

**International Law
and the
Public/Private Law Distinction**

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ABSTRACTS

Abstract

Traditionally, public international law and private international law were perceived as two different categories of law; the former governing the international relations between states and the latter those between private individuals. Their relation 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 a dynamic dialogue that equally challenges 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.

Résumé

Traditionnellement, le droit international public et le droit international privé étaient considérés comme deux catégories juridiques bien distinctes, le premier réglant les relations internationales entre des Etats et le dernier entre des individus privés. Leur relation est basée sur un développement évoluant du droit privé au droit public, ainsi que celles du droit municipal au droit international. Dans le monde aujourd'hui, cette évolution a culminé dans un dynamisme qui est reflété dans de nombreuses interactions entre une multitude d'acteurs différents. Par conséquent, les limites établies entre les dichotomies de droit public et droit privé, ainsi que de droit international et droit municipal sont devenues floues. A l'aube d'une société globale, ces quatre catégories majeures de droit sont entrées dans un dialogue dynamique que conteste également la théorie et la pratique juridique. Ce dialogue est situé au centre de la question d'un cadre juridique global à laquelle le droit international public et le droit international privé – à cause de leur champ distinct d'application – peuvent répondre autant qu'ils parlent une langue commune.

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I. INTRODUCTION

1. *The Status Quo of International Law*

1.1. The Scope of International Law¹

The present world situation is characterised by an enormous increase in dynamism. The former clearly-established boundaries between systems, nations, peoples, and all other traditional patterns or notions of distinction, fade away in an unknown dimension. The outcome is a state of chaotic “disorder”, apparent or not, but measurable only by the notion of entropy². This development can even be expected to accelerate exponentially within years to come. The urgent question in this process is what is the role of law therein, and especially the role of international law? The role of law, in its widest sense, is to provide rules to coordinate reciprocal behaviour amongst various members of a social order, in order to avoid conflicts or detrimental effects amongst these members. In the present world with its decreasing importance of boundaries, through mobility of persons, goods, capital, thoughts and other kinds of information, it is the ill-defined notion of international law that is called to face the challenge of a menacing disorder spreading over the emerging international community.

The two categories of public international and private international law, by their field of application, are most likely to fulfil this function in the emerging international community on a global level. Public international law, or the “law of the nations”, is traditionally defined as the system of law governing the relations between states. Only states, and more recently international organisations, are thus subject to this system. Its main focus is the

¹ The term “international law” is commonly regarded as synonymous with public international law. However, in this context, the term is used in a neutral manner and therefore does not distinguish between different categories of law, but only points out the global character of the issue at stake.

² The notion of “entropy” was coined by Rudolf Clausius (1822-1888) and is usually defined as the degree of disorder of a system; see J. Ostermeyer, “Auch die Unvollkommenheit hat ihre Regeln: Zum 100. Todestag des Physikers und Ingenieurs William Rankine” *Frankfurter Allgemeine Zeitung* (24 December 1997) 10, online: LEXIS (German, ALLNWS); see also S. Hawking, *A Brief History of Time* (New York: Bantam Books, 1998) at 106.

establishment of an elementary minimal legal order on a broad scale. Private international law, or the "conflict of laws", is a system co-ordinating the different laws from different countries. It responds to the question of applicability of foreign or domestic law within domestic courts. Mainly private persons (natural and moral) are subject to this body of rules, and its main focus is to render justice and fairness to individual litigants.

In *Hilton v. Guyot*, a judgment rendered by the Supreme Court of the United States in 1895, Mr. Justice Gray gave the following opinion:

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 "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.³

This judgment reflects a definition of international law as an expression of a harmonious relation between public and private international law, by granting states and individuals the same status in the international legal order. This harmony may have existed at the time of the judgment, when complex interactions between states and private individuals rarely occurred. In the present time, however, the harmony between public and private international law cannot be confirmed anymore, given the persistence of their categorical separation. Nonetheless, almost a hundred years after *Hilton v. Guyot* not much has changed in the consideration of public and private international law. In 1986, H.J. Steiner and D.F. Vagts were led to critically comment on *Hilton v. Guyot*, as an example of the relationship between public and private international law, by reflecting on a contrast between three pairs of opposing terms, namely: (1) private and public law; (2) national and international law; and

³ (1895), 159 U.S. 113, cited in H.J. Steiner & D.F. Vagts, *Transnational Legal Problems*, 3rd ed. (Mineola: The Foundation Press, 1986) at 11-12.

(3) law and politics, arguing that they ought to complement rather than contradict each other.⁴ In the past century, additional consideration of public and private international law in legal discourse has taken place but the issue is still considered highly controversial. Above all, this distinction still prevails and dominates legal education,⁵ legal practice, and legal theory. Throughout the last hundred years, despite numerous voices in favour of the convergence of public and private international law, the situation has hardly changed.⁶ The

⁴ Steiner & Vagts, *supra* note 3 at 19.

⁵ The prestigious Hague Academy of International Law offers, for example, one course in private and one in public international law; see the Homepage of the The Hague Academy of International Law, online: <<http://www.hagueacademy.nl/>> (date accessed: 07 October 1999).

