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Keynote: What Does International Law Have to Do with International Development

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KEYNOTE: WHAT DOES INTERNATIONAL LAW HAVE TO DO WITH INTERNATIONAL DEVELOPMENT?

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I. INTRODUCTION

The broad topic of international development, understood with particular reference to the Millennium Development Goals,¹ addresses one of the critical aspects of our global future. Simply put, development is not just a good idea, a policy option, or a preferred outcome; it is a necessary process, fundamental to the future of human society.

I believe that without development, growth, progress, whatever you may wish to call it, the human race will stagnate and expire. That is the gloomy news. The good news is that it is in our nature to work towards a better future, to invent, to overcome, to improve, and to develop. At least, that's what several millennia of human existence suggest to me.

Yet, development is not inevitable. It may be necessary, but it is not inexorable. We have within us the seeds of our own obliteration. A world that doesn't develop, a world in which large portions of the human race live in poverty, in poor health and in political subjugation, where large segments of the population

* Visiting Professor of Law, Georgetown University Law Center. Member, Inter-American Juridical Committee; President-elect, American Branch of the International Law Association; ALI project on Restatement (Fourth) Foreign Relations Law of the United States (co-reporter on immunities); member, Board of Editors of the American Journal of International Law and Executive Council, ABA Section of International Law. It is a pleasure to return to the Sturm College of Law in Denver for this Sutton Colloquium on "The International Legal Perspectives on the Future of Development," and to share some thoughts on the relationship between international development and international law. Professor Ved Nanda has been one of my personal heroes for many years, a truly accomplished international lawyer and a man of unparalleled grace, wisdom and insight. It's been my privilege to work with him in a number of circumstances, including the American Branch of the International Law Association and the American Society of International Law. I am certain you realize how truly fortunate you are at the Sturm College of Law to be able to study with him, and under his tutelage.

1. The official site for the MDG implementation "indicators" is *Millennium Development Goal Indicators*, U.N., <http://mdgs.un.org/unsd/mdg/host.aspx?Content=indicators/officiallist.htm> (Apr. 6, 2014). The eight Millennium Development Goals, adopted by the U.N. General Assembly in 2000, are to (1) eradicate extreme poverty and hunger, (2) achieve universal primary education, (3) promote gender equality and empower women, (4) reduce child mortality, (5) improve maternal health, (6) combat HIV/AIDS, malaria and other diseases, (7) ensure environmental sustainability, and (8) develop a global partnership for development. Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sept. 18, 2000). See U.N. DEP'T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT (2013), available at <http://www.un.org/millenniumgoals/pdf/report-2013/mdg-report-2013-english.pdf>, for the most recent Millennium Development Goals Report (2013), which assesses progress toward the 2015 target date.

are excluded, where resources and wealth and the benefits of progress are not shared but are reserved for the fortunate few . . . well, that is very likely to be a world of jealousy and hostility, chaos and conflict, war and destruction. We do not need to be the proverbial rocket scientists to know that down that road lies a real prospect of annihilation.

If you are with me so far, then we can probably agree that international development is, as my daughter would say, “like, really important.”

But what does it have to do with international law? Or with us as lawyers or future lawyers? To turn the question around, what does international law have to do with development? Can international law contribute to development, and if so, how? How can we, as international lawyers, contribute most usefully to international development?

In answering these questions, my aim this morning is to speak primarily to the students and recent graduates in the audience, because I want to suggest some important possibilities to you.² I will be happy to take questions and comments at the end.

II. PROPOSITION ON HOW INTERNATIONAL LAW CAN CONTRIBUTE TO INTERNATIONAL DEVELOPMENT

Here is my proposition.

First: Not only can international law contribute to international development, it is an essential aspect of international development, one of the key ingredients that promotes and facilitates development. Not the only one, of course. Law alone cannot make development occur. I am not a believer in a legal “right to development,” or in the notion that development and progress can simply be legislated or legally mandated. But at the same time, international development is not likely to take place, and certainly not likely to occur as quickly or effectively, in a lawless environment. I hope you will agree that development will not thrive—*cannot* thrive—in the face of civil unrest or chaos or armed conflict, or in situations of widespread human rights abuses, or where corruption is rampant, or where the affected population seethes with unresolved grievances or is excluded from the political process.

Second: What is needed is not just economic growth and increased prosperity. Those things are necessary, of course, but they must also be accompanied by a stable system of governance, rules for the fair operation of society, mechanisms for resolving disputes equitably, prohibitions against crime and corruption, protections for human rights, effective remedies for wrongs—all the things that we generally say constitute the Rule of Law. That’s why Rule of Law promotion is almost

2. For some suggestions about possibilities and resources in this regard, those interested may wish to consult the references at *International Development*, GEO. L., <http://www.law.georgetown.edu/careers/career-planning/practice-areas/international-development.cfm> (last visited July 20, 2014).

always included as part of the “development package.” And *public sector reform* as part of good governance efforts in developing countries has traditionally been at the center of the Rule of Law agenda. Traditionally, the principal focus has been on the promotion and incorporation of public international law principles and standards at the international, regional, and national levels, particularly those coming from the human rights framework. This is where international law is generally thought to have its greatest impact, and where international lawyers can have a truly significant impact.

Third: What is often overlooked, however, is the importance of developing legal rules at the next level, in the context of *private transactions*. In other words, Rule of Law and public sector ordering is not sufficient, by itself. For truly effective growth and development to occur, it is critical to have effective rules, mechanisms and procedures at the transactional level, where businesses and customers and consumers and individuals connect. This is where the principles of *private international law* come into play.

The point is that these principles also have a direct and increasingly positive role in promoting good governance and the Rule of Law. And they too work to foster economic growth, by providing clarity of rules and certainty of expectations in private transactions, by establishing effective dispute settlement mechanisms in cross-border contexts, and by promoting fair and efficient commerce. This too is the lawyer’s territory. It is where we as lawyers have a broad—and often overlooked—range of opportunities to be productively engaged in the development process. It is where you, as lawyers-in-training, can usefully focus your attention.

III. ROLE OF LAW IN DEVELOPMENT

So let me expand on these general points. In thinking about the role of law in development, I have found it useful to imagine that there are three overlapping circles of endeavor: the economic and financial sector, Rule of Law efforts, and the contributions of private international law. Each is important in its own right, but all three working together are necessary.

A. *Economic Development*

Let us first take the economic field. This of course is at the heart of the process, and it involves mostly the work of the economic, financial, and development experts and their various projects directly related to sustainable development—such as building roads and bridges and airports, power grids and water mains and communications systems, schools and hospitals and factories—all the parts of the economic infrastructure and all the facilities that are absolutely necessary to the process of economic development and that in many ways actually define development.

This is mostly the domain of non-lawyer specialists, the economists and financial and engineering folks, the agriculture specialists, the hydrologists—all the technical experts who work at places like the U.N. and UNDP and the World Bank, the regional development banks, other international organizations such as the OECD, government agencies such as USAID, entities like the Peace Corps,

and non-governmental organizations such as Oxfam, the Ford Foundation, all the contractors—all the “direct action” institutions that provide funding and technical expertise and assistance.³

To be sure, many lawyers are involved in this sector, and many provide valuable counsel and service to the direct actors, but they are mostly in legal support roles addressing the needs of the specialists—lawyers advising and assisting clients. It’s good work, necessary work, very satisfying, and I have a number of colleagues who thrive in that environment. But it is a traditional role for lawyers serving their clients.

