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International Law and the Public/Private Law Distinction

Rostam J. Neuwirth, Graz

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I. Introduction

Traditionally, public international law and private international law were perceived as two distinct categories of law; the former governs the international relations between states and the latter those between private individuals. Their relationship is based upon an evolutionary development from private to public, and from municipal to international, law. In the modern world, this evolution has culminated in a dynamism reflected in numerous interactions between a wide range of different actors. As a result, the former boundaries between the public and private law, as well as the international and municipal law dichotomy, have become blurred. In an emerging global society, these four major categories have entered into a dynamic dialogue that challenges, equally both legal theory and

practice. This dialogue is centred around a functioning global legal framework, in which public international law and private international law can, due to their distinct scopes of application, answer many unanswered questions, providing that they speak with one voice.

This note focuses thus on the interplay between different categories of law, to be construed as a conceptual overview of the spheres of public and private law and their relationship in the emerging global legal order. After a short presentation of recent trends in the international order, the main features of the various constellations between the two dichotomous pairs, the public/private and municipal/international dichotomy – underlying the distinction between public and private international law – are sketched in order to indicate their mutual interdependence. Based on the inseparable link between law and the human being in the struggle to shape the living environment, the impact of public and private international law on selected areas of law, economics, and politics reveals the necessity to equally consider and to combine dichotomous elements in a dynamic process. Finally, the note encourages the striving for a more intense consideration of the commonality of public and private international law in the future.

II. Recent Challenges for the International Legal Order

The principal function of law is the provision of a just regulatory framework for its society. Law can be considered just when it provides adequate coordination of the sum of the interactions that take place amongst the members of the respective society.[1] Equally, law must be able to deal with conflicts once they arise from these interactions. The normative nature inherent in law, postulates that a law is adequate not only when it regulates a present state with the least friction possible, but also when it does a future one as well.

At the dawn of an emerging global society in which interactions between a great variety of actors, both public and private, have increased, the goal of the adequacy of law is difficult to achieve. The present world's situation has entered a critical stage, which is characterised by the immense diversity of societies and its many different legal systems, and the mutual dialogue they increasingly enter. Beside the multitude of legal systems, a trend of juridification of the social spheres has taken place in most national legal systems.[2] The gain in legal certainty, predictability,

[1] Compare *Schnitzer*, Handbuch des internationalen Privatrechts, vol 1[4] (1957) 23.

[2] See *Teubner* (ed), Juridification of Social Spheres (1987); see also *Oppetit*, Les tendances régressives dans l'évolution du droit contemporain, in Mélanges dédiés à Dominique

and legitimacy, is then often paid for by a loss in orientation, efficiency, and equal justice for all. The international level has not been spared by this development and the traditional concepts of state sovereignty and territoriality are fading away. Furthermore, in the past century, the end of the colonial era, and later the end of the Cold War, have strengthened the confidence in local religious, social, and cultural values. In the field of law, this confidence is expressed in a frequent rejection of a solely Eurocentric or Western approach to international law, as it is reflected in the notions of legal pluralism[3] and legal polycentricity.[4]

A global society thus needs a legal framework that fulfils the requirement of a just and efficient global legal order. The current critical stage has introduced a variety of new elements of which a global legal order must be constituted. The notion of "international" law is derived from interstate relations based upon the absolute power of state sovereigns, and is no longer sufficient to effectively encompass the complexity of the world's societies and the numerous actors that form each of them. Rather, new constituting elements have become necessary because of the emergence of recent complex developments that have left their imprint on today's world. These new developments are translated into the sphere of law by a great many new variations of notions that aim to cover the totality of actors and transactions that are taking place around the world. For instance, the notion of "multinational" has extended the scope of interstate relations from bilateral to multilateral contacts. "Supranational" has created a higher degree of interstate cooperation, which is expressed in the regional integration of several states in regional organisations, with the European Union (EU) at the forefront. "Transnational law" was coined in

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Holleaux (1990) 317 ("gigantesque magma législatif et réglementaire"); *Glenn*, Persuasive Authority, 32 McGill LJ (1987) 286 ("plethora of laws"); and the speech of the former German President *R. Herzog* before the *Deutschen Juristentag* in 1998 warning of the danger of a flood of norms by criticising the excessive use of legislation by the European as well as the German authorities and calling for the deregulation of the existing regulatory regime; "Herzog: Das Recht muss bürgernäher werden." Grundsatzrede auf dem Deutschen Juristentag, Süddeutsche Zeitung, 26 September 1998, 6 ("*Normenflut*").

[3] "Legal pluralism" describes "the parallel existence of different legal systems or orders in one geographical or in one topical area"; see *Sand*, From the Distinction between Public and Private Law – to Legal Categories of Social and Institutional Differentiation, in a Pluralistic Legal Context, in *Petersen/Zahle* (eds), Legal Polycentricity: Consequences of Pluralism in Law (1995) 85 (88).

