Part I MAPPING A HYBRID WORLD

1 Introduction

WE LIVE IN A WORLD OF MULTIPLE OVERLAPPING normative communities. For example, I am typing these words in a house in Massachusetts, although I am a resident of Maryland, who works in Washington, DC. Thus, Massachusetts state law may govern some of my activities, while Maryland law or DC law may be relevant to other aspects of my life. And in Massachusetts, Maryland, and DC I am also located within a variety of political sub-divisions, such as towns, cities, counties, wards, neighborhood districts, water regions, and so on, each of which may have normative authority over me. Federal law governs many aspects of my life as well, from the speed limits on the interstate highways to certain environmental standards affecting the air and water, to the individual liberties the U.S. Constitution protects. International law may be the source of additional rights or protections, ranging from standards for trade, technology, and the use of satellites to the frameworks for regulating the environment, consumer product labeling, and the conduct of war. And certainly if I travel abroad or surf Internet sites based overseas or enter into contracts with foreign entities I will run up against international and transnational legal norms.

But these governmental normative communities are just the tip of the iceberg. Nonstate communities may also impose significant normative force. For example, if I think someone is violating the copyright of this book, I may use international arbitration sanctioned by the World

Intellectual Property Organization, a nongovernmental entity. If Web searches for my book do not place my Web page high enough on the list, I may need to challenge Google's search indexing protocols. And I am governed (or at least strongly influenced) by tenure rules at my university, religious rules of my faith (if I am a believer), American Bar Association rules regarding the conduct of law school classrooms, the metrics used by *US News & World Report* when it ranks law schools, and simply the practices and customs of the academic community of which I am a part. And on and on.

This book seeks to grapple with the complexities of law in a world where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes. Law often operates based on a convenient fiction that nation-states exist in autonomous, territorially distinct spheres and that activities therefore fall under the legal jurisdiction of only one regime at a time. Thus, traditional legal rules have tied jurisdiction to territory: a state could exercise complete authority within its territorial borders and no authority beyond it. In the twentieth century, such rules were loosened, but territorial location remained the principal touchstone for assigning legal authority. Accordingly, if one could spatially ground a dispute, one could most likely determine the legal rule that would apply.

But consider such a system in today's world. Should the U.S. government be able to sidestep the U.S. Constitution when it houses prisoners in "offshore" detention facilities in Guantánamo Bay or elsewhere around the world? Should spatially distant corporations that create serious local harms be able to escape local legal regulation simply because they are not physically located in the jurisdiction? When the U.S. government seeks to shut down the computer of a hacker located in Russia, does the virus transmitted constitute an act of war or a violation of Russia's sovereignty? Does it make sense to think that satellite transmissions, online interactions, and complex financial transactions have any territorial locus at all? How can we best understand the complex relationships among international, regional, national, and subnational legal systems?

And in a world where nonstate actors such as industry standard-setting bodies, nongovernmental organizations, religious institutions, ethnic groups, terrorist networks, and others exert significant normative pull, can we build a sufficiently capacious understanding of the very idea of jurisdiction to address the incredible array of overlapping authorities that are our daily reality?

Thus, a simple model that looks only to territorial delineations among official state-based legal systems is now simply untenable (if it was ever useful to begin with). Thankfully, debates about globalization have moved beyond the polarizing question of whether the nation-state is dying or not. But one does not need to believe in the death of the nation-state to recognize both that physical location can no longer be the sole criterion for conceptualizing legal authority and that nation-states must work within a framework of multiple overlapping jurisdictional assertions by state, international, and even nonstate communities. Each of these types of overlapping jurisdictional assertions creates a potentially hybrid legal space that is not easily eliminated.