B. Rule of Law

By comparison, lawyers play a much larger and active role in the Rule of Law effort, which involves various international undertakings aimed at promoting and developing social and economic and governmental change through “law reform.”

The Rule of Law is a term that lacks an agreed definition and can encompass a wide range of projects aimed at creating the kind of modern, effective structure of public governance that supports and fosters economic growth. Its content differs from country to country, depending on the particular circumstances. But Rule of Law initiatives typically consist of capacity building initiatives aimed, for example, at creating effective government structures (with a functional, popularly elected legislature, an orderly and independent judiciary, an effective police presence and criminal justice system, and so forth) as well as promoting a broad culture of respect for human rights and fundamental freedoms in which the institutions of government comply with the law and can be held accountable for violations.⁴

More often than not, folks in the Rule of Law field will say they are working more broadly to create all the other things that constitute a workable and vibrant “civil society,” including a culture of law, fostering acceptance of non-governmental organizations, developing the legal profession, effective law schools, active bar associations, etc.⁵

This is mainstream lawyers’ territory, and when people talk about the role (or rule) of law in development, for the most part this is what they have in mind.

3. One helpful source of possibilities in this regard is Duke Law’s Career and Professional Development Center. See *Tips for Students Interested Post Graduate Careers in International Public Interest Law*, DUKE L., http://law.duke.edu/sites/default/files/international/International_Public_Interest_Tipsheet.pdf (last visited July 20, 2014).

4. Consider, for example, the different approaches taken by the United Nations. See U.N. & THE RULE OF L.: WEBSITE & DOCUMENT REPOSITORY, <http://www.un.org/en/ruleoflaw> (last visited July 20, 2014); see also *What is the Rule of Law?*, WORLD JUST. PROJECT, <http://worldjusticeproject.org/what-rule-law> (last visited July 20, 2014).

5. One of the most active organizations in the field, which takes a broad view of “rule of law” projects, is the International Development and Law Organization (“IDLO”). See *About IDLO*, IDLO, <http://www.idlo.int/about-idlo> (last visited July 20, 2014).

Without question it is vital, because without the Rule of Law, economic progress is hardly likely to be lasting. We can probably all think of resource-rich countries that have experienced stunted growth and development precisely because they lack the Rule of Law.

Done correctly, the Rule of Law effort requires specialists in many legal areas, from constitutional law to legislative and administrative law, public procurement, economic regulations (securities markets, trade and commerce, and banking), and lots of other areas like the environment, health, education, and especially human rights. There is a particular need for experts in all the various aspects of criminal law, for the obvious reason that few threats to developing societies are more dangerous than bribery and corruption, the predations of organized crime, those who trafficking in drugs, people, arms—that is why this is really is an important area for international criminal lawyers.

The Rule of Law challenges are especially critical in situations of conflict or post-conflict reconstruction, where the criminal justice system may be dysfunctional and needs to be reconstituted and reformed. Here there is often a need for criminal law specialists who can work on issues of transitional justice, including such mechanisms as truth and reconciliation commissions. One of the most interesting and satisfying courses I teach is in fact international criminal law, precisely because of its relevance in the development context.

If you look at the increasing number of academic programs which are addressed to “law and development” or which offer specialized degrees in “development law,” these are the areas of specific knowledge that you will find they emphasize. Their goal is to prepare folks to work in the Rule of Law vineyard.⁶

If this is what calls to you—if this is where you think you might make a useful contribution—then I want to draw your attention to a recently published book, which should be of great interest and assistance to those of you who are called to the Rule of Law endeavor. It is edited by Leila Mooney, a lawyer who has worked in this field for many years. It’s entitled “Promoting the Rule of Law: A Practitioner’s Guide to Key Issues and Developments,” published a few months ago by the ABA.⁷ It details the kinds of direct involvement lawyers can have in this area. It is a wonderful introduction to the importance of this work and the range of possibilities open to you. It should be assigned reading in every course related to the process of development.

6. See, e.g., *Sustainable International Development Law LL.M. Program*, U. WASH. SCH. OF L. (Mar. 11, 2014), <http://www.law.washington.edu/sid/>; *LLM International Law and Development*, U. NOTTINGHAM SCH. OF L., <https://www.nottingham.ac.uk/law/prospective/ma-degrees/course-list/llm-international-law-dev.aspx> (last visited July 20, 2014); *LLM in International Development Law and Human Rights*, WARWICK SCH. OF L. (Nov. 19, 2013), http://www2.warwick.ac.uk/fac/soc/law/pg/pgprogram/human_rights_law/.

7. PROMOTING THE RULE OF LAW: A PRACTITIONER’S GUIDE TO KEY ISSUES AND DEVELOPMENTS (Leila Mooney ed., 2013).

C. Transactional Level

But in my view, the by-now traditional kind of Rule of Law effort is, alone, not sufficient. Why, you ask? Simply, we can all think of countries with great economic and natural resources as well as stable systems of governance at the public level, which do not grow because they lack a vibrant *private sector*.

As I indicated, Rule of Law programs focus mostly on the *public* level, on issues of governmental structure and functioning, on the need to create institutions for the administration of justice—courts, legislature, dispute settlement mechanisms—and the importance of establishing a culture of law in civil society. I want you to look past that, to the third level I mentioned earlier, the level of *private* transactions. This is critical because a society genuinely based on the Rule of Law also provides its constituents with fair and reliable norms by which they can organize their affairs and conduct their business, as well as the institutional means for resolving their disputes effectively and efficiently.

Properly conceived, the Rule of Law is more than just rules and laws, and promoting the Rule of Law certainly involves more than supporting or facilitating the creation of functional institutions to administer them. The Rule of Law rests fundamentally on attitudes and expectations, on a sense of confidence and commitment on the part of the individuals concerned, on broad acceptance and participation, and on a belief that reciprocal behavior will lead to orderly and equitable outcomes. These characteristics must be manifested in dealings between private parties as much as in their interaction with the courts, the criminal justice system, and other institutions of the state. It is often overlooked that at this other level that law and lawyers can also make significant contribution to the process of development, in the context of interactions between private members of the community with each other.

This is an area where the institutions and processes of “private international law” come into play. For many of you, the notion of Private International Law may be unfamiliar, or at least a bit fuzzy. So let me offer a brief overview and then give you some concrete examples to demonstrate what I mean and why it is important.

IV. PRIVATE INTERNATIONAL LAW AND DEVELOPMENT

Private international law is often defined as the law governing questions arising in transnational (cross-border) situations involving private parties, in particular such issues as jurisdiction, conflicts of law, and enforcement of judgments.⁸ It is thus distinguishable from public international law, which deals

8. The narrowest view, equating private international law with conflicts of law, is typically found in the civil law tradition but sometimes in British textbooks. See, e.g., MALCOM M. SHAW, INTERNATIONAL LAW 647 (6th ed., Cambridge 2008). Many U.S. textbooks favor a broader approach. See, e.g., MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARIES 836 (4th ed. 2011).

primarily with relations between sovereign states and international organizations rather than private parties.