[4] The term "legal polycentricity" was coined by Professor *Henrik Zahle* at the Conference on Legal Polycentricity, convened by the Institute of Legal Science of the University of Copenhagen and is defined as "consisting in a critique of the single-value approach to law, a denial of radical relativism, and in an acceptance of moral pluralism"; see *Sinha*, Legal Polycentricity and International Law (1996) 1.

the context of international economic relations and is understood as comprising of different legal categories, from civil to criminal aspects, to national and international law, both public and private.[5] The decline of the nation state is reflected in the notion of "community law" or "common law" that emphasises the importance of peoples over the territory they populate. Besides its main use for the law of the EU, the communitarian element has also arisen in a broader context, namely as a concept of law for a single world community (*civitas maxima*), thus creating a notion of world law[6] or world community law.[7] Another notion that strives to reach a higher degree of integration between different legal systems is found in that of "international uniform law", consisting of the effort to harmonise and unify laws.[8] A body of law governing problems of a scope that include the entire planet (as well as its atmosphere) and the growing participation of non-governmental actors strengthening the civil society all over the world, is recognised by the notion of "global law".[9] Last but not least, the claim for the universality of laws, *i.e.* their validity for all human beings inhabiting this planet, is founded in the notion of "universal law".[10] These various elements are the prerequisites of a global legal order that aims for the adequacy of its laws.

From a practical perspective, the challenge of meeting the aim of adequacy on the international level was formulated in *Hilton v Guyot*, a judgment rendered by the Supreme Court of the United States in 1895.[11] In his judgment, Justice *Gray* defined international law, including public international law and private international law, as follows:

> International law, in its widest and most comprehensive sense, – including not only questions of right between nations, governed by what has been appropriately called the

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[5] Transnational law was first used in the 1930's in the German-speaking world and can be roughly said to have four different applications: (1) international uniform law; (2) law of cross-border issues; (3) law governing relations between states and foreign private corporations and (4) transnational commercial law; see *Siehr*, Sachrecht im IPR, transnationales Recht und lex mercatoria, in *Holl/Klinke* (Hrsg), Internationales Privatrecht – Internationales Wirtschaftsrecht (1985) 103 (108–112), and see *Jessup*, Transnational Law (1956) 106.

[6] See e.g. *Berman*, World Law, 18 Fordham Int LJ (1995) 1617 (1621 et seq).

[7] *Georg Schwarzenberger* describes a community as distinct from society in the higher degree of integration achieved amongst a social group; a society being a loose type of association; *Schwarzenberger*, The Dynamics of International Law (1976) 2, 4, 107–117.

[8] See e.g. *Kropholler*, Internationales Einheitsrecht (1975).

[9] See *Brown Weiss*, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity (1989) 95, and *Teubner* (ed), Global Law without a State (1997).

[10] See e.g. *Universal Declaration of Human Rights*, GA Res 217 (III), UN GAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

[11] *Hilton v Guyot* (Supreme Court of the United States), 159 US (1895) 113.

"law of nations" (or "public international law"), but also questions arising under what is usually called "private international law," or the "conflict of laws," and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation, – is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.[12]

At the time of the judgment, the two categories of law were regarded as distinct. Public international law was the system of law governing the relations between states. Only states, and more recently also international organisations, are subject to public international law. Private international law, or conflict of laws, on the other hand, is a body of rules that coordinates the national laws of different countries. Adhering to the branch of domestic law, its rules address private persons, both natural and moral. Despite their complementary relationship, and the numerous claims for their common consideration, the two categories remained separate throughout history, and the separation still persists in theory (and education) as well as in practice. Moreover, one century after *Hilton v Guyot*, the consideration of public international and private international law has not fundamentally changed. In 1993, *Hunt v Lac d'Amiante du Québec Ltée* was decided before the Supreme Court of Canada.[13] In this judgment, the necessity of their common function in facing the diversity of societies and its members by providing the global society with an adequate legal framework was renewed.[14] Despite the fact that major changes have taken place in the human environment, and that a paradigm shift has begun to seize science as a whole, the separation between private and public international law prevails in theory (and education) as in practice.

The reasons for their separate consideration remain unclear because public international law and private international law are both entangled in a dynamic evolutionary legal process, fuelled by the public and private, as well as by the international and municipal, dichotomy. Hence, they differ in their orientation on a horizontal level, represented by the public/

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[12] *Hilton v Guyot* (Supreme Court of the United States), 159 US (1895) 113, cited in *Steiner/Vagts*, Transnational Legal Problems[3] (1986) 11–12.

[13] *Hunt v Lac d'Amiante Québec Ltée*, 109 DLR (1993, 4th) 19.

[14] "Legal systems and rules are a reflection and expression of the fundamental values of a society, so to respect diversity of societies it is important to respect differences in legal systems. But if this is to work in our era where numerous transactions and interactions spill over borders defining legal communities in our decentralised world legal order, there must be a workable method of co-ordinating this diversity. Otherwise, the anarchic system's worst attributes emerge, and individual litigants will pay the inevitable price of unfairness. Developing such co-ordination in the face of diversity is a common function of both public and private international law"; ibid.

private law distinction, as well as on a vertical level, represented in the international/municipal law distinction. The connection between public international law and private international law therefore consists of cross-referential relationships between these four basic legal categories.