⁶ In reverse chronological order: See U. Mattei & M. Reimann, "New Directions in Comparative Law" (1998) 46 *Am. J. Comp. L.* 597 at 602; A. Lowenfeld, "Forum Shopping, Antisuit Injunctions, Negative Declarations, and Related Tools of International Litigation" (1997) 91 *A.J.I.L.* 314 at 314 [hereinafter "Forum Shopping"]; H.S. Burman, "International Conflict of Laws, The 1994 Inter-American Convention on the Law Applicable to International Contracts, and Trends for the 1990s" (1995) 28 *Vand. J. Transnat'l L.* 367 at 367; J.R. Paul, "Interdisciplinary Approaches to International Economic Law: The New Movements in International Economic Law" (1995) 10 *Am. U.J. Int'l L. & Pol'y* 607 at 610 [hereinafter "Interdisciplinary Approaches"]; H. Charlesworth & C. Chinkin & S. Wright, "Feminist Approaches to International Law" (1991) 85 *A.J.I.L.* 613; J.R. Paul, "Comity in International Law" (1991) 32 *Harv. Int'l L.J.* 1 at 2, 27, 69-70, 77-79 [hereinafter "Comity"]; Steiner & Vagts, *supra* note 3 at 19-21; H.G. Maier, "Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law" (1982) 76 *A.J.I.L.* 280; A. Lowenfeld, "Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction" (1979) 163 *Rec. des Cours* 315 at 321 *et seq.*; K.M. Meessen, "Kollisionsrecht als Bestandteil des Allgemeinen Völkerrechts: Völkerrechtliches Minimum und kollisionsrechtliches Optimum" in W. Flume & H.J. Hahn & G. Kegel & K.R. Simmonds, eds., *International Law and Economic Order: Essays in Honour of F.A. Mann on the Occasion of his 70th Birthday on August 11, 1977* (München: C.H. Beck, 1977) 227; F.A. Mann, "Conflict of Laws and Public Law" (1971) 132 *Rec. des Cours* 107 at 116, 117 [hereinafter "Conflict of Laws"]; E.E. Cheatham & H.G. Maier, "Private International Law and Its Sources" (1968) 22 *Vand. L. Rev.* 27 at 29, 39, 41, 101-102; P.C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956); G. Scelle, *Manuel de droit international public* (Paris: Domat-Montchrestien, 1948) at 19.

See generally J. Kropholler, *Internationales Privatrecht*, 2nd ed. (Tübingen: Mohr, 1994) at 48-53 [hereinafter *Privatrecht*]; D. McLean, *The Conflict of Laws*, 4th ed. (London: Sweet & Maxwell, 1993) at 1-2; M. Akehurst, *A Modern Introduction to International Law*, 6th ed. (London: Unwin Hyman, 1987) at 48-50; U. Drobnig, "Private International Law" in R. Bernhardt, ed., *Encyclopaedia of Public International Law*, vol. 10 (Amsterdam: North Holland, 1987) 330 at 334-335; G. Kegel, *Internationales Privatrecht*, 7th ed. (München: C.H. Beck, 1987) at 5-16; R. David & J.E.C. Brierley, *Major Legal Systems in the World Today*, 3rd ed. (London: Stevens & Sons, 1985) at 10; H. Kelsen, *Principles of International Law* (New York: Rinehart & Company, 1952) at 254-257.

Contra: M. Bos, "Droit international public et droit international privé: deux identités bien distinctes" in J. Makarczyk ed., *Theory of International Law at the Threshold of the 21st Century* (The Hague: Kluwer Law

limited success is even more surprising in the light of the dynamism mentioned above. It is true that much of the global change, by the emergence of “new realities”⁷, has shattered the fundamentals of doctrinal thinking on which the classical doctrine was built upon. The decline of state sovereignty and the increasing insufficiency of a pure positivist theory of law to explain phenomena on the legal plane, are only two out of many examples.⁸

One century after *Hilton v. Guyot* another court, this time the Supreme Court of Canada, rendered a judgment portraying the current world’s situation and emphasising the necessity for a combined consideration of public and private international law regarding transnational issues. In *Hunt v. Lac d’Amiante du Québec Ltée*, Judge La Forest delivered the following opinion:

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.⁹

International, 1996) 89 at 95, 98; P. Daillier & A. Pellet, *Droit International Public*, 5th ed. (Paris: L.G.D.J., 1994) at 35-36; M.N. Shaw, *International Law*, 3rd ed. (Cambridge: Grotius Publications Ltd, 1991) at 1; K. Heller, “Das Internationale Privatrecht in der Österreichischen Rechtsordnung” in F. Schwind, ed., *Europarecht – Internationales Privatrecht – Rechtsvergleichung* (Wien: Österreichische Akademie der Wissenschaften, 1988) 9 at 17-20 [hereinafter “Rechtsordnung”]; F. Schwind, *Handbuch des Österreichischen Internationalen Privatrechts* (Wien: Springer, 1975) at 22-23; K. Lipstein, *Conflict of Laws before International Tribunals* (London: The Grotius Society, 1941) 142 [hereinafter *Conflict of Laws*].

⁷ See e.g. J.A. Perkins, “The Changing Foundations of International Law: From State Consent to State Responsibility” (1997) 15 B.U. Int’l L.J. 433.

⁸ *Ibid.* at 434; see also the discussion of legal positivism and the sovereignty paradigm in A.L. Strauss, “Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts” (1995) 36 Harv. Int’l L.J. 373 at 373-380, 389-393.

⁹ *Hunt v. Lac d’Amiante Québec Ltée* [1993] 109 D.L.R. (4th) 19.

The object of this essay is to compare public and private international law and to contribute to the elaboration of a method to assist in their coordination.