Today, private international law covers a vast and growing range of subjects, far beyond the traditional trilogy of jurisdiction, conflicts of law, and enforcement of judgments, from transnational commercial agreements to child support and family maintenance, from consumer protection, bankruptcy and secured transactions to the transportation of goods by sea and the regulation of intermediated securities.⁹ That's the sense—the broader sense, the contemporary sense—in which I am using the term.

In point of fact, the global community is deeply and actively involved in formulating truly *international* rules and procedures applicable to private individuals, transactions, and relationships. With greater frequency, these rules and principles are formulated in international bodies in the form of treaties and other international instruments (including non-binding “soft law”), and they are increasingly interpreted and applied by international tribunals as well as domestic courts and tribunals.

At the international level, the principles and instruments of private international law are mostly negotiated, agreed, and adopted in five different, but inter-related organizations. Of these five, three are international in scope and two are primarily regional. All have a global footprint.

The Hague Conference on Private International Law is the oldest of the five, having been founded in 1893. Largely European in its origins, the Conference now counts seventy-four member states from around the globe as well as the European Union, and more than 130 states are parties to at least one of the Conference's thirty-six modern conventions.¹⁰

The International Institute for the Unification of Private Law (known as “UNIDROIT”) was originally created in 1926 as an auxiliary organ of the League of Nations; today it is an independent intergovernmental organization headquartered in Rome entity, with sixty-three member states representing a wide range of different legal, economic and political systems as well as different cultural background.¹¹ It focuses largely on modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States.

The United Nations Commission on International Trade Law (“UNCITRAL”), established in 1966, serves as the core legal body of the U.N.

9. See, e.g., DON FORD, AMERICAN SOCIETY OF INTERNATIONAL LAW [ASIL]: ELECTRONIC RESOURCE GUIDE OF PRIVATE INTERNATIONAL LAW 3 (2013); *Areas of Private International Law*, HCCH, http://www.hcch.net/index_en.php?act=text.display&tid=10 (last visited July 20, 2014); *Private International Law*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/c3452.htm> (last visited July 20, 2014).

10. See *Home*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [HCCH], http://www.hcch.net/index_en.php (last visited July 20, 2014), for information about the Conference.

11. See *UNIDROIT*, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], <http://www.unidroit.org> (last visited July 20, 2014), for information about UNIDROIT, including the conventions and other instruments it has adopted.

system in the field of international trade law.¹² Its membership consists of sixty member states elected by the U.N. General Assembly for six-year terms. Despite its formal title, many of its substantive efforts involve important public international law issues.

At the regional level, here in the Western Hemisphere, the Organization of American States ("OAS") has long undertaken work on issues of private international law. The negotiation of new principles and instruments among the member states has normally been conducted through specialized conferences on private international law, the first of which was held in 1975.¹³ Over the years that process produced some twenty-six separate instruments, including twenty conventions, three protocols, one model law and two "uniform documents."¹⁴ Today, much of the private international law activity takes place in the Inter-American Juridical Committee.¹⁵

For its part, the European Union has become an increasingly important venue for the articulation of private international law as part of its ongoing integrative efforts to harmonize the internal law of the Union's member states.¹⁶ It exercises considerable authority under the various constitutive treaty provisions on which the EU is based, and decisions of the European Court of Justice play an increasingly important role in the development of private international law doctrines.¹⁷

In the State Department, where I spent much of my career, a number of lawyers specialize in this field, in the Office of Private International Law, and working with these organizations, precisely because of the importance of their efforts for economic development and trade and business.¹⁸

The general, unifying goal of these organizations, in their private international law efforts, is to remove legal obstacles to cross-border business transactions through greater harmonization and unification of the relevant legal norms and principles. The objective is to provide the parties to such transactions a much

12. See generally *UNCITRAL*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW [UNCITRAL], <http://www.uncitral.org> (last visited July 20, 2014).

13. See *Private International Law*, ORG. OF AM. STATES [OAS], http://www.oas.org/dil/privateintlaw_interamericanconferences.htm (last visited July 20, 2014).

14. *Id.*

15. See *Inter-American Juridical Committee*, OAS, <http://www.oas.org/en/sla/iajc/default.asp> (last visited July 20, 2014), for information on the Committee.

16. Increasingly, the rules and regulations adopted by the European Union also exert an important influence on the formation and content of private international law throughout the world. See, e.g., Ronald A. Brand, *The European Union's New Role in International Private Litigation*, 2 LOY. U. CHI. INT'L L. REV. 227 (2005); see also Ralf Michael, *EU Law as Private International Law? Re-Conceptualising the Country-of-Origin Principle as Vested Rights Theory*, 2 J. PRIV. INT'L L. 195 (2006).

17. IVANA KUNDA & CARLOS MANUEL GONÇALVES DE MELO MARINHO, PRACTICAL HANDBOOK ON EUROPEAN PRIVATE INTERNATIONAL LAW 3-4 (2010), available at http://ec.europa.eu/justice/civil/files/practical_handbook_eu_international_law_en.pdf.

18. See, e.g., FORD, *supra* note 9; HCCH, *supra* note 9; U.S. DEP'T OF STATE, *supra* note 9.

greater degree of legal clarity, certainty, and predictability in their civil and commercial dealings.

At its core, the process of economic development results from private activity.¹⁹ Official development assistance and other government-to-government programs are vital, but development is driven on the ground by expanding markets, increasing mobility, quick and reliable financial transactions, and virtually unlimited, instantaneous information exchange through the mass media and the Internet. The rules and mechanisms of private international law contribute to economic growth and prosperity in developing countries, especially those lacking the legal and transactional infrastructure necessary to participate fully and efficiently in the modern global economy.

In an increasingly inter-connected world, the harmonization functions of private international law assume an ever-greater practical importance in promoting trade, commerce, and economic development. States with little or no experience in private international law matters, and those that lack the necessary legal infrastructure to participate actively and effectively in the globalized economy, tend to be severely disadvantaged in international trade, investment, and capital markets. One of the purposes of the private international law project is to assist them in gaining the knowledge and experience needed to overcome this deficiency.

By clarifying and harmonizing the rules and principles that apply to transnational civil and commercial dealings, and by enhancing party autonomy in ordinary commercial contracts, private international law facilitates the successful conclusion of commercial transactions and the avoidance (as well as prompt and efficient resolution) of disputes arising thereunder. By reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, it contributes directly to economic development and (because economic development is critical to establishment of the Rule of Law) it thereby contributes as well to the emergence of a robust and functional Rule of Law.

V. EXAMPLES OF THE ROLE OF PRIVATE INTERNATIONAL LAW IN DEVELOPMENT

So now, let me give you some concrete examples of the kind of work done by these private international law institutions, which are directly relevant to the process of development. The examples are intended to illustrate (i) how private international law projects actually contribute to establishing and strengthening the rule of law at the intra- and inter-state levels and (ii) what kind of opportunities are available for lawyers in practice to contribute to the international development project (broadly conceived).