III. "... *et in omnes se effuderit gentes humanas*"[15]

Before some light can be shed on the seven possible links between the private/public and municipal/international law dichotomy, it is necessary to question generally the constituents that underlie the two sets of dichotomies. From the genuine link between law and society, as expressed in the adage "*ubi societas, ibi ius*", a further conclusion can be drawn. Obviously, a society is made of citizens who consist of women and men; thus it follows that "*ubi societas, ibi femina/homo*". More generally, law is not purely a matter of law; it ought to be a matter of life instead. Law, as far as it concerns and exercises a binding force upon human beings and their relations to other human beings, as well as their environment, is – with the exception of divine revealed law, discussion of which exceeds the scope of this essay – solely human-made law.[16]

This is why law must also consider the human being to be the centre of its interest. At the same time, it explains why law is organised according to the constitution of the human being. From this mutual dependence, an analogy to the public international law and private international law dichotomy can be made. *C. G. Jung* has highlighted both dichotomies as they are rooted in the human psyche.[17] First, the female and male dichotomy within a single human being is expressed in the continuous attraction between the two opposite poles of the human mind *animus/anima* and their effort towards unification. *Jung* calls this dichotomy "*mysterium coniunctionis*", and it is the main driving force in evolution. Second, he explains another dualism inherent in every human being's unconscious, expressed in a superficial layer called the "personal uncon-

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[15] See *Gentilis*, cited in *Lauterpacht*, Private Law Sources and Analogies of International Law (1927) 11.

[16] For example, Islamic Law as a concept must be excluded from this discussion since both distinctions, the public/private and secular/divine, are foreign to it. Thus, the Islamic concept can be said to stand above or to integrate these classifications. In Islam, law is a religious science, because "law and religion form one composite concept; see *Bozeman*, Politics and Culture in International History (1960) 363.

[17] See *Jung*, Mysterium coniunctionis: Untersuchungen über die Trennung und Zusammensetzung der seelischen Gegensätze in der Alchemie, vol 1^4 (1984) 3, 4, 42 et seq.

scious" and in a deeper layer called the "collective unconscious". The personal unconscious is developed and based on experience, whereas the collective unconscious is inborn and universal, meaning that it has contents and modes of behaviour that are common to all individuals. From these analogies can be concluded that each human being is at the same time a public and a private as well as an individual and a collective entity.[18]

IV. Links between the Public/Private and Municipal/International Dichotomy

These dichotomies, deeply rooted in the human mind, correspond to the dichotomies that are dominating the two categories of law and their constituent elements. The mutual attraction of the female/male dichotomy is manifest in current, dynamic developments taking place in most societies where the boundaries between the public and the private sphere have become blurred.[19] The private sphere tends towards a process of publicisation, as expressed in the increasing transparency of matters of private life that affects all individuals and not only public officials. Even actors from the private sphere, such as companies and NGOs, are engaged in many fields, such as social welfare, that were previously left to the state. Private companies also survey their clients and employees and, in so doing, diminish their private sphere.[20] The public side, on the other hand, has – often because of budget consolidation purposes – shifted towards a trend of "privatisation". Many agendas are contracted out to private

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[18] For an interesting discussion of the analogy between the development of the individual and its role in society, see *Freud*'s treatise "Das Unbehagen in der Kultur" (1930), in *Freud*, Abriss der Psychoanalyse – Das Unbehagen in der Kultur (1953).

[19] See *Kennedy*, The Stages of the Decline of the Public/Private Distinction, 130 UPaL Rev (1982) 1349; *Horowitz*, The History of the Public/Private Distinction, 130 UPaL Rev (1982) 1423; *Mnookin*, The Public/Private Dichotomy: Political Disagreement and Academic Repudiation, 130 UPaL Rev (1982) 1429; see equally *Arendt*, The Public and the Private Realm, in *Bronner* (ed), Twentieth Century Political Theory: a Reader (1997) 66; *Charlesworth/Chinkin/Wright*, Feminist Approaches to International Law, 85 AJIL (1991) 613 (626): "At a deeper level one finds a public/private dichotomy based on gender".

[20] For example, a study effectuated amongst 1085 companies in 1998 by the American Management Association, revealed that 40% of these companies keep their personnel under surveillance; they check their e-mails, their telephone calls and the messages on their answering machines and film their performance at their place of work. Further intrusion in the employees privacy is exercised through random drug sample surveys, psychological and medical tests, and the use of lie detectors; see *Duclos*, Gründe für den fortgesetzten Angriff des Privaten auf das Private, TAZ, 13 August 1999, 10, online: LEXIS (German, ALLNWS).

companies, the civil servant is replaced by short term employees, entire state-owned companies are sold, and the outcome is a so-called slim state. The same dynamic has seized the realm of *public law* and *private law*. Three theories for their distinction (the theory of interest, of subjection, and that of subject; focusing respectively on the interest, the hierarchical standing, and the subject of the respective body of law) are not sufficient to clearly draw a line between public law and private law.[21] Rather a third category, that of a *droit mixte*,[22] a category bridging the differences between the two, has emerged. The same fate is shared by the distinction between *municipal law* and *international law*. The competing theories of monism and dualism have given way to a theory of harmonisation that comprises elements from both initial theoretical approaches.[23] From a practical perspective, supranational law is the external manifestation of the fusion of international and municipal law.