1.2. Legal Pluralism and Legal Polycentricity in International Law

The world community of today is formed by a great number of diverse societies.¹⁰ As a matter of fact, each political society has its own law which is based on its own traditional religious, cultural or social values. Their influence on the realm of law is recognised today by the grouping of different laws in different legal traditions or families.¹¹ These various and different legal families, in the past as well as in the present, have not only exercised a great influence on the international relations between different nations, but have also essentially formed each country's domestic legal system.¹² Consequently, there is probably no country in the world able to claim that its law has been received from only one single source.¹³ Even within a single state different laws exist. Hence differences in societies, and in the law governing the interactions between their members, do not correspond to territorial borders as drawn by states. In the course of time and through the migration of people, legal traditions have transcended borders. Therefore, legal traditions can be considered as "interlocal", "intertemporal," and "interpersonal" in character.

In this context it is necessary to ask how these characteristics relate to the public and private international law distinction. Private international law by its nature – although within the boundaries of the *ordre public* only – is more open to the acceptance of other concepts of

¹⁰ According to S.P. Huntington there are eight major civilisations present in the contemporary world, which are the Sinic, the Japanese, the Hindu, the Islamic, the Orthodox, the Western, the Latin American and the African civilisation; S.P. Huntington, *The Clash of Civilizations and the Remaking of the World Order* (New York: Touchstone, 1996) at 45-48.

¹¹ Different criteria for the grouping of legal traditions exist and these can vary throughout history. A major classification divides into Civil, Common, Socialist, Islamic, Talmudic, Asian, Hindu, and African/Malagasy legal families; see David & Brierley, *supra* note 6.

¹² The contemporary legal system of China, for example, unifies civil, common and socialist law, beside the parallel existence of other families, such as Islamic law; see J. Huang & A. Xuefeng Qian, "One Country, Two Systems," Three Law Families, and Four Legal Regions: The Emerging Inter Regional Conflicts of Laws in China" (1995) 5 *Duke J. Comp. & Int'l L.* 289.

¹³ See Glenn, H.P., "Persuasive Authority" (1987) 32 *McGill L. J.* 261 [hereinafter "Persuasive Authority"].

law, by allowing the application of foreign law which eventually is very different from the law of the forum. This does not seem to hold true for public international law. Public international law in its contemporary form is often criticised as a solely European or more recently “Western”¹⁴ concept of law.¹⁵ Indeed, the formation of the current international legal order was closely linked to the European and Euro-American colonialist and imperialist ages. This strong imprint on today’s international legal system based on various international organisations must be accepted as a historical *factum*, but certainly not as a *datum* for the future.¹⁶ The first steps in the recognition of the diversity of the world community are found in the terms of “legal pluralism”¹⁷ and “legal polycentricity”¹⁸, repudiating both the presumption of the sole existence of one total legal order and a single-value approach to law.

For the purposes of this essay, it suffices to say that considering the very nature and rationale of public and private international law – both dealing with interactions amongst these various societies, whether organised as states, peoples, groups or individuals, that together form the world community – different legal traditions must be given their equal and due place in the international legal order. This can be achieved by emphasising the continuity in the evolution of law; an evolution that has constantly been influenced by the exchange of many different cultures. In fact, where no such exchange has taken place no evolution has

¹⁴ The term “West” is hard to delimit but generally is said to include Europe, North America, plus other European settler countries such as Australia and New Zealand; see Huntington, *supra* note 10 at 46-47.

¹⁵ See e.g. R.P. Anand, *New States and International Law* (Delhi: Vikas Publishing House, 1972) at 6-44; A.B. Bozeman, *The Future of Law in a Multicultural World* (New Jersey: Princeton University Press, 1971) at 35-49, 161-186 [hereinafter *Future of Law*].

¹⁶ See A.B. Bozeman, *Politics and Culture in International History* (Princeton: Princeton University Press, 1960) at 520-522 [hereinafter *Politics and Culture*].

¹⁷ “Legal pluralism” describes “the parallel existence of different legal systems or orders in one geographical or in one topical area”; see I.-J. Sand, “From the Distinction between Public and Private Law – to Legal Categories of Social and Institutional Differentiation, in a Pluralistic Legal Context” in H. Petersen & H. Zahle, eds., *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot: Dartmouth, 1995) 85 at 88.

¹⁸ 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 S.P. Sinha, *Legal Polycentricity and International Law* (Durham: Carolina Academic Press, 1996) at 1.

taken place either. Finally, the recognition of different legal traditions may also assist in the controversy about the dilemma of legal polycentricity and its denial of radical relativism. Because the dependence of legal traditions on local, personal and temporal criteria is accepted, their obvious differences are only apparent and can still be perceived as a single-value approach.

1.3. The Critical Point: Tendencies in Contemporary Law

As said earlier, the second half of the 20th century has faced dynamic development in literally all areas affecting human society. In accordance with the adage “*ubi societas, ibi ius*,” and driven by the theory of legal positivism, law was not spared from this development and underwent, is undergoing, and will undergo, significant changes. The evolution of law has, at the dawn of this century, reached a critical point, since the present state of law gives cause for hope as well as for concern. This critical point is understood as two parallel yet mutually antagonistic trends. These trends give rise to hope as well as to concern.

The evolution of law in the western and westernised world, from the Treaty of Westphalia (1648)¹⁹ to the beginning of the current century, can be described as relatively slow. Altogether the efforts that were being made, focused on the establishment of an international legal regime existing independently from the traditional will of the sovereign. In the middle of the current century, due to the rapid development on the political, economical and social plane, fostered by the scientific and technological progress, and usually referred to as “globalisation”, the world has grown smaller. The outcome of this progress is obvious and spares no one within society, and is most felt in *e.g.* the field of telecommunications, means of transport, experiments in the medical field, pollution, warfare etc. The new developments of the natural sciences are creating new problems for law, and as a result new categories of laws are required. Although the world has grown relatively smaller, the gap between the different actors constituting the world is constantly expanding. This is recognised in the

¹⁹ The treaty of Westphalia is considered as the point of departure of contemporary international law; see Daillier & Pellet, *supra* note 6 at 49-50.

distinction between the developed and developing world, regardless of whether the distinction is reasonable or not.