With regard to conflicts between and among states, the growth of global communications technologies, the rise of multinational corporate entities with no significant territorial center of gravity, and the mobility of capital and people across borders mean that many jurisdictions will feel effects of activities around the globe, leading inevitably to multiple assertions of legal authority over the same act, without regard to territorial location. For example, in 2000 a French court asserted jurisdiction over the U.S.-based web portal Yahoo! because French users could download Nazi memorabilia and Holocaust denial material via Yahoo!'s auction sites, in violation of French law.[1] Yahoo! argued in response that the French assertion of jurisdiction was impermissibly extraterritorial in scope because Yahoo!, as a U.S. corporation transmitting material

[1] Tribunal de grande instance (TGI) [ordinary court of original jurisdiction] Paris, May 22, 2000, Ordonnance de référé, *UEJF et Licra c/ Yahoo! Inc. et Yahoo France*, *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm.

uploaded in the United States, was protected by the First Amendment of the U.S. Constitution.[2] Yet, the extraterritoriality charge runs in both directions. If France is *not* able to block the access of French citizens to proscribed material, then the United States will effectively be imposing First Amendment norms on the entire world. And whatever the solution to this problem might be, a territorial analysis will not help because the relevant transaction is both "in" France and not "in" France simultaneously. Cross-border environmental,[3] trade,[4] intellectual property,[5] and tax regulation[6] raise similar issues.

The problem of multiple states' asserting jurisdiction over the same activity is just the beginning, however, because nation-states must also often share legal authority with one or more international and regional courts, tribunals, or regulatory entities. Indeed, the Project on International Courts and Tribunals has identified approximately 125 international institutions, all issuing decisions that have some effect on state legal authority,[7] though those decisions are sometimes deemed binding, sometimes merely persuasive, and often fall somewhere between the two. For example, under the North American Free Trade Agreement (NAFTA) and other similar agreements, special panels can pass judgment

[2] *Id.*

[3] *See, e.g.*, *Transboundary Harm* in *International Law: Lessons from the Trail Smelter Arbitration* (Rebecca M. Bratspies & Russell A. Miller eds., 2006); Philippe Sands, Turtles and Torturers: The Transformation of International Law, *33 N.Y.U. J. Int'l L. & Pol.* 527 (2001).

[4] *See, e.g.*, Richard W. Parker, The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict, 12 *Geo. Int'l Envtl. L. Rev.* 1 (1999).

[5] *See, e.g.*, *Barcelona.com, Inc. v. Excelentisimo Ayuntamiento de Barcelona,* 330 F.3d 617 (4th Cir. 2003); *GlobalSantaFe Corp. v. GlobalSantaFe.com,* 250 F. Supp. 2d 610 (E.D. Va. 2003); Graeme B. Dinwoodie, A New Copyright Order: Why National Courts Should Create Global Norms, 149 *U. Pa. L. Rev.* 469 (2000).

[6] *See, e.g.*, Paul Schiff Berman, The Globalization of Jurisdiction, 151 *U. Pa. L. Rev.* 311, 334–7 (2002).

[7] *See* Project on International Courts and Tribunals, The International Judiciary in Context (2004), *available at* http://www.pict-pcti.org/publications/synoptic_chart/Synop_C4.pdf.

on whether domestic legal proceedings have provided fair process.[8] And though the panels cannot directly review or overturn local rulings, they can levy fines against the federal government signatories of the agreement, thereby undermining the impact of the local judgment.[9] Thus, now that a NAFTA tribunal has ruled that the conduct of a Mississippi trial against a Canadian corporation "was so flawed that it constituted a miscarriage of justice amounting to manifest injustice as that expression is understood in international law,"[10] it is an open question as to how Mississippi courts will rule in future cases involving foreign defendants.[11] Meanwhile, in the realm of human rights, we have seen criminal defendants convicted in state courts in the United States proceed (through their governments) to the International Court of Justice (ICJ) to argue that they were denied the right to contact their consulate, as required by treaty.[12] Again, although the ICJ judgments are technically unenforceable in the United States, at least one state court followed the ICJ's command anyway.[13] Meanwhile, outside these more formal adjudicative processes, there are many powerful transnational networks of governmental regulators setting a kind of international policy as a de facto matter over much of the global financial system, among other areas.[14]

Finally, nonstate legal (or quasi-legal) norms add to this pluralism of authority. Given increased migration and global communication, it is not

[8] *See* North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 7–17, 1992, art. 1135, 32 I.L.M. 605, 646.