The further subcategories are characterised by further dichotomies that raise important questions for the coordination among different branches of law. For example, the interaction of *public law* and *public international law* is determinant for the reception of international law within a domestic legal system. It clarifies the question of the different impact of international custom or international treaties whether self-executing or not.[24] Further, it lays the foundation for the creation of international law by empowering the executive branch to enter into negotiations with other states. Altogether, their complementarity is expressed in the *dédoublement fonctionnel*, designating the higher degree of organisational structure and the availability of more efficient sanctions of the national legal order.[25] Both categories of domestic origin, *private law*, and *private international law*, are equally linked in their interaction because of the international dimension of their field of application. Their linkage is rooted in the different degree of harmonisation between the content of

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[21] See e.g. *Koziol/Welser*, Grundriß des Bürgerlichen Gesetzbuches, vol I[9] (1992) 6–7; see *Palandt*, Bürgerliches Gesetzbuch, vol 7[55] (1996) 1.

[22] See *Starck/Roland/Boyer*, Introduction au droit[4] (1996) 83–93.

[23] See generally *Rousseau*, Droit international public, vol 1 (1970) 39; *Verdross*, Völkerrecht (1964) 111–113; *Brownlie*, Principles of Public International Law[3] (1979) 33; *Scelle*, Manuel de droit international public (1948) 4; *Kelsen*, Introduction to the Problems of Legal Theory (1992) 117–122; *O'Connell*, International Law, vol 1 (1965) 42–46; *Keller*, Rechtsvergleichende Aspekte zur Monismus-Dualismus-Diskussion, 3 SRIEL (1999) 225.

[24] See *Jackson*, Status of Treaties in Domestic Legal Systems: a Policy Analysis, 86 AJIL (1992) 310.

[25] *George Scelle* argues that a legal order, from an institutional point of view, can only be efficient when it has a set of sanctions at its disposal (*"Les hommes ne sont point de purs esprits juridiques. Ils ne s'inclinent que devant les règles exécutoires"*); *Scelle*, Manuel de droit international public (1948) 21–23.

the substantive norms of private law.[26] Or in other words, the more private law is harmonised or even unified, the less need it has of conflicts of law rules.[27] The relationship between *public law* and *private international law* stands at the core of the problem of international legal disharmony between different state jurisdictions, as it is reflected in so-called limping legal acts,[28] of which the *matrimonium claudicans*,[29] as pointed out by *Kahn-Freund*, is the "ultimate shame of private international law".[30] Depending on whether foreign or domestic public law is focused on, their relationship can alternately stand in context with municipal or with international law.[31] In a purely domestic approach, public law is the basis for the enactment of conflicts of law rules.[32] Their main touching point is found

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[26] See generally *Glenn*, Harmonization of Law, Foreign Law and Private International Law, 1 Eur Rev Priv L (1993) 47.

[27] Many states have not, or not entirely, unified their own private law, thus making necessary the application of interlocal conflict rules. However, most continental European countries have unified their national private law. Different private laws within the state prevail in e.g. the United States of America, Canada, South Africa, Australia, the United Kingdom; *Kegel*, Internationales Privatrecht[7] (1987) 38; for a discussion of questions arising from the competence of the European Union to adopt a European Civil Code, its codification, its feasibility and possible procedural steps, see *Hondius*, Towards a European Civil Code, in *Hartkamp/Hesselink/Hondius/Joustra/Perron*, Towards a European Civil Code[2] (1998) 3; for a discussion of the different degree of integration in NAFTA and the EU, see *Fitzpatrick*, The Future of the North American Free Trade Agreement: a Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe, 19 Hous J International L (1996) 1; generally, *David/Brierley* argue that "it will be easier, or in the long run more practical, to reach international agreement on the substantive legal rules applicable to such international relations, rather than to attempt to unify the national conflict rules"; *David/Brierley*, Major Legal Systems in the World Today[3] (1985) 10.

[28] Limping legal acts are acts that are treated differently in different countries and, thus, give rise to international disharmony; see *Bar*, Internationales Privatrecht, vol 1 (1987) 163–164, 209.

[29] A *matrimonium claudicans*, a so-called "limping marriage" (*hinkende Ehe*), is a marriage that is valid only within a limited territory. It is formed when a marriage is concluded under the formal requirements of one country that are not recognised within a second country; see *Schnitzer*, Handbuch des internationalen Privatrechts, vol 1[4] (1957) 355.

[30] *Kahn-Freund*, General Problems of Private International Law (1976) 14.

[31] See *Mann*, Conflict of Laws and Public Law, 132 Rec des Cours (1971) 107 (115); see also *Swan*, The Canadian Constitution, Federalism and the Conflict of Laws, 63 Can Bar Rev (1985) 271; *Baade*, The Operation of Foreign Public Law, 30 Tex Int LJ (1995) 429; *Mann*, The Doctrine of Jurisdiction in International Law, 111 Rec des Cours (1964) 1.

[32] Note that private international law is generally perceived as belonging to the realm of private law; see *Schnitzer*, Handbuch des internationalen Privatrechts, vol 1[4] (1957) 25–27; but see *Story*, Commentaries on the Conflict of Laws, Foreign and Domestic[3] (1846) 13, classifying private international law as a branch of public law.

in the concept of the *ordre public* (public policy) which is responsible for the restriction on the application of foreign law in a domestic forum. The international level is directly involved through the existence of an international *ordre public*, as well as the common distinction between the protection of nationals (civil rights) and the protection of everyone (human rights). In respect to the reception of foreign public law, the same problem of drawing a clear line between public and private law exists. Only more recently, the view prevails that the application of foreign private law also requires the consideration of foreign public law. Finally, the relation between *private law* and *public international law* further clarifies the human mind's influence on the terminology of law. Both legal categories employ the same terminology, such as *pacta sunt servanda*, and the same legal tools, such as contracts as a means to enter into mutual relations. Private law and public international law are closely linked through the analogies that exist between them.[33]