At the same time and due to this process, law – municipal as well as international – has rapidly evolved, but the question is whether it has progressed or regressed? Law has certainly progressed externally, *i.e.* in terms of its presence in daily life, and this is felt by both states and individuals. Almost every action by a state or any other entity of international law, and equally, almost every interaction between individuals is subject to law. Hence, the most visible progress is one in the quantity of norms governing a great variety of fields of application. The underlying intention is that the possibility of *lacunae* is being reduced, the democratic participation of a great variety of subjects is broadened and guaranteed; altogether the legal regime itself has gained stability, predictability and legality. These are the factors that contain hope.

From an internal point of view, as far as the function of law with respect to justice in *largu sensu* (thus including morality, predictability and continuity) is concerned, the issue is less clear. As a matter of fact, the huge quantity of norms enacted gives rise to much concern. This phenomenon has emerged under different notions, such as “plethora of law”²⁰, “*gigantesque magma législatif et réglementaire*”²¹ or “*Normenflut*”²² (flood of norms or laws), “juridification”²³, and additionally goes hand in hand with a loss of editorial legislative quality, a decrease in orientation for the subject in search of law, an aggravation in the finding, the subsequent application of the relative norm and a possible augmentation of concurrence of norms inside and outside different branches of law. Together these trends

²⁰ See “Persuasive Authority”, *supra* note 13 at 286.

²¹ See B. Oppetit, “Les tendances régressives dans l’évolution du droit contemporain” in J.-F. Pillebout, ed., *Mélanges dédiés à Dominique Holleaux* (Paris: Litec, 1990) 317 at 317.

²² See *e.g.* 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) at 6.

²³ See G. Teubner, “Juridification: Concepts, Aspects, Limits, Solutions” in G. Teubner, ed., *Juridification of Social Spheres* (Berlin: Walter de Gruyter, 1987) 3.

are capable of putting the state governed by the rule of law in serious danger, and therefore must be considered to be factors for concern.

These recent developments have created two competing effects in various fields. The gain in legal security by the omnipresence of law in human society is compensated by the loss in orientation by the huge mass of norms. Thus, the progressive development has also created regressive tendencies. The current dilemma is well described in the statement, made by H. Keyserling in 1933, that "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."²⁴

This statement leads back to the initial distinction between "public" and "private", because the two notions are also synonyms for the question of whether a single individual or a collective group of individuals (in the form of the state) are subject to law. The inherent problem (enigma) of the dichotomy of public and private is therefore the question as to whether subjects of public international law, which are traditionally states, or subjects of private international law, namely individuals, are supposed to slip through the web of norms and thus be denied legal protection? The answer to this major problem is found in the very nature of law as it is traditionally perceived.²⁵ A law is thus an attempt to formulate a norm with the use of abstract wording, that governs the broadest area of life possible. The difficulty of this undertaking is well highlighted by Aristotle, who pointed out that "every law is laid down in general terms, while there are matters about which it is impossible to speak about in general terms. Where then, it is necessary to speak in general terms, but impossible to do so correctly, the legislator lays down what holds good for the majority of

²⁴ H. Keyserling, *Problems of Personal Life* (London: Jonathan Cape Thirty Bedford Square, 1934) at 134-135.

²⁵ It is to be noted that the two remaining major legal systems (after the fall of the Berlin Wall in 1989), the Civil and the Common law systems, are characterised by different approaches. While the Civil law system builds on general and abstract norms, the Common law system undertakes a more a specific case-based approach. Despite this difference in the point of departure, the differences are decreasing and both systems increasingly incorporate elements of the other, and they will eventually forge into one.

cases, being quite aware that it does not hold good for all".²⁶ Thus, the simple consideration of all cases – which is attempted and leads to the process of juridification – would render the formulation of a general statement impossible. Aristotle continues: "The law, indeed, is none the less correctly laid down because of this defect; for the defect lies not in the law, nor in the lawgiver, but in the nature of the subject-matter, being necessarily involved in the very conditions of human action."²⁷

Despite or perhaps because of this flaw apparently inherent in law, the challenge in the near future is to examine the traditional perception of the theory underlying law. This flaw and the various opposite tendencies in the evolution of law, call for new theoretical approaches to the law regulating the present world order. From a practical perspective it calls for a simpler general theory, allowing for a rapid orientation but also a just application of the vast variety of norms.

The interest of this work is, therefore, grounded in the question of a possible entanglement of legal notions that are opposed to each other, such as the controversial relationship between private and public international law.

2. A Law for the World of Today?

2.1. Dynamic Evolution vs. Static Notion

Throughout history, constant attempts have been made and continue to be made to adapt the present legal order to the underlying dynamic evolution that human society is going through. The present challenge is to find a legal notion that faces the challenges of the new realities that a global political world order has created. In the face of many new developments, such a notion would not only have to cover the different categories of law, such as private or public, but also it would have to meet the implications of an immense cultural diversity of legal systems traditionally represented by a large number of states.

²⁶ Aristotle, *Nicomachean Ethics*, 10th ed. (London: Kegan Paul, Trench, Trübner & Co., 1906) at 175.