[9] *Id.*

[10] *Loewen Group, Inc. v. United States*, ICSID (W. Bank) Case No. ARB(AF)/98/3 (June 26, 2003) (Final Merits Award), reprinted in 42 I.L.M. 811 (2003), *also available at* http://naftaclaims.com/Disputes/USA/Loewen/LoewenFinalAward.pdf. Publicly released documents on all NAFTA disputes are *available at* http://www.naftalaw.org.

[11] *See generally* Robert B. Ahdieh, Between Dialogue and Decree: International Review of National Courts, 79 *N.Y.U. L. Rev.* 2029 (2004) (discussing case).

[12] *See Case Concerning Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 12.

[13] *See Torres v. State*, No. PCD-04–442, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004) (granting stay of execution and remanding case for evidentiary hearing).

[14] *See, e.g.*, David Zaring, Rulemaking and Adjudication in International Law, 46 *Colum. J. Transnat'l L.* 563 (2008); David Zaring, Informal Procedure, Hard and Soft, in International Administration, 5 *Chi. J. Int'l L.* 547 (2005).

surprising that people feel ties to, and act on the basis of affiliations with, multiple communities in addition to their territorial ones. Such communities may be ethnic, religious, or epistemic; transnational, subnational, or international; and the norms asserted by such communities frequently challenge territorially based authority. Indeed, canon law and other religious community norms have long operated in significant overlap with state law. And in the Middle East and elsewhere, conflicts between a personal law tied to religion and a territorial law tied to the nation-state continue to pose constitutional and other challenges.[15] Bonds of ethnicity can also create significant normative communities. For example, some commentators advocate regimes that give ethnic minorities limited autonomy within larger nation-states.[16] Transnationally, when members of an ethnic diaspora purchase securities issued by their "home" country, one might argue that, regardless of where, territorially, the bonds are purchased, the transactions should be governed by the law of the "homeland."[17] Finally, we see communities of transnational bankers and accountants developing their own regulatory regimes governing trade finance[18] or accounting standards,[19] as well as the use of modern forms of lex mercatoria[20] to

[15] *See, e.g.*, Chibli Mallat, On the Specificity of Middle Eastern Constitutionalism, 38 *Case W. Res. J. Int'l L.* 13, 47–55 (2006).

[16] *See, e.g.*, Henry J. Steiner, Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities, 66 *Notre Dame L. Rev.* 1539, 1541–2 (1991) (identifying three different types of autonomy regimes for ethnic minorities).

[17] *See* Anupam Chander, Diaspora Bonds, 76 *N.Y.U. L. Rev.* 1005, 1060–74 (2001) (describing debt instruments offered by the Indian government to raise capital principally from its diaspora).

[18] *See* Janet Koven Levit, A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments, 30 *Yale J. Int'l L.* 125 (2005).

[19] For example, the International Accounting Standards Board is an independent, not-for-profit organization that seeks "to develop a single set of high quality, understandable, enforceable and globally accepted international financial reporting standards." IFRS Foundation, About the IFRS Foundation and the IASB, *available at* http://www.ifrs.org/The+organisation/IASCF+and+IASB.htm.