The various links in the referential relationships between the four main constituting elements of the private/public and international/municipal dichotomy reflect the natural interdependence of public international and private international law. Their relation has further become fortified through dynamic global developments. This dynamism, fostered by new insights gained in science, and particularly in physics, has blurred the lines of distinction between several fields and categories.[34] Legal theory is equally not spared from this dynamic paradigm shift.[35] The entire system of division of labour is shattered. Labour division is still necessary, but has to proceed in a different way and should now be called "labour sharing" instead. The separate consideration of legal or non-legal categories can no

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[33] See *Lauterpacht*, Private Law Sources and Analogies of International Law (1927) 33; see also *Ferrari-Bravo*, International and Municipal Law: the Complementarity of Legal Systems, in *Macdonald/Johnston* (eds), The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory (1986) 715.

[34] See e.g. *Kosko*, Fuzzy Thinking: the New Science of Fuzzy Logic (1993); *Capra*, The Tao of Physics[3] (1991) 360–368; *Capra*, The Turning Point (1983); *Vester*, Die Kunst, vernetzt zu denken: Ideen und Werkzeuge für einen neuen Umgang mit Komplexität (1999).

[35] Some new theories highlighting this shift are general systems theory, cybernetics, multivalent logic, theory of automata, information theory, and the theory of self-referential "autopoietic" systems; see *Luhmann*, Law and Social Theory: Law as a Social System, 83 Nw UL Rev (1988) 136 (137), and *Slaughter Burley*, International Law and International Relations Theory: a Dual Agenda, 87 AJIL (1993) 205 (215); *Chodosh*, An Interpretative Theory of International Law: the Distinction between Treaty and Customary Law, 28 Vand J Transnat L (1995) 973 (977); see also *Sovern* stating that "Law is not a thing but a process", cited in *Rheinstein*, Einführung in die Rechtsvergleichung[2] (1987) 5; *Teubner* (ed), Autopoietic Law: a New Approach to Law and Society (1988), and *Teubner*, Law as an Autopoietic System (1993).

longer be conducted. The nature of the relation of a *pars pro toto* must be permanently kept in mind. With regard to the public international law/ private international law dichotomy, this is particularly true for the triad of law, economics, and politics. In each field the discussed dichotomies play an important role, and they also affect their interrelations as a whole.

V. The Public/Private Distinction in Law, Economics and Politics

In *law*, the major differences and at the same time the principle areas of entanglement between public and private international law are revealed. To begin with, most countries in the world have enacted conflicts of law rules. They are of domestic origin but the cases they deal with go beyond state territory and must, therefore, be classified as "international". In their purpose, these different national laws aim at an international equity among the citizens of the respective countries. From this diversity and the common goal, the question whether private international law can be deduced from public international law has arisen. The controversy in this question has produced two different schools: The international school (universalists), which argues that every state must have a system of private international law and that states may not exclude foreign law altogether; and the national school (particularists) which perceived private international law as a purely domestic matter and held that any consideration of foreign law is at its best based on comity.[36] In the past few decades, new realities have proven the national school to be too limited, and have encouraged a shift towards the international school's approach which holds that public international law is indeed a foundation for private international law.[37] At the same time, a strong process of unification of

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[36] See *Lipstein*, Conflict of Laws before International Tribunals (1941) 22 et seq. Comity stands in between the competing interests between foreign and domestic law. The meaning of the word comity is not uniformly interpreted. Its definition reaches from an obligatory source of international law to pure courtesy depending upon the good will of a sovereign state; see *Paul*, Comity in International Law, 32 Harv Int LJ (1991) 1 (2–5). In the context described here, i.e. in the eyes of the "national school", comity is more likely to be understood as a non-binding concept of courtesy. As an exception, *Wharton* refers to comity as a binding source, because it is part of the common law. He argues that private international law is part of the law of nations which itself is again part of the common law; see *Wharton*, A Treatise on the Conflict of Laws[2] (1881) 5; see also *Maier*, Extraterritorial Jurisdiction at a Crossroads: an Intersection between Public and Private International Law, 76 AJIL (1982) 280 (281), writing that "comity is discretionary and international law is obligatory".

[37] Compare *Jayme*, Staatsverträge zum Internationalen Privatrecht: Internationalprivatrechtliche, staatsrechtliche, völkerrechtliche Aspekte, in *Berichte der Deutschen Gesellschaft für Völkerrecht* (ed), Staatsverträge zum Internationalen Privatrecht (1975) 7 at 28.

private international laws has occurred. The unification is undertaken through the means of bilateral or multilateral negotiations anticipated through comparative research and harmonisation of laws. On the other hand, the extensive legislative work at the international level has produced a crisis.[38] Since many new actors, such as international and supranational organisations as well as NGOs have entered the legislative realm that was previously exclusively occupied by states, different bodies of law at different levels were created. This "flood of norms" has led to a great variety of potential conflicts between different legal sources.[39] These conflicts potentially manifest themselves on a vertical and a horizontal level as well as in a combination of both levels, as the increasing conflicts of competence between various international organisations and their respective legal texts have shown.[40]