19. See Heidi Metcalf Little, *The Role of Private Assistance in International Development*, 42 N.Y.U. J. INT'L L. & POL. 1091 (2010), for a discussion on the importance of private development assistance generally.

A. Goods and Services

Consider first the importance of clarity and certainty in cross-border contractual arrangements for the purchase and sale of goods and services. Differences in the domestic laws of various trading partners complicate the conclusion of such contracts. Harmonization of substantive commercial law principles can assist contracting parties in reaching an agreement on the terms of their deals as well as in the resolution of disputes arising out of those transactions. In so doing, private international law contributes not only to economic growth and stability, but also to respect for the Rule of Law.

Here, one needs only to acknowledge UNIDROIT's contributions, in particular the adoption in 2010 of the third edition of its Principles of International Commercial Contracts (sometimes described as a "global law of international commercial contracts"). While not themselves binding (in the same way as a treaty or domestic law), the Principles have been accepted by parties to trans-border commercial dealings, used as a model for domestic legislation, and frequently applied by tribunals in international commercial arbitration.²⁰

In 1980, UNCITRAL adopted the Convention on the International Sale of Goods and Services ("CISG"), now ratified by eighty-one U.N. member states (including the United States).²¹ As a self-executing treaty in the United States, the CISG is binding law with respect to contracts that fall within its scope, displacing state law to the extent of any inconsistency. The United States is a party to this convention,²² and some of you may actually have come across the CISG in your commercial law courses.

UNCITRAL has also played an important role in helping to adapt the rules of international commercial transactions to new forms of communication. Such transactions are increasingly carried out through electronic data interchange and other means of communication, commonly referred to as "electronic commerce." These involve the use of alternatives to paper-based methods of communication and storage of information. On the whole, domestic legislatures have been slow to

20. UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994), available at <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994>. The 2010 revision has been published by UNIDROIT in a stand-alone volume. See UNIDROIT, PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), available at <http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf>

21. Venezuela and Ghana have signed but not yet ratified the CISG. Status: U.N. Convention on Contracts for the International Sale of Goods (Vienna, 1980), UNCITRAL http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited July 20, 2014). See UNCITRAL, U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), U.N. Sales No. E.10.V.14 (2010), for the text of the Convention. That site also has the current list of States Parties and a link to UNCITRAL's Digest of Case Law under the Convention.

22. Status: United Nations Convention on Contracts for the International Sale of Goods, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last visited July 20, 2014).

adapt to these technological innovations, and inconsistencies between national legislation have hindered transacting parties.

So in 1996, UNCITRAL adopted a model law intended to facilitate the use of electronic commerce on a basis acceptable to states with different legal, social, and economic systems.²³ In 2001, it adopted a second model law, aimed at legitimizing the use of electronic messaging and identification by making “electronic signatures” the functional equivalent of handwritten signatures.²⁴ And in 2005, it adopted the U.N. Convention on the Use of Electronic Communications in International Contracts.²⁵ The central premise of the Convention (like the earlier Model Law) is “functional equivalency,” so that information in electronic (data message) form will not be denied legal effect, validity or enforceability solely on the grounds of its electronic nature.²⁶

With regard to issues of dispute settlement in international commercial dealings, I imagine most of the students in the audience have had occasion to study the 1958 U.N. Convention on the Recognition and Enforcement of Arbitral Agreements (the “New York Convention”), along with the 1976 UNCITRAL Arbitration Rules (amended in 2010) and its 1985 Model Law (amended in 2006).²⁷ These three are among UNCITRAL’s best-known achievements, and all have played essential roles in establishing a framework for settling transnational commercial disputes between private parties through consensual arbitration rather than domestic court litigation.

In the context of commercial transactions, disputes and controversies are inevitable. When both parties are from the same jurisdiction, their disagreement may be submitted to their domestic courts. When the transaction crosses national borders, reaching agreement on a particular national forum for dispute resolution is less likely. International arbitration offers a viable alternative. But to be attractive to commercial parties, the system of international arbitration must be effective and efficient. Taken together, this triad of instruments offers parties to international transactions an alternative framework to domestic litigation for the resolution of disputes that arise from their civil and commercial dealings. These are critical to

23. UNCITRAL, UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE, U.N. Sales No. E.99.V.4 (1996).

24. UNCITRAL, UNCITRAL MODEL LAW ON ELECTRONIC SIGNATURES, U.N. SALES NO. E.02.V.8 (2001).

25. CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS, NOV. 23, 2005, U.N. DOC. A/60/515, E.07.V.2.

26. To date, eighteen countries have signed this treaty, including Russia and China, although only 5—Russia, Honduras, the Dominican Republic, Singapore and Congo—have ratified. *Status: Convention on the Use of Electronic Communications in International Contracts*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html (last visited July 20, 2014). See *Electronic Commerce*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce.html (last visited July 20, 2014), for the texts of all three instruments.

27. See *UNCITRAL Texts & Status: International Commercial Arbitration & Conciliation*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html (last visited July 20, 2014), for all three instruments.

the effective settlement of disputes in transnational commerce, in particular between developed and less developed countries.

B. Secured Transactions

Another illustrative area concerns secured interests. Access to adequate and affordable credit is unquestionably an essential element in economic development; in the case of private trade and commercial transactions, access to secured credit is frequently a *sine qua non*. Clarifying and standardizing the rules for such transactions is an essential Rule of Law task. Among the first international instruments to address these issues was UNCITRAL's 2001 U.N. Convention on the Assignment of Receivables in International Trade.²⁸ The purpose of the Convention is to promote the development of international trade by providing a comprehensive approach to the rules governing the transfer by agreement of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum ("the receivable") from a third person ("the debtor").²⁹

Another key private international law instrument in this effort has been UNIDROIT's 2001 Convention on International Interests in Mobile Equipment (often referred to as the "Cape Town Convention").³⁰ As the title indicates, its focus is on secured interests in easily identifiable, high-value mobile equipment, which can readily move across national boundaries.³¹ Among other things, the Convention provides for the creation of a recognized international security interest sufficient to protect the interests of the creditors.³² It establishes the means for the electronic registration of those interests, in order to provide notice to third parties, and thus to enable creditors to preserve their priority against subsequently registered interests, any unregistered interests, and potentially, the debtor's insolvency administrator.³³

A protocol to the Cape Town Convention (adopted at the same time as the Convention itself) addresses the particular issues related to security interests in aircraft equipment.³⁴ A second protocol was concluded in 2007 covering the financing of railroad rolling stock (such as engines, freight cars, and passenger

28. U.N. COMM'N ON INT'L TRADE LAW, U.N. CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, U.N. Sales No. E.04.V.14 (2004).