²⁷ *Ibid.*

In this process of adaptation, the preliminary step is to bring about the desired change by redefining existing notions, or by creating new notions used in legal discourse. Engagement in such an attempt inevitably leads us to confront the significance of language, for any kind of human activity and especially for law. Generally, it is accepted that notions are expressions based on ideas that manifest themselves through written or spoken language. Since legal norms consist of such notions, their genesis can be traced back to a legal idea.²⁸ In the course of the evolutionary development of society, the conditions of life change and legal ideas change as well. Since codification²⁹ – the process whereby legal ideas become positive law – is taking place extensively, changes in the ideas do not automatically result in changes of the written positive law. Therefore, when new legal ideas emerge, they are still expressed through, or at least stand in the context of, notions that gave shape to previous legal norms. The new ideas, and the meaning that was referred to these notions at the moment of their adoption as a norm, may then stand in clear contradiction to each other.

In general, this fate is shared by the notion of international law, especially when approached from the perspective of the different categories of private and public international law. Several attempts that have been made to adapt the notion of international law to the rapid changes in the world will now be examined.

2.2. The Notion of “International Law”

The problem with the notion “international law” covering most of the new realities of the current world (in the legal context) becomes clear when it is juxtaposed with the adjectives public and private. The reason for this problem is explained by Judge P.C. Jessup, who points out that the universality of the human problems in a “complex interrelated world community which may be described as beginning with the individual and reaching up to the

²⁸ The process of realisation of law (*Rechtsverwirklichung*) includes three steps from a legal idea (*Rechtsidee*), to a legal norm (*Rechtsnorm*), and to a legal decision (*Rechtsentscheidung*); see A. Kaufmann, *Analogie und “Natur der Sache”*, 2nd ed. (Heidelberg: R. v. Decker & C.F. Müller, 1982) at 13.

For a short discussion of the concept of a legal idea (*Rechtsidee*) with regard to public international law, see also A. Verdross, *Völkerrecht* (Wien: Springer, 1964) at 13-17.

²⁹ See generally H.P. Glenn, “The Grounding of Codification” (1998) U.C. Davis L. Rev. 765.

so-called “family of nations” or “society of states” and the necessity of law to respond to the resulting realities, does not seem to fit with the notion of “international law”.³⁰ The term “international law” is of a misleading kind, since it “suggests that one is concerned only with relations of one nation (or state) to other nations (or states)”.³¹ This definition of international law does not meet the standards set forth by our present time in order to cover a major part of the various actors engaged in cross border activities. The increase in these activities also led to the emergence of various new notions that evolved parallel to the new realities. These main notions are:

International law – The problem with international law lies in the literal meaning of its Latin root ‘*natio*’, which refers to its relation between states and states only. Since today, numerous activities crossing one or several nation’s borders appear not only derived from the activities of states, public authorities or international organisations, but also from private individuals, private corporations or international non-governmental organisations (INGO’s), the notion “international” appears too narrow and therefore outdated. Variations on the term “international” using the root ‘*natio*’ are the terms “supranational” or “multinational”. On the one hand, supranational law simply lifts the scope of the nation’s domestic law across its borders and commonly denominates the law created in the process of regional integration (e.g. EU). On the other hand, multinational law suggests by its literal meaning that “many” nations are involved. The most common use of multinational law is with regard to the law governing multinational enterprises (MNE’s) and their cross-border activities. Multinational corporations or, as they are sometimes called, transnational corporations, are companies headquartered in one state but operating in many countries.³² The term transnational law³³ is closely related, but at the same time broader. For Judge P.C. Jessup, transnational law

³⁰ Jessup, *supra* note 6 at 1-34.

³¹ *Ibid.* at 1.

³² See D.H. Ott, *Public International Law in the Modern World* (London: Pitman, 1987) at 80-81.

³³ 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 K. Siehr, “Sachrecht im IPR, transnationales Recht und lex mercatoria” in W. Holl & U. Klinke, eds., *Internationales Privatrecht – Internationales Wirtschaftsrecht* (München: Heymann, 1985) 103 at 108-112.

includes “both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private.”³⁴

International Uniform Law (*Internationales Einheitsrecht*)³⁵ – The problem with this term is that it is more descriptive in alluding to the uniformity of the normative content than constitutive, by denominating a whole body of law, in character. Moreover, it is usually limited to the realm of private international law and like most notions has not yet reached a consistent meaning.³⁶

[European] Community (Common) Law (*droit commun/Gemeinschaftsrecht*) – The communitarian or common element is now mainly used to describe the law of the European Union. Nonetheless, it 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 a world law³⁷ or world community law.³⁸ Here, emphasis is laid upon the social rather than the political aspect, which results in giving priority to the peoples over the state. Such enhanced focus on the peoples is reflected in the Latin notion *ius gentium* as well as in the German notion *Völkerrecht*. The emphasis on the role of the peoples also appears as a principal aim of the Amsterdam Treaty of the European Union.³⁹

³⁴ Jessup, *supra* note 6 at 106.

³⁵ See e.g. J. Kropholler, *Internationales Einheitsrecht* (Tübingen: J.C.B. Mohr, 1975) [hereinafter *Einheitsrecht*].

³⁶ *Ibid.* at 1.

³⁷ See e.g. H.J. Berman, “World Law” (1995) 18 *Fordham Int’l L.J.* 1617 at 1621 *et seq.*

³⁸ 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. See G. Schwarzenberger, *The Dynamics of International Law* (Milton: Professional Books Limited, 1976) at 2, 4, 107-117 [hereinafter *Dynamics*].