[20] *See, e.g.*, Clayton P. Gillette, The Law Merchant in the Modern Age: Institutional Design and International Usages Under the CISG, 5 *Chi. J. Int'l L.* 157, 159 (2004) (noting that the Convention "explicitly incorporates trade usages into contracts that it governs, permits usages to trump conflicting [Convention] provisions, and authorizes courts to

govern business relations.[21] Such nonstate legal systems often influence (or are incorporated in) state or international regimes.[22]

These spheres of complex overlapping legal authority are, not surprisingly, sites of conflict and confusion. In response to this hybrid reality, communities might seek to "solve" such conflicts either by reimposing the primacy of territorially based (and often nation-state-based) authority or by seeking universal harmonization. Thus, on the one hand, communities may try to seal themselves off from outside influence, either by retreating from the rest of the world and becoming more insular (as many religious groups seek to do), by building walls either literal or regulatory to protect the community from outsiders, by taking measures to limit outside influence (U.S. legislation seeking to discipline judges for citing foreign or international law is but one prominent example), or by falling back on territorially based jurisdiction or choice-of-law rules. At the other extreme, we see calls for harmonization of norms, more treaties, the construction of international governing bodies, and the creation of "world law."

interpret and complete contracts by reference to usages"). *But see* Celia Wasserstein Fassberg, Lex Mercatoria – Hoist with Its Own Petard? 5 *Chi. J. Int'l L.* 67 (2004) (arguing that the modern revival of lex mercatoria departs significantly from the historical conception).

[21] *See, e.g.*, Amitai Aviram, A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems, 22 *Yale L. & Pol'y Rev.* 1 (2004) (using game theory to argue that the existence of preexisting networks enhances a private legal system's ability to enforce norms); Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 *J. Legal Stud.* 115 (1992) (discussing the system of "private lawmaking" in the New York Diamond Dealers Club); Lisa Bernstein, Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions, 99 *Mich. L. Rev.* 1724 (2001) (describing the nonstate legal system used to govern commercial transactions in the cotton industry); Eric A. Feldman, The Tuna Court: Law and Norms in the World's Premier Fish Market, 94 *Cal. L. Rev.* 313 (2006) (discussing a "Tuna Court" in Japan that adjudicates disputes about sale prices in a tuna market).

[22] *See, e.g.*, Levit, *supra* note 18, at 165 (describing ways in which formal lawmaking institutions such as the World Trade Organization have, over time, appropriated nonstate trade finance norms into their official legal instruments). *See generally* Carol Weisbrod, Fusion Folk: A Comment on Law and Music, 20 *Cardozo L. Rev.* 1439 (1999) (using the incorporation of folk music into "high culture" classical compositions as a metaphor for understanding the relationship between state and nonstate law).

I argue that we should be wary of pinning our hopes on legal regimes that rely either on reimposing sovereigntist[23] territorial insularity or on striving for universals. Not only are such strategies sometimes normatively undesirable, but more fundamentally they simply will not be successful in many circumstances. As I will address in more detail, the influence and application of foreign norms or foreign decision-making bodies may be useful and productive, but in any event they are inevitable and cannot be willed away by fiat.

Therefore, I suggest an alternative response to legal hybridity: *we might deliberately seek to create or preserve spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms, institutions, and practices that aim to manage, without eliminating, the legal pluralism we see around us*. Such mechanisms, institutions, and practices can help mediate conflicts by recognizing that multiple communities may legitimately wish to assert their norms over a given act or actor, by seeking ways of reconciling competing norms, and by deferring to alternative approaches if possible. And even when a decision maker cannot defer to an alternative norm (because some assertions of norms are repressive, violent, and/or profoundly illiberal), procedures for managing pluralism can at least require an explanation of why deference is impossible.

The excruciatingly difficult case-by-case questions concerning how much to defer to another normative community and how much to impose the norms of one's own community are probably impossible to answer definitively. The crucial antecedent point, however, is that although people may never reach agreement on norms, they may at least acquiesce in procedural mechanisms, institutions, or practices that take pluralism seriously, rather than ignoring it through assertions of territorially based power or dissolving it through universalist imperatives. Processes for managing pluralism seek to preserve spaces of opportunity for contestation

[23] I borrow the term "sovereigntist" from Peter Spiro, The New Sovereigntists: American Exceptionalism and Its False Prophets, *Foreign Affairs* 9–15 (Nov./Dec. 2000).