In the process of mitigation of these various constellations of conflicts, experiences drawn from private international law can come to be of aid to public international law. Concretely, conflicts of law rules can fulfil a coordinating and organising role between the numerous bodies of law created by numerous different actors – whether public or private – under the auspices of public international law.[41]

In the realm of law, the relation between private international and public international law can, thus, be summed up as follows: Public international law provides the overall legal framework in a global society in which the transnational interactions between citizens of a limited number of different states are governed by private international law. Private international law is therefore a part of public international law. Public international law, in its efforts to harmonise the diversity of the

[38] This "crisis of international codification policy" consists mainly of the proliferation of legal material manifested in a huge quantity of existing conventions, a so-called "*embarras de richesse*" produced by a "*fuite en avant*"; see *Meessen*, Staatsverträge zum Internationalen Privatrecht: Völkerrechtliche und verfassungsrechtliche Aspekte, in *Berichte der Deutschen Gesellschaft für Völkerrecht* (ed), Staatsverträge zum Internationalen Privatrecht (1975) 49 (49–52).

[39] For instance, in the period 1948–1994, GATT contracting parties notified 118 RTAs relating to trade in goods. Since the creation of the WTO (1995), 80 additional RTAs covering trade in goods and services have been notified. Out of the total of 198 RTAs notified to the GATT/WTO, 119 are presently in force; see Regionalism and the Multilateral Trading System, online: World Trade Organization http://www.wto.org/wto/develop/regional.htm (date accessed: 21 January 2000).

[40] Such conflicts are, for example, conflicts between the UN and NATO, between the UN and the WTO, as well as between the WTO and NAFTA or the EU etc.

[41] One such international convention that approximately fulfils the function of a conflict of laws regime public international law, is the United Nations Convention on the Law of the Treaties, signed at Vienna in 1969; see United Nations Convention on the Law of the Treaties, 1155 UNTS (23 May 1969) 340.

existing legal systems, assists private international law in its process of unification, whether bilateral, regional or multilateral. Last but not least, private international law can provide useful assistance in the coordination between the various sources that were created by public international law.

In the field of *economics*, the relation of public international law and private international law is expressed less in terms of common touching points, and more in terms of the consequences of their absence. The international trade regime is divided in accordance with the separation of public international from private international law. On the one hand, regional or multilateral organisations, such as the WTO, at the forefront of things, are created under the auspices of public international law and govern the regulation of international trade and commerce. On the other hand, the activities of private parties involved in transnational commercial activities are generally regulated by the respective national legal systems and their courts. Thus, the sphere of international economic relations is marked by a strict distinction between state regulation and private participation and the absence of active mutual interaction. Almost no access or legal recourse to the various regional or international organisations is granted to private individuals.[42] In national courts, further, regulations stemming from such supranational or international bodies can rarely be invoked directly either. Hence, international trade and transnational commercial activities are faced with an insufficient legal framework for their multinational activities. Here, the insufficiency derives from a gap that results from the lack of consideration of private affairs in the public realm and *vice versa*.

This so-called gap is bridged by the concept of a new *lex mercatoria* that was newly presented some thirty years ago.[43] The legal character of this concept is highly disputed because of the taboo it has broken. This taboo consists of the fact that its sources are not solely based upon state authority but also derive from the activity of private actors; *ergo* the *societas mercatorum* itself. Its decentralised, partly public and partly private character leaves no room for a strict legal classification as a legal order in accordance with traditional perceptions of national and international law. The assumption

[42] Exceptions are the system established by the European Convention of Human Rights (ECHR), the North American Free Trade Agreement (NAFTA), the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID) and the legal system of the European Community (EC); see *Hilf*, New Frontiers in International Trade: the Role of National Courts in International Trade Relations, 18 Mich J Int L (1997) 321 (324, 332, 334–335).

[43] See *Gaillard*, Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules, in *Van Den Berg* (ed), International Council for Commercial Arbitration – Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration (1996) 570.

that the new *lex mercatoria* is indeed a legal order that arose from the gap between private and public international law, is nurtured by various international practices, beginning with the delocalisation of contracts from national legal systems, moving on to transnational contracts between states and private parties, and progressing further to alternative dispute resolution mechanisms, especially in the form of mixed arbitral tribunals.[44]

Politics is equally faced with a great dynamism in its interaction with law, and an insufficiency in dealing with the private and public distinction.[45] Politics and its institutional mechanisms have problems adapting to the blurring of the private and public distinction. In a societal context the problem consists in the increasing democratisation process that has reached the national as well as the international level. The challenge is to deal with the dual human nature as expressed in the coexistence of an individual and a collective feature inherent in every human being and its successful translation into the organisation of society. Moreover, the expansion of law on the international plane has reduced the scope of politics in foreign relations. National legislation, both private and public, has expanded its influence across borders and makes itself felt internally through the concepts of comity, and externally in the extraterritorial effect of certain laws. A further complicating element in international politics is found in the fact that not all the states taking part in the international community feel committed to the (international) rule of law. The lack of commitment to established rules creates some major problems that connect private and public international law. For example, the question of the recognition of a country by another country can have a determining impact on the recognition of the respective country's foreign law or judgments. Or, in the case of sanctions and embargoes, the obedience to a public international law rule can lead to a violation of a private law rule as set out in a contract and *vice versa*.