29. *Id.*

30. See *Convention on International Interest in Mobile Equipment*, UNIDROIT (Nov. 16, 2001), available at <http://www.unidroit.org/instruments/security-interests/cape-town-convention>, for information about the 2001 Cape Town Convention on International Interests in Mobile Equipment.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Convention on International Interest in Mobile Equipment on Matters Specific to Aircraft Equipment*, Nov. 16, 2001, 4 U.S.T. 1830, 2307 U.N.T.S. 285, available at <http://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf>.

cars), and work is currently proceeding on a possible third protocol addressed to space-based assets.³⁵

For its part, the OAS has also been active in the field of secured interests. In 2002 it adopted a Model Inter-American Law on Secured Interests, aimed at regulating security interests and securing the performance of any obligations in movable property.³⁶ States adopting the Model Law undertake to create a “unitary and uniform registration system applicable to all existing movable property security devices in the local legal framework.”³⁷ Proposed Model Registry Regulations, approved in October 2009, provide solutions to questions concerning registration and uniformity, and are intended for use in both civil law and common law systems in a cohesive implementation of the Model Law.³⁸

C. *Transport by Sea*

A third illustration concerns the transportation of goods by sea. The international legal framework governing this area extends back over eighty years, lacks uniformity, and has failed to adapt to modern transport practices such as containerization, door-to-door transport contracts, and the use of electronic transport documents. This outmoded legal system imposes significant costs (direct and indirect) on international commerce.

In 2008, UNCITRAL completed work on a new treaty to replace the antiquated rules contained in such earlier agreements as the Hague, Hague-Visby, and Hamburg Rules. The new U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was opened for signature in Rotterdam in the fall of 2009 (and thus was quickly denominated the “Rotterdam Rules”).³⁹

This multilateral convention is intended to provide both shippers and carriers with a modernized, balanced and universal regime to support the operation of maritime contracts of carriage including those involving other modes of transport (such as road or rail). In scope, it covers the entire contract of carriage, including: liability and obligations of the carrier, obligations of the shipper to the carrier, transport documents and electronic transport records, delivery of the goods, rights of the controlling party and transfer of rights, limits of liability, and provisions

35. Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, Feb. 23, 2007, 46 I.L.M. 662, available at <http://www.unidroit.org/instruments/security-interests/rail-protocol>; *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets*, UNIDROIT, (Mar. 9, 2012), available at <http://www.unidroit.org/instruments/security-interests/space-protocol>.

36. *Model Inter-American Law on Secured Transactions* (2002), available at http://www.oas.org/dil/cidip-vi-securedtransactions_eng.htm.

37. *Id.* art. 1.

38. See OAS, *Model Registry Regulations Under the Model Inter-American Law on Secured Transactions*, CIDIP-VII/doc.3/09 rev.3 (Oct. 9, 2009), for the text of the model registry regulations.

39. *New U.N. Convention Rotterdam Rules Open for Signatures*, ROTTERDAM RULES, <http://www.rotterdamrules2009.com/cms/index.php> (last visited July 20, 2014).

regarding the time for suit to be filed, jurisdiction, and dispute resolution mechanisms.⁴⁰

This new treaty, if widely adhered to, could bring significant benefits for trade with developing countries, many of which are currently party to the 1976 Hamburg Rules. To date, only three States—Spain, Togo, and the Congo—have ratified the Convention, although twenty-two others (including the United States) have signed it.⁴¹

D. Simplified Stock Corporations

One of the most intriguing recent developments concerns the promotion of a new form of corporate entity, known as the “Simplified Stock Corporation,” to facilitate economic growth at the level of small and micro-businesses. Essentially a hybrid of what we in the United States might call a limited liability partnership and a “close” corporation, this innovation is aimed at reducing the time, costs, and formalities of incorporation of formal companies while providing many of the benefits (structural and contractual flexibility, protection for investors and the ability to attract capital, and sufficient governmental supervision to ensure protection for customers).

Within the OAS, the Inter-American Juridical Committee has studied the concept, taking into account Colombia’s very successful experiences in this area, and in 2011 the Committee adopted a proposed Model Law on the topic for consideration of the Member States.⁴² The topic has more recently been taken up by UNCITRAL’s Working Group I on micro, small, and medium-sized enterprises.⁴³

E. Electronic Warehouse Receipts

Still another area in which legal creativity and innovation are making real contributions to economic growth and development involves establishment of electronic systems of warehouse receipts. In many areas of the world, and especially in many agricultural sectors, staple commodities (flowers, fruits, grains, vegetables) are produced by farmers working small plots or parcels of land. In general, these farmers either sell their surplus commodities locally or bring them to

40. *See id.*

41. *See* United Nations, Multilateral Treaties Deposited with the Secretary-General, *U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea* (July 20, 2014), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-D-8&chapter=11&lang=en (last updated Sept. 20, 2014).

42. Inter-American Juridical Committee, *Project for a Model Act on Simplified Stock Corporation*, CJI/RES. 188 (LXXX-O/12) and CJI/doc.380/11 corr. 1 (2012), compiled in OAS, *Annual Report of the Inter-American Juridical Committee to the 43rd Regular Session of the OAS General Assembly*, at 65-84, OAS Doc. CJI/doc.425/12 (August 10, 2012).

43. *See* UNCITRAL Working Grp. I Secretariat, *Micro, Small and Medium-Sized Enterprises: Features of Simplified Business Incorporation Regimes*, U.N. Doc. A/CN.9/WG.I/WP.82 (December 10, 2013).

a storage or collection point (warehouse) for transfer up the supply chain to a very distant market, in some cases in a different country. In most cases, the transactions are recorded on some form of paper-based “warehouse receipt” which give the producer little if any security. Frequently the farmer must wait a long time to receive his share of the proceeds.

Establishing a standardized and electronically based system of warehouse receipts can speed up the transactions considerably. If the receipt is secured and negotiable, both the farmer and his purchaser(s) can take more confidence in the transactions, and the producers can more easily obtaining financing to invest in the next crop yield.

In the United States, the 1916 Warehouse Act created a licensing system for warehouses to provide for financial security, recordkeeping, protection, and other operational items. The statute was recently revised to accommodate warehouse receipts in electronic form.⁴⁴ Both UNCITRAL and UNIDROIT have given some consideration to the issue, and in 2013 the Inter-American Juridical Committee undertook a project to prepare a model law on the subject for the consideration of the member states of the OAS.⁴⁵

F. Public Procurement

In most states, government procurement constitutes a significant portion of public expenditure. Fair, objective, and efficient procurement rules and procedures foster integrity, confidence, and transparency. They are the hallmarks of a Rule of Law system. They also promote economy, efficiency, and competition and thus lead to increased economic development. The lack of such rules and procedures invites fraud, waste, and corruption.

UNCITRAL’s revised Model Law on Public Procurement, adopted in 2011 to replace the 1994 UNCITRAL Model Law on Procurement of Goods, Construction, and Services, contains procedures and principles aimed in large part at avoiding abuses in the procurement process.⁴⁶ The text promotes objectivity, fairness, participation, competition, and integrity. Transparency is also a key principle, allowing visible compliance with the procedures and principles to be confirmed. A year later, UNCITRAL adopted a Guide to Enactment of the UNCITRAL Model Law on Public Procurement to assist states in implementing the Model Law.⁴⁷

44. Warehouse Act, ch. 313, pt. C, § 2 (1916), amended by Pub.L. 106-472, Title II, § 201, 114 Stat. 2061 (2000) (current version at 7 U.S.C. 241-256 (2012)).