³⁹ See the second paragraph of Article A of the Amsterdam Treaty of the European Union, which reads as follows: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen” [emphasis added], *The Amsterdam Treaty* (signed on 2 October 1997), Official Journal C 340, 10.11.1997, pp. 1-144, online: European Union Homepage, <<http://europa.eu.int/eur-lex/en/treaties/index.html>> (date accessed: 9 April 1999).

Global Law – This notion reflects what the international community is really about today, namely a world society comprising the sum of all nations and also of non-state actors on the globe called “Planet Earth”. An important element of global law is the shift of legal development from the state to society. In this context, society means that the state is not the sole actor, but that numerous non-state actors such as multinational enterprises (MNEs), multinational law firms, international non-governmental organisations (INGOs), and labour unions, are also engaged in the law-making process. A wide range of legal sources stemming from non-governmental actors, such as a transnational law of economic enterprises (*lex mercatoria*) or a *lex sportiva internationalis* have emerged.⁴⁰ The term “global” thus stands in direct contact with planetary issues that cannot be confronted solely on the basis of a single state’s legal instruments; and given the lack of an international institutional authority capable of regulating these issues, members of the society involved with these issues take recourse to the means of self-regulation. A further important example for such a planetary issue concerns environmental problems and the protection of nature. For E. Brown Weiss these planetary rights and obligations include all sorts of natural (*e.g.* water, soil, forests) and cultural (*i.e.* the knowledge of natural resources) resources. Furthermore, she adds to the spatial factor the time-factor of intergenerational equity.⁴¹ Global law, therefore, can be defined as a body of law governing the entire planet (including its atmosphere) as well as civil society, *i.e.* private actors as a law-maker.

Universal Law – A label that, according to physics terminology, would meet the geographical requirements of human law so as to include outer space activities, is found in that of ‘universal law’. However, before there is reported contact with an outer space life form, it suffices to refer to the term universal in its usual conception. As can be observed in

⁴⁰ See G. Teubner, ed., *Global Law without a State* (Aldershot: Dartmouth, 1997) [hereinafter *Global Law*].

⁴¹ “Principles of equity between generations lead to a set of planetary, or intergenerational, rights and obligations, with associated international duties of use. Planetary rights [and obligations] are the rights [and obligations] which each generation has to receive [and to pass on] the planet in no worse condition than that of the previous generation, to inherit comparable diversity in the natural and cultural resource bases, and to have equitable access to the use and benefits of the legacy”; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (Tokyo: The United Nations University, 1989) at 95.

the context of the Universal Declaration of Human Rights (UDHR)⁴², the main concern is not only geographic but also temporal, especially with respect to the moral foundation, and its resulting (global and eternal) validity and degree of acceptance, of a specific law.

2.3. A Synthetic Search for a Suitable Notion

When contemplating the variety of notions that exist for the law of today and possibly of tomorrow, it is hard to make a choice. Each notion has appeared in a different time and in a different context, but all of them are interrelated and overlap. Hence, for the purposes of this essay, preference will be given to the commonly used term "international law", because as an adjective it is common to private and public international law and it is used in the widest context of all. Therefore, instead of trying to change the term itself, the focus will be on a change of its understanding and the scope of its application.

The role of the nation-state, reflected in the adjective "international", within a world law is well recognised and established. The nation-state was and continues to be the organisational entity that laid the foundations for the emergence of a world legal order. The hybrids "supra-, multi-, transnational" simply anticipate the trend of extending the scope of issues of international interest. In a wider context "supra" can be understood as an incentive to expand the field of observation towards a wider perspective and "multi" can be translated as the need for a pluralistic approach, while "trans" expresses the need to link the various emerging approaches in a pluralistic scheme of international law. International uniform law raises awareness of the role of uniform laws, which help to guarantee legal values such as predictability and identical interpretation, and hence serve justice and fairness. From community law the importance of an increased participation of private individuals and other smaller group entities can be drawn. It also establishes the important and ideal paradox of a maximum degree of collective integration through a maximum of individual freedom. "Global" refers to the breadth of the field of application of laws with respect to spatial and temporal considerations, as well as to the borderline between state actors or private actors as

⁴² *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

law-makers. A concept of global law encompasses everything relevant to the planet as a whole, and thus forces one to think in holistic patterns. Finally, the universal element can be thought of as a reminder of some important features of law, namely continuity, morality, validity and justice.

3. *Methodological Considerations*

3.1. Method of Approach

The many implications of the theme at issue call for a few clarifying comments on the purpose and the methods chosen for this study. It goes without saying that each of the two categories of law, public international law as well as private international law, deal with a great variety of complex interactions between numerous different actors, within different diverse societies of the current global community. This complexity has reached the field of law and is responsible for the production of a huge amount of legal material such that no longer can any single individual master it. Parallel to the increase in the complexity and diversity of life, a general paradigm shift in scientific thinking is on its way. This shift was first initiated by new insights in the realm of physics.⁴³ In the meantime, and probably due to their connection to the smallest (subatomic level) as well as largest (the universe) entities in