The lack of commitment to an international rule of law results – as suggested by *Anne-Marie Burley* – in a division of transnational relations between states acting in a "zone of law" and those acting in a "zone of

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[44] See *Berger*, The Creeping Codification of the Lex Mercatoria (1999) 234; *Maniruzzaman*, The Lex Mercatoria and International Contracts: a Challenge for International Arbitration, 14 Am U Int L Rev (1999) 657 (694–697), and *Tetley*, The General Maritime Law – the Lex Maritima, 20 Syracuse J Int L Com (1994) 105 (135–137, 144–145); see also *Mertens*, Lex Mercatoria: a Self-Applying System Beyond National Law? in *Teubner* (ed), Global Law without a State (1994) 31.

[45] The "indistinguishable" nature of law from politics was also demonstrated by both Political Realists and Legal Realists, who demonstrated that "legal doctrines inevitably reflect underlying policy choices"; see *Slaughter Burley*, International Law and International Relations Theory: a Dual Agenda, 87 AJIL (1993) 205 (209).

politics".[46] The zone of law describes transnational relations between liberal states; and the zone of politics describes those between liberal and nonliberal states, and between nonliberal states amongst themselves. The legal institution to deal with relations in the zone of politics is found in the act of state doctrine, which is best described as a self-imposed judicial restraint to mitigate conflicts between the executive and the judiciary.[47] Once foreign law is received in a domestic court, the doctrine prevents this court from examining the validity and consistency of acts by the respective foreign government with a minimum of international standards of justice. However, in times of a growing international legal order, as accompanied by and highlighted through the concept of obligations *erga omnes*,[48] and the responsibility of individuals, both public and private, under international law, the doctrine can no longer be considered appropriate. In accordance with the principle of *iniuria non excusa iniuriam*, liberal states should equally apply the standards as set forth amongst themselves in respect to nonliberal states, since the success or failure of a legal order is measured in cases of conflict. Therefore, the interplay between law and politics is characterised by a complementary process in which law provides politics with the necessary stability and predictability for the planning and the organisation of transnational relations, whereas politics brings about the changes to the international legal order that guarantee that the laws are adequate, *i.e.* not causing friction in the interactions taking place therein.

VI. Conclusion

> Only when the lines of distinction blur, the relations between the parts appear. Then, despite a little data, one hereby recognises the "system".[49]

At the beginning of this note, the necessity for law to provide a just regulatory framework for its society was identified. In a modern global society, comprised of a great diversity of societal subsystems with the

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[46] *Burley*, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 Colum L Rev (1992) 1907.

[47] See *Comment*, The Act of State Doctrine – Its Relation to Private and Public International Law, 62 Colum L Rev (1962) 1278 (1278, 1286).

[48] See *Ragazzi*, The Concept of International Obligations Erga Omnes (1997).

[49] "Erst wenn die Trennlinien verschwimmen, treten die Beziehungen zwischen den Teilen hervor. Trotz weniger Daten erkennt man so auf einmal das "System"." See *Vester*, online: The Cybernetic Website of Frederic Vester, http://www.frederic-vester.de/index.htm (date accessed: 4 October 1999) (translation by author).

human individual as its core element, public international law and private international law are capable of fulfilling this role to a satisfactory extent, but only when they are dealt with together. The various subcategories of their relation and the consideration of their impact on law and economics as well as politics guarantee that the legal net is strong enough and prevents the individual case from slipping through its web.[50] While private international law renders justice in the case of the private individual, public international law provides the overall framework that coordinates the sum of interactions taking place between private individuals. In analogy to the duality of human nature, private international law renders justice to the individual involved in a conflict whereas public international law safeguards peace and justice for the collective entity. The parallel existence of the two different levels, coexistent permanently in every human being, corresponds to the requirements of justice as formulated by *John Stuart Mill*, who pointed out the insoluble link between the individual and the collective for the determination of a certain situation as just or unjust.[51] Hence, a situation can only be fully judged as just or unjust when the individual level and the collective level are considered and balanced together.

This general requirement of justice can, on the basis of the evident link between law and the human being, be extended to a wider field. More precisely, it is necessary to consider in all legal problems the sum of human activities that are subject to law. As an abstract and general formulation of this requirement, the principle of conjunction (*principium coniunctionis*)[52] is proposed. It establishes the duty to connect all relevant phenomena and lead them from their dichotomous distinction to their later identity. This duty stands in direct opposition to the common habit of the human mind to distinguish and to separate and to neglect the dynamic motion inherent in nature itself.[53] Any distinction is legitimate

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[50] Compare the statement, made by *H. Keyserling* in 1933, according to which "a judicial system will be less and less apt to do justice to reality, the more the latter becomes differentiated. All statistics allow the unique case to slip through them and the more humanity evolves, the more will it be precisely the uniqueness of each individual and of each special case which matters"; see *Keyserling*, Problems of Personal Life (1934) 134–135.

[51] For *J.S. Mill* justice is established by the feelings of just persons and just persons are "[...] persons resenting a hurt to society, though not otherwise a hurt to themselves, however painful, unless it is of the kind which society has a common interest with them in the repression of"; *Mill*, Utilitarianism, Liberty, and Representative Government (1910) 48.