45. Inter-American Juridical Committee, CJI/doc.427/13 and CJI/doc.437/13, *compiled in OAS, Annual Report of the Inter-American Juridical Committee to the 44th Regular Session of the OAS General Assembly*, at 104-12, OAS Doc. CP/doc.4956/14 (Jan. 24, 2014).

46. See *Procurement and Infrastructure Development*, UNCITRAL (2014), http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.htm (last visited July 20, 2014), regarding a description of UNCITRAL’s work on procurement of goods and services.

47. *Id.*; see also UNCITRAL Secretariat, *Guidance on Procurement Regulations to be Promulgated in Accordance with Article 4 of the UNCITRAL Model Law on Public Procurement*, U.N. Doc. A/CN.9/770 (Apr. 22, 2013).

Viable public-private partnerships require a legislative framework that guarantees transparency, fairness, and long-term sustainability, removes undesirable restrictions on private sector participation, and provides effective procedures for the award of privately financed infrastructure projects as well as the resolution of the inevitable disputes which arise thereunder. Recognizing these principles, UNCITRAL adopted, in 2002, a Legislative Guide on Privately Financed Infrastructure Projects, intended to assist in the establishment of such a legal framework. The Guide was supplemented in 2003 by Model Legislative Provisions drafted to assist domestic legislative bodies in the establishment of the necessary legal framework.⁴⁸

G. Access to Information

A key component in any system characterized by the Rule of Law is citizen access to government information. In a democracy, such access is considered an indispensable right, because it is essential to the citizen's ability to make informed decisions. It works to ensure government accountability and responsiveness to public needs. It also serves to protect individual rights. Lack of access undermines trust, fosters inefficiency, and invites corruption.

In recent years, the OAS has made a number of important contributions to Rule of Law promotion within the hemisphere. Perhaps the most critical has been acceptance of democracy as the fundamental principle of governance, in the form of the 2001 Inter-American Democratic Charter.⁴⁹ Among other things, the Charter recognizes (in Article 4) that "transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy."⁵⁰ To promote implementation of this principle, the OAS General Assembly in 2009 directed the preparation of a draft Model Law on Access to Information, together with an implementation guide, for the consideration of member states.⁵¹ The final versions of both documents were approved by the OAS General Assembly in June 2011, and OAS member states were urged to consider embracing and implementing the Model Inter-American Law on Access to Public Information.⁵²

The Model Law and Implementation Guide were drafted to apply in both common law and civil law systems, and address not only the collection, retention, and use of governmental information, but also information drawn from the private

48. See *Procurement and Infrastructure Development*, *supra* note 46, for the texts of the Legislative Guide and the Model Legislative Provisions.

49. Organization of American States, Inter-American Democratic Charter, Sept 11, 2001, OAS Doc. OEA/SerP/AG/Res.1 (2001).

50. *Id.* art. 4.

51. OAS, *Access to Public Information: Strengthening Democracy*, OAS Doc. AG/RES. 2514 (XXXIX-O/09) (Jun. 4, 2009).

52. See *Access to Information*, OAS DEP'T OF INT'L LAW, http://www.oas.org/DIL/access_to_information_model_law.htm (last visited July 20, 2014), for information on the Model Law on Access to Information and accompanying legislative guide.

sector and individuals. In consequence, they recognize that the rights to privacy and to access information must co-exist and be applied harmoniously. Many countries in the region had *habeas data* provisions even before they had considered adoption of access to information laws. Clearly, this is an area in which private international law rules work together with principles of human rights and progressive tenets of political ordering to foster greater respect for the Rule of Law.

H. Consumer Protection

Another current example of the contributions of private international law to the Rule of Law comes from the rapidly evolving area of international consumer protection. A number of international bodies have undertaken significant initiatives in this field, many of which focus on the importance of governmental regulation and enforcement, but the international system still lacks any centralized standard-setting or enforcement effort.

By contrast, within the OAS, recent efforts have addressed means of facilitating the effective resolution of disputes in cross-border consumer transactions. Since 2003, when CIDIP-VII was convened, attention has focused on possible ways to provide parties to cross-border consumer transactions with effective, economical, and expeditious alternatives to traditional forms of litigation in their domestic courts, while at the same time facilitating cross-border trade and lowering transaction costs.⁵³

Several possible approaches have been under consideration. One, put forward by Brazil, Argentina, and Paraguay, proposed a new multilateral Convention on Consumer Protection and Choice of Law.⁵⁴ Alternatively, Canada offered a draft Model Law on Jurisdiction and Choice of Law for consumer contracts.⁵⁵ For its part, the United States promoted a Model Law on Consumer Dispute Settlement and Redress which would, among other things, establish an expeditious, low-cost, and “user friendly” procedure for resolving “small claims” in cross-border consumer contracts as an alternative to litigation in domestic courts.⁵⁶

To date, no agreement has been reached. Largely as a result, the issue has been taken up in other bodies. For the past several years, UNCITRAL’s Working

53. See DAVID P. STEWART, PROMOTING THE RULE OF LAW AND ECONOMIC DEVELOPMENT THROUGH PRIVATE INTERNATIONAL LAW 14 (2011), available at http://www.oas.org/dil/esp/XXXVIII_Curso_Derecho_Internacional_David_Stewart_promoting_the_rule_of_law_and_economic.pdf, for general information on this effort.

54. OAS, *Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) Topic I: Consumer Protection (Brazil)*, OAS Doc. CP/CAJP-2652/08 add. 4 (Nov. 10, 2008).

55. OAS, *Proposals by the Member States for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) Topic I: Consumer Protection (Canada)*, OAS Doc. CP/CAJP-2652/08 (Aug. 21, 2008).

56. OAS, *Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers submitted by the United States of America for CIDIP-VII*, OAS Doc. CP/CAJP-2652/08 add. 1 rev.1 (May 3, 2010).

Group III has been focused on developments in electronic commerce and communication, and in particular the elaboration of procedural rules for the on-line resolution of disputes (“ODR”) in cross-border electronic commerce transactions, including through conciliation and arbitration.⁵⁷ These rules would presumably apply in both business-to-business (“B2B”) and business-to-consumer (“B2C”) transactions.

Within the International Law Association (“ILA”), a committee of experts on international consumer protection has surveyed national legislation and practice in this area adopted a very thoughtful final report concerning the international dimensions of consumer protection in cross-border situations, as well as a “Statement on the Development of International Principles on Consumer Protection.”⁵⁸

I. Choice of Forum in Commercial Contracts

Returning to the fundamental question of dispute resolution, the international community to date has been unable to reach general agreement about (i) the permissible bases of domestic court jurisdiction over civil and commercial cases involving foreign parties or transactions, (ii) a unified approach to choice of law issues in cross-border transactions, or (iii) the specific grounds on which foreign judicial judgments will be recognized or enforced in domestic courts. For a number of years, negotiations on a multilateral “jurisdiction and judgments” treaty covering these areas were conducted at the Hague Conference, but they ultimately failed. Thus, at the global level, there is still no “civil litigation” analogue to the New York Convention or its OAS counter-part, the Inter-American Convention on International Commercial Arbitration.⁵⁹

But from the failed negotiations in The Hague, there arose a new and ultimately successful proposal for a convention addressed specifically to contractual “choice of court” clauses in international civil and commercial contracts. The Hague Conference adopted this new Convention on Choice of Court Agreements in June 2005, and it is now open for signature and ratification.⁶⁰

57. Comm’n on Int’l Trade Law, *Online Dispute Resolution for Cross-Border Electronic Commerce Transactions: Draft Guidelines*, UN Doc. A/CN.9/WG.III/WP.128 (Jan. 22, 2014) (Note by the Secretariat).