⁴³ The main discoveries were the formulation of the theory of relativity by A. Einstein, the interpretation of quantum mechanics by N. Bohr and W. Heisenberg as well as the unification of the theory of relativity and quantum mechanics in the bootstrap theory by G.F. Chew. Their discovery and the progress of science as a whole has brought a change in scientific thinking that according to Fritjof Capra is founded in six main criteria for new-paradigm thinking: 1. A shift in the relationship between the part and the whole. Former scientific thinking was based on the belief that a complex system could be understood from the properties of the parts. In the new paradigm, the view is that the properties of the parts admittedly contribute to the understanding of the whole, but at the same time the properties of the parts can only be understood through the dynamics of the whole; 2. a shift from thinking in terms of structure to those of process. In the new paradigm, structures are not of primary interest, rather than the processes underlying these structures; 3. a shift from objective to epistemic science. In objective science scientific descriptions are seen as independent from the observer and the process of knowledge, whereas in epistemic science they are not; 4. a shift from science as the building of knowledge to a network of relationships; 5. a shift from truth to approximate description. Accordingly, science cannot provide any complete and definitive understanding but only approximate descriptions of reality; and 6. a shift from the attitude of domination and control of nature to cooperation; see F. Capra, *The Tao of Physics*, 3rd ed. (London: Flamingo, 1991) at 360-368.

the human being's living environment, the shift also begins to be felt in social sciences.⁴⁴ The change of perception common to natural science and legal science, for example, is reflected in the definition of law given by Michael I. Sovern, when he stated that "law is not a thing, but a process"⁴⁵ or, generally, in an "autopoietic" approach to law.⁴⁶

In short, the paradigm shift can be reduced to a trend towards a more holistic approach in science that is generated through an increase in available data and the launch of a dynamism in the totality of interactions taking place in the world today. As the dynamism increases, paradoxes appear in greater number.

However controversial and disputed some of the formulations of these theories may be, a general trend in this direction must be accepted as a fact, reflected in the rich diversity and the high complexity of the present world situation. More complex phenomena and problems call for more dynamic theories and proposals for solutions based on a broader spectrum.

This need is created by complex mechanisms dominating life in an information society⁴⁷, where an ever increasing amount of data is available through automated data processing.

⁴⁴ 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 N. Luhmann, "Law and Social Theory: Law as a Social System" (1988) 83 Nw. U.L. Rev. 136 at 137 and A. Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 A.J.I.L. 205 at 215.

⁴⁵ See M. Rheinstein, *Einführung in die Rechtsvergleichung*, 2nd ed. (München: C.H. Beck, 1987) at 5. As a contrasting comparison of law with the field of the particle world in physics, S-Matrix theory – as originally proposed by W. Heisenberg in 1943 – brought about a change in the emphasis from objects to events; see Capra, *supra* note 43 at 290.

⁴⁶ See G. Teubner, ed., *Autopoietic Law: A New Approach to Law and Society* (Berlin: Walter De Gruyter, 1988) [hereinafter *Autopoietic Law*] and G. Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993) [hereinafter *Autopoietic System*].

⁴⁷ One aspect of the information society is that it is built upon the development and the widening application of information and communication technologies (ICTs). Therefore, living and working in the information society requires not only strong basic skills in numeracy and literacy, but also the special skill of "informacy", which is defined as the skill of interaction with the new technology; see EC, Commission, *Green Paper – Living and Working in the Information Society: People First*, COM(96)389 (22 July 1996), online: The European Commission, *Official Documents*, Homepage, <http://www.europa.eu.int/comm/off/green/index_en.htm#1999> (date accessed: 10 October 1999).

Unfortunately, an increase in information does not always mean a better understanding which guarantees a good orientation in our environment. The need for orientation especially holds true for the legal realm, as was shown before. The impact of the information age on international law, one scholar has written, is equal to the imprint of the Peace of Westphalia on (international) law during the past centuries.⁴⁸ With respect to law, this issue is often raised in terms of whether generalisation or specialisation should be favoured in legal education. Straight answers to how better understanding and orientation can be achieved are lacking and the subject remains a controversial one.⁴⁹ It is obvious that legal education is positioned in an interplay with the legal profession.⁵⁰ With the dramatic changes in the world, the legal profession has to change as well. This change is best translated into a general broadening of the field of legal practice by an increase in transnational activity and the resulting need for the unification of law now produced in huge quantities at various levels.⁵¹

In the near future, the trend in legal education and theory – by means of practicability and feasibility, as well as reality – will be forced to move towards generalisation at the expense

For a short survey of some further problems regarding the "information society"; see also EC, Commission, *White Paper on Education and Training – Teaching and Learning – Towards the Learning Society*, COM(95) 590 (29 November 1995), online: The European Commission Homepage, *Official Documents*, <http://www.europa.eu.int/comm/off/green/index_en.htm#1999> (date accessed: 10 October 1999).

⁴⁸ See J.K. Gamble, "International Law and the Information Age" (1996) 17 *Mich. J. Int'l L.* 747 at 799.

⁴⁹ Professor Harold Koh warned at the ASIL/NVIR Joint Conference, held in The Hague, July 4-6, 1991, that a trend towards abandonment of generalisation and the danger of over-specialisation can be observed; see H. Hongju Koh, in *The American Society of International Law & The Nederlandse Vereniging voor Internationaal Recht*, eds., *Contemporary International Law Issues: Sharing Pan-European and American Perspectives* (Dordrecht, Martinus Nijhoff Publishers, 1992) 198 at 198.

⁵⁰ One side of the nature of this interplay is reflected in the statement that "the theory of today is the practice of tomorrow, just as the practice of today is the theory of yesterday" given by Professor Wolfgang Mantl (Professor for Constitutional Law and Political Science at the Karl-Franzens-Universität Graz, Austria) in his lectures during the summer term 1996, when he was confronted with the criticism concerning the lack of practical value of today's legal education in Austria. The other side, of course is, that the legal practice exercises an undeniable influence on the legal education by means of demand for a certain kind of a trained lawyer.

of specialisation. Generalisation, however, does not mean the imparting of the maximum knowledge, but rather the provision of the methods and the substrata for a problem-oriented working ability. This particular meaning of 'generalisation' has also appeared in the terminology of a general jurisprudence, that designs "a science which would embrace the general concepts of law common to all systems, international and municipal, private and public".⁵² The reason is that a general understanding allows for better clarification of a detailed problem, rather than the reverse. In a complex and diverse interdependent world, an identical problem is very unlikely to appear twice.