[52] See *Jung*, Mysterium coniunctionis: Untersuchungen über die Trennung und Zusammensetzung der seelischen Gegensätze in der Alchemie, vol 1^4 (1984).

[53] "Otherness is a fundamental category of human thought"; see *de Beauvoir*, Introduction to The Second Sex, in *Bronner* (ed), Twentieth Century Political Theory: a Reader (1997) 319 (321).

as well as appropriate when the time factor is excluded; but is of no more value when the dynamic motion of nature is taken into account. The dynamic evolutionary process leads any elements of distinctive constitution to tend towards their identity, hereby clearing away any antinomy and pointing out its illusionary character. This process and its imprint on the human mind has found an equivalent in legal methodology, where the *argumentum e contrario* and the *argumentum per analogiam* are only seemingly contradicting each other.[54]

Applied to the interrelation of public international law and private international law, the urgent task facing the principle of conjunction is to link them in accordance with their inherent individual or collective character. First, private parties must be granted enhanced access in domestic courts to the norms set forth by public international law in order to strengthen the (national and international) legal order, to improve interpretative uniformity, and to increase democratic participation of private individuals in the field of international law. Secondly in the realm of private international law, public international law must assist in coordinating the rich diversity of the world's legal systems in order to avoid so-called "limping legal acts" that can seriously harm justice and are capable of causing enormous friction among the various interactions between public and private actors. In this context the consideration of public law and the invocability of public international law within domestic courts must be increased and improved. Finally, the common consideration of public international law and private international law helps to increase the efficiency of the existing global legal framework, and to decrease the conflicts arising from the quantity of legal norms.

The reconciliation between two differing opinions is amongst the main functions of law, regardless of whether performed *a posteriori* in a given case, or *a priori* in the adoption of a legal text. Every conflict reflects the struggle of differing perspectives for its victory. The victory, however, does not consist in the victory of one and the eradication of the other, but in the harmonious coexistence of the two in a state of unification. Besides providing an adequate framework for a given situation as reflected in a *de lege lata* approach, law also engages itself in a future-oriented effort. From a *de lege ferenda* approach law, and especially legal theory, in the dynamic

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[54] Most definitions of 'analogy' differ but express the same underlying principle: "Analogy is neither identity nor difference, but both: "complementarity of identity and difference""(*Heidegger*); "the golden mean between identity and contradiction"(*Lakebrink*); "unity of the compliance between different entities" (*Söhngen*) or as *Hegel* expressed it: "dialectic identity", "unity of unity and opposition", or "identity of identity and non-identity"; see *Kaufmann*, Analogie und "Natur der Sache"[2] (1982) 19 (translation by author).

and diverse world of today, is challenged to provide for an advanced regulatory framework that safeguards the adequacy of the laws in force at any place and moment in time.

Zusammenfassung

Die Unterscheidung zwischen Privatrecht und öffentlichem Recht stellt einen gewichtigen Ausdruck des dichotomen menschlichen Denkmodus auf dem Gebiet des Rechts dar. Weiters spiegelt sie den archaischen Konflikt des Menschens dar, ob sie/er sich als individuelle oder als kollektive Wesenheit betrachten soll. Zum Zeitpunkt des Entstehens einer globalen Gesellschaft gewinnt eine zweite solche Unterscheidung, die zwischen Völkerrecht und nationalem Recht, zunehmend an Bedeutung. Diese Bedeutung gründet sich auf der weit gehenden Vielfältigkeit der Gesellschaften dieser Welt und ihren vielen unterschiedlichen Rechtssystemen sowie deren wachsendem gegenseitigen Dialog. Aus der Sicht des Rechts gipfeln die Interaktionen zwischen den Kategorien des Privatrechts und des öffentlichen Rechts in der Beziehung (oder dem Fehlen einer solchen Beziehung) zwischen dem Völkerrecht und dem internationalen Privatrecht wobei das Völkerrecht die Beziehungen zwischen den Staaten und das internationale Privatrecht die Beziehungen der privaten Personen untereinander regelt. In diesem Artikel untersucht der Autor die Wechselwirkung zwischen diesen verschiedenen Kategorien des Rechts in der sich im Entstehen befindenden globalen Rechtsordnung und plädiert für eine gemeinsame Betrachtung des Völkerrechts und des internationalen Privatrechts. Tatsächlich resultieren viele der aktuellen Probleme in der heutigen internationalen Rechtsordnung aus der anhaltenden Trennung von Völkerrecht und internationalem Privatrecht, obwohl einerseits die wechselseitigen Handlungen zwischen Staaten und privaten Personen und andererseits diejenigen zwischen Staaten und privaten Personen untereinander im Zunehmen begriffen sind. In der Folge werden einige der negativen Auswirkungen des Fehlens einer Koordination zwischen den beiden Rechtskategorien unter Berücksichtigung der aus Recht, Wirtschaft und Politik geformten Dreiecksbeziehung hervorgehoben. Schließlich werden Möglichkeiten für deren Harmonisierung durch eine nähere Überprüfung der Parallelen zwischen der Psychologie des menschlichen Denkapparates und der Struktur der Rechtskategorien angeboten.

Correspondence: Mag. Rostam J. Neuwirth, LL.M. (McGill), currently Ph.D.cand. (EUI), European University Institute, Via dei Roccettini 9, I-50016 San Domenico di Fiesole (FI), e-mail: rostam.neuwirth@iue.it.