58. See *International Protection of Consumers*, INT’L LAW ASS’N [ILA], <http://www.ila-hq.org/en/committees/index.cfm/cid/1030> (last visited July 20, 2014) for the ILA’s “Conference Report” and “Conference Resolution” from the ILA Biennial in Sophia in 2012.

59. See generally *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; *Inter-American Convention on International Commercial Arbitration*, Jan. 30, 1975, 1438 U.N.T.S. 249.

60. *Convention on Choice of Court Agreements*, concluded June 30, 2005, 44 I.L.M. 1294. To date, only Mexico has ratified this Convention, although the United States and the E.U. have signed. *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, HCCH (Nov. 19, 2010), http://www.hcch.net/index_en.php?act=conventions.status&cid=98.

The Choice of Court Agreements Convention addresses a gap in the current fabric of international commercial dispute settlement by providing that states parties must recognize and give effect to “exclusive choice of court agreements” (in U.S. parlance, these are sometimes called “forum selection clauses”). Such clauses are often employed when contracting parties do not wish to utilize non-judicial mechanisms such as arbitration. Obviously, they will agree to litigate in a specific court or judicial system only if they have assurance that the chosen jurisdiction will in fact hear the case and that the resulting judgment will be recognized and enforced in other countries.

Thus, the new Convention sets forth three basic rules to be applied in all states parties with respect to choice of court agreements falling within its scope: (i) the court chosen by the contracting parties has (and must exercise) jurisdiction to decide a covered dispute, (ii) courts *not* chosen by the parties do *not* have jurisdiction and must suspend or dismiss proceedings if brought, and (iii) a judgment from a chosen court rendered in accordance with such an agreement must be recognized and enforced in the courts of other states party to the Convention.⁶¹ By its terms, the Convention applies only to *exclusive* choice of court clauses, but states parties have the option (by taking a declaration) of permitting their courts to recognize and enforce judgments of courts of other States party designated in *non-exclusive* choice of court agreements.

The potential benefits of the Convention for private parties of qualifying transnational contracts are significant. Resting on the principle of party autonomy, the system provided by the Convention will ensure that the dispute settlement arrangements agreed to by those private contracting parties will be honored in the case of domestic court litigation in much the same way as private agreements to arbitrate are respected and given effect, thereby promoting certainty and predictability in international trade. Moreover, it will enhance the enforceability of the resulting judgments in the courts of other states parties, helping to redress the “lack of reciprocity” problem, which arises when foreign judgments are given more favorable consideration in some national courts than the judgments of those courts receive in foreign courts.

There continues to be debate about the modalities by which this Convention might be implemented in U.S. law, should the Senate give its advice and consent to ratification. Much of the debate centers around the extent to which the method of implementation would “federalize” matters related to the enforcement of foreign judicial judgments (there has never been a general federal statute in this area) and impose requirements on state courts to accept certain cases involving foreign parties.⁶²

61. Convention on Choice of Court Agreements, *supra* note 60, arts. 5, 6, 8.

62. See generally Guy S. Lipe and Timothy J. Tyler, *The Hague Convention on Choice of Court Agreements: Creating Room for Choice in International Cases*, 33 HOUS. J. INT'L L. 1 (2010); see also *Hague Convention on Choice of Courts*, NAT'L CENTER FOR STATE CTS., <https://www.ncsc.org/Services-and-Experts/Government-Relations/International/Hague-Convention-on-Choice-of-Courts.aspx> (last visited July 20, 2014).

J. International Family Law

The Rule of Law is arguably most important at those junctures where the interests and activities of the state intersect with the most basic needs and interests of the individual. Few such intersections are more sensitive than the ones involving families. In a world characterized by rapidly increasing transnational contacts and cross-border mobility, international family law has clearly emerged as a field of specialization in its own right. Here again, one finds private international law working to bridge gaps, reduce conflicts, and provide orderly and efficient mechanisms of dispute resolution.

Two multilateral treaties adopted by the Hague Conference, both widely ratified, constitute the cornerstones of the still-emerging international regime of child protection: the 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Inter-country Adoption.⁶³ The former (with ninety-one contracting states) works to prevent (or undo) the removal of a child by one parent from the country of its habitual residence in violation of the other parent's custodial rights, and the latter (with ninety-three contracting states) serves to regularize the process of transnational adoptions, protecting the legitimate interests of all concerned.⁶⁴ The United States is a party to both, and both are applied and widely respected in practice on the international level.

In an increasingly globalized world, families frequently span continents. So do family disputes and dissolutions. How are trans-border maintenance and support arrangements to be handled in such cases? Some countries address this issue primarily through bilateral agreements providing for reciprocal recognition and enforcement of support orders in defined circumstances. The United States, for example, is party to more than twenty such agreements with other countries.⁶⁵ Within the OAS, the 1989 Inter-American Convention on Support Obligations has thirteen states parties.⁶⁶ But until recently, a global approach has been lacking.

In 2007, the Hague Conference adopted a new multilateral instrument, the Convention on the International Recovery of Child Support and Other Forms of

63. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 98, available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24; Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 168, available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=69.

64. Convention on the Civil Aspects of International Child Abduction, *supra* note 63, art. 3; Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption, *supra* note 63, art. 1.

65. See *Legal Considerations*, BUREAU OF CONSULAR AFF., http://travel.state.gov/law/family_issues/support_issues/support_issues_582.html (last visited July 20, 2014), for information about U.S. arrangements for child support and maintenance, including bilateral treaties.

66. *Signatories and Ratifications: Inter-American Convention on Support Obligations*, OAS, <http://www.oas.org/juridico/english/treaties/b-54.html> (last visited July 20, 2014).

Family Maintenance.⁶⁷ As in other family law agreements, the basic principle set forth in this agreement is one of reciprocity: a decision on child maintenance and support made in one state party must be recognized and enforced in other states party if the first state's jurisdiction was based on one of the accepted grounds enumerated in the Convention. In the United States, courts generally do recognize and enforce foreign child support obligations as a matter of comity, even though U.S. orders may not be given comparable treatment in the originating country.⁶⁸ The Convention would regularize this imbalance among all states that adhere to it and will in general work in favor of the children in question. The United States has signed the Convention and is actively pursuing ratification.⁶⁹

The foregoing is far from a complete description of the growing list of international family law agreements and projects. Others include protection of the elderly, recognition of same sex unions, and protection of international migrants, to name a few. But it should certainly serve to illustrate the many ways in which the rapidly expanding field of international family law works actively to promote Rule of Law objectives and fosters development in this critical area.

