civil servant" or a privately contracted employee? Does the definition of "civil service" under U.A.E. law matter? Does it matter that he exercised the "powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns"? What else would you like to know about his job function? For whom do you think judgment was issued and why? El-Hadad v. United Arab Emirates, WI. 2141943 (C.A.D.C., 2007).

Managerial Implications

1. You are a vice president of a multinational corporation headquartered in North America. You are asked to visit Latin America to meet with government officials to consider a location for a new factory. On your arrival, you are met at the airport by one of your hosts, who spends some time that day taking you on a tour of the city and getting acquainted. That evening you are invited to his home for dinner with government representatives. After dinner, one of the guests, who works for a key government ministry, asks you what you think of your company's role in his country as an employer, taxpayer, and corporate good citizen. He makes it clear that his country is no longer a "puppet" of the North Americans. He asks you to show him that you understand his concerns and to show him that your company will be respectful of his country's culture, environment, natural resources, and local laws. How do you respond?

2. Assume that a Korean company manufacturing critical tail assemblies for commercial aircraft ships several defective assemblies to manufacturers in the United States. The CEO, a Korean national, was not only aware of the defects at the time the assemblies were being made but was also responsible for knowingly using inferior parts. He even threatened an engineer with termination if he leaked the truth. One of the assemblies failed on the American-made plane, leading to the crash of a Canadian-sold passenger airliner on takeoff from New York. When the investigation leads to him, he flees Korea for Saudi Arabia, where he lives for several years in luxury. Which countries have jurisdiction to prosecute the Korean citizen, and under what legal principles? You do not need to research any international treaties, but you should base your analysis on general principles from this chapter. Subsequently, the U.S. government settles for his conviction from his home in Saudi Arabia and transport to the United States to stand trial. Does he have the right under the U.S. Alien Tort Claims Act to sue the United States for damages resulting from the abduction?

3. Your company in Makombo uses a number of toxic cleaning solvents to clean manufacturing equipment. You could sell empty solvent containers and make money or pay to have them disposed of in an environmentally safe way. Makombo has very little environmental regulation, and the first option is legal in Makombo, but would not be in the United States. What is your decision, and why? Does your answer change if the profit or expenses of each option changes?

Ethical Considerations

We have considered many subjects in this chapter that raise ethical issues—human rights law, international criminal law, international labor standards, bribery and corruption, and others. Here are two cases to consider as food for thought.

Exports of "Unsafe" Pharmaceuticals.

Some years ago, it was reported in the world's press that American pharmaceutical companies were selling expired medicines in developing countries that were no longer permitted to be sold in the United States. Assess the validity of the following arguments:

"There are two sides to every debate. We are talking about antibiotics that are lifesaving and in short supply in some developing countries. True, they are expired under federal regulations in the United States, but they will still be effective for some time to come. It is not illegal overseas, and maybe not illegal to export them, so why should I do anything more than just obey the law? After all, we are selling them at..."
reduced prices to the governments of developing countries. They probably have foreign aid money to buy these with. They will sell them, or give them away, to poor people that otherwise would not be able to afford any medicine at all. Why should I destroy them? After all, we are not talking about AIDS, are we? I wonder what the world and big pharmaceutical companies are doing about that problem.

Bribery as a “Cost of Doing Business.”

What are the economic, political, and social arguments for and against criminalizing the bribery of foreign government officials in developing countries by employees and representatives of Western companies? Assess the validity of each of the following arguments in this statement:

“I’ve always thought that bribery is endemic in the developing countries, so “When in Rome, do as the Romans do.” It’s legal there, isn’t it? Nothing would happen to me if I get caught there, would it? My government does not have the right to say whether what I do in a foreign country is a crime. They can’t tell me what is legal or illegal over there. And I don’t have a moral problem either. I see it as a small price to pay—my company just considers this another “cost of doing business.” We might even try to deduct it on our corporate income tax returns. If I don’t offer cash payments or gifts to my customers in government offices overseas, then my competitors from other countries will. Foreign customers will just buy from my competitors. If I don’t pay, I’d just be giving my competitors a “corruption advantage.” And what difference does this make anyway? Why should my country care? I’ve heard about companies that gave cash payments to the Shah of Iran when he was in power in the 1970s, to his government ministers, even to members of his family. They got contracts worth tens and hundreds of millions of dollars to install everything—telecommunications systems, power plants, refineries, and, most of all, armaments and weapons. I heard he was a brutal dictator, but so what? That’s not my problem. I don’t see what the problem is.”