VI. TECHNICAL ASSISTANCE

Let me just a few words about the often-ignored area of *Technical Assistance*.

Standing alone, even the best private international law conventions, model laws, statements of principle, and other texts have little effect; they are just texts. Their potential can only be realized through acceptance and effective implementation at the domestic level. The first step must of course be formal approval and acceptance by the state concerned, either through ratification of the particular treaty, adoption of the model law, or implementation of other kinds of texts through regulation or judicial application.

In most instances, an equally important step is to promote uniformity of application across national boundaries. A convention aimed at harmonization, for example, will not achieve its objective if its provisions are given disparate interpretation in the courts of member states. For that reason, it has become common to see guides to implementation (either in the form of suggested statutory texts, legislative principles, or "handbooks") adopted at the same time as the convention itself.

Increasingly, the various international organizations concerned with private international law have tried to assist states in achieving effective and consistent

67. International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, 47 I.L.M. 257, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=131. See Convention on the Law Applicable to Maintenance Obligations, Protocol, Oct. 2, 1973, 1056 U.N.T.S. 199, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=133, for the companion Protocol on the Law Applicable to Maintenance Obligations.

68. See Michael J. Peters, *International Child Support: The United States Striving Towards a Better Solution*, 15 NEW ENG. J. OF INT'L & COMP. L. 91, 107-108 (2009).

69. *Status Table: Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, HCCH (Aug. 8, 2013), http://www.hcch.net/index_en.php?act=conventions.status&cid=131.

implementation of the treaties and other instruments in domestic law and practice. These efforts take a variety of forms. Within the Hague Conference, for example, the Permanent Bureau (its secretariat) provides technical assistance to promote and support the delivery of assistance and training to government and legal officials around the world regarding implementation of the Conference's various conventions, in particular those involving the international protection of children and families, international legal co-operation and litigation and international commercial and financial law.⁷⁰ They provide specialized training programs and customized technical assistance with the stated aim of creating "mutual understanding of legal cultures, building legal and administrative capacity and reinforcing the rule of law and good governance."⁷¹ The Permanent Bureau devotes a substantial portion of its efforts to encouraging uniform interpretation of, and consistent practices under, these and other instruments (a technical assistance function it calls "providing post-Convention services").⁷² One focal point for such efforts has been the Conference's International Centre for Judicial Studies and Technical Assistance.⁷³

Both UNIDROIT and UNCITRAL maintain electronic databases providing ready access to case law and other materials relevant to the interpretation and application of their conventions and other instruments. UNIDROIT's "UNILAW" database aims to make available up-to-date information on its uniform law instruments,⁷⁴ and UNCITRAL's "Clout" system includes court decisions and arbitral awards interpreting and applying the Commission's conventions and model laws.⁷⁵

Within the OAS, a Network of Hemispheric Legal Cooperation in the Area of Family and Child Law provides a means for the relevant authorities in the various national governments to coordinate with each other regarding application of the four regional family law conventions (i.e., those concerning support obligations, the return of children, trafficking in minors, and adoption).⁷⁶ This system also

70. *Overview*, HCCH, http://www.hcch.net/index_en.php?act=text.display&tid=26 (last visited July 20, 2014).

71. CITY OF THE HAGUE, *GUIDE TO INTERNATIONAL ORGANIZATIONS IN THE HAGUE* 44 (2013), available at <http://www.denhaag.nl/web/file?uuid=ebb86e87-e581-4921-9aa7-58bec16d899b&owner=a564205f-9b90-4ab4-b47b-ba5fe3736bf1>.

72. HCCH, *Brief Summary of the 5 April 2013 Meeting of the Technical Assistance Working Group*, HCCH Info. Doc. 9 (Apr. 2013), available at <http://www.hcch.net/upload/wop/genaff2013inf09.pdf>.

73. *GUIDE TO INTERNATIONAL ORGANIZATIONS IN THE HAGUE*, *supra* note 71 at 44.

74. See *The UNILAW Database on Uniform Law*, UNIFORM L. FOUND., <http://web.archive.org/web/20131207204707/http://unidroit.info/program.cfm?menu=subject&file=convention&lang=en> (last visited July 20, 2014), for access to the database.

75. See *Case Law on UNCITRAL Texts (CLOUT)*, UNCITRAL, http://www.uncitral.org/uncitral/en/case_law.html (last visited July 20, 2014).

76. See *Family and Child Law (the "Network")*, OAS (July 20, 2014), http://www.oas.org/dil/family_law.htm.

provides information to private individuals regarding the conventions and their application.

The general field of technical assistance is an area where you, as lawyers, can make a truly important contribution. More importantly, there are many opportunities. Let me give you one example with which I am personally involved. The International Law Institute in Washington, with a presence in Kampala, Abuja, Cairo, Santiago, and Istanbul, was originally connected to Georgetown Law Center but has been independent for some 30 years. It is dedicated to contributing to economic development and effective governance through the provision of technical assistance including “on the ground” as well as “off-site” training.⁷⁷

Key to its approach is recognition of the necessity of addressing both the public and private sectors in any discrete development undertaking. Economic growth and social stability is achieved through the right combination of enlightened policies, capable administration, and an active private sector. Without question, among the essential agreements are good government, stable legal and judicial systems, and functioning capital markets. The ILI’s training courses range further to cover such matters as government procurement, privatization, arbitration, bank restructuring, borrowing, and debt management. The Institute draws on professors and academics, partners and other practitioners from top law firms, government sector specialists, folks from donor organizations, intergovernmental organizations such as the WTO and the World Bank, and non-governmental organizations such as the International Judicial Academy. It is an excellent illustration of the ways in which we as lawyers can become directly and productively involved in international development efforts.

It also offers fascinating internships for those interested in this field.⁷⁸

VII. CONCLUSION

So, to conclude: There are many ways for us as lawyers—as international lawyers and even as students of international law—to contribute to economic growth and development, and to realizing the policy goals represented by the Millennium Development Goals.

My effort this morning has been to stress two points:

- First, that law, and in particular international law, has an integral role (in my view an indispensable role) to play in the process of development, and
- Second, law makes a critical contribution at the transactional level, in the form of contemporary private international law.

In my view, there really can be no question that the principles, instruments, and mechanisms of private international law, as reflected in the diverse endeavors described above, contribute directly to the trans-border flow of trade, capital,

77. See *About the International Law Institute*, INT’L L. INST. [ILI], <http://www.ili.org/about.html> (last visited July 20, 2014), for general information on the International Law Institute.

78. *Internships*, ILI, <http://www.ili.org/opportunities/internships.html> (last visited July 20, 2014).

people and ideas, the effective settlement of disputes, the well-being of families and children, and therefore to the Rule of Law. By focusing primarily on the relationship between international and domestic law, private international law adds an essential element to efforts to promote the legitimacy of the law internationally as well as domestically.

This provides an often-overlooked range of possibilities for us as lawyers to be involved in the development process. We can help to ensure that private international law continues to play a critical role in this field, by working to guarantee that the law adapts and responds effectively and creatively to the changing needs and structure of the international community. The successful achievement of the Millennium Development Goals depends on it.