3.2. Seven Links between "Public" and "Private"

The paradigm shift that was mentioned above, is also expressed in the shift from a 'classification-universe' towards a 'relation-universe'.⁵³ *In concreto*, this means that it is not the clear boundary and content of a specific category of law, such as public or private international, which is of major interest, but the various points of entanglement with other such existing categories. Moreover, from a dynamic approach – taking into account the evolutionary process in the formation of these categories – the interwovenness of each separate category in a general web of law is more likely to become apparent. On the other hand, each such category consists of a huge quantity of legal material that might hinder the clear delimitation of one category from the other, and dim the overall view of the system. To prevent this from happening, and for reasons of feasibility in the framework of an essay, a method comparable to 'pattern recognition' is pursued. 'Pattern recognition' does not rely so

⁵¹ For a general discussion of this topic see H.P. Glenn, "Private International Law and the New International Legal Professions" in *Conflicts et harmonisation, Kollision und Vereinheitlichung, Conflicts and Harmonization – Mélanges à l'honneur d'Alfred E. von Overbeck* (Fribourg: Éditions Universitaires, 1990) 31 at 31-45.

⁵² See H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London: Longmans, Green & Co, 1927) at 33.

⁵³ See F. Vester, *Die Kunst vernetzt zu denken: Ideen und Werkzeuge für einen neuen Umgang mit Komplexität* (Stuttgart: DVA, 1999) at 143 *et seq.*

much on numerically or statistically ascertainable data, but rather on the relation of components of dynamic open systems.⁵⁴

For the interrelation between public and private international law, their main elements can be reduced to the general dichotomy of the terms “public” and “private”, as well as the dichotomy of international and municipal (or domestic) law. To enhance the dynamic character of the interrelation of these two pairs of opposites, they will be structured at the intersection of two axes. This imaginary rotation shall stand for the dynamism that is taking place in the world today and that is responsible for the blurring away of pairs of opposites such as that of public/private. The horizontal axis deals with the public and private, and the vertical axis with the international and municipal law, dichotomy. From the various possibilities of relating one to the other – as if in the process of rotation – seven possible comparative approaches result as follows:

- I. *Private law and public law;*
- II. *international and municipal (domestic/national) law*
- III. *public law and public international law;*
- IV. *private law and private international law;*
- V. *public law and private international law;*
- VI. *private law and public international law; and*
- VII. *private international law and public international law.*

These seven juxtapositions of the private/public and international/municipal law dichotomy will be examined. Their analysis will be preceded by a general outlook of the significance of the terms public and private, without direct reference to the legal realm. After all, clear emphasis is laid upon the interrelation of public international law and private international law due to their global regulatory outreach, and this will be dealt with in a proper chapter in

⁵⁴ ‘Pattern recognition’ therefore relies less on the quantity and precision of the available data, but is rather based on a few principal parameters of information. It hereby works similar to the human brain, and is also closely related to the concept of fuzzy logic; *ibid.* at 21-23, 54 *et seq.*, 149-153; The formal name of fuzziness in science is ‘multivalence’ (as opposed to ‘bivalence’). Multivalued logic was first worked out in order to deal with W. Heisenberg’s uncertainty principle in quantum mechanics. The uncertainty principle states that “if you measure some things precisely, you cannot measure other things as precisely”; see B. Kosko, *Fuzzy Thinking: The New Science of Fuzzy Logic* (New York: Hyperion, 1993) at 18 *et seq.*

three separate subdivisions. Finally, it is noteworthy to state that no hierarchical preference is given to one or the other concept of law in their juxtaposition.

3.3. Résumé

This essay focuses on the interplay between different categories of law, to be construed as a conceptual overview over the spheres of public and private law and their relation in the emerging global legal order. This Introduction yields two judgments, *Hilton v. Guyot* and *Hunt v. Lac d'Amiante du Québec Ltée*, highlighting the growing awareness of the importance of a common consideration of public and private international law, in the past century. Following that, it aims to give a short reflection of some of the main points of interest in today's legal order that need to be kept in mind. Chapter I shortly presents private and public international law and sketches the main characteristics of the various constellations between two dichotomous pairs that underlie the distinction of public international and private international law. The two pairs are the opposition between private and public law in relation to the opposition of international and municipal law. In Chapter II the current situation of the relation of public international law and private international will be scrutinised in an abstract subdivision of an organic view of society in three domains; Law, Economics, and Politics. In a succeeding synthesis an attempt will be made to explain the core of the elements nurturing the world's dynamism and to localise the consequences for the legal realm. The Conclusion shortly reconsiders the principal statements made in this essay.

II. THE DYNAMISM OF THE PUBLIC/PRIVATE DICHOTOMY

1. *Public International Law and Private International Law*

1.1. Public International Law

a.) A Short Survey of its History and Evolution

The genesis of what is today commonly called “public international law”, or the “law of nations”, cannot be traced back to a particular date, but rather vanishes in the dark of history. What is clear though, is that the history of international law is insolubly linked to human history, a fact expressed in the adage “*ubi societas, ibi ius*”. Its primordial traces reach back to religious revelations and prehistoric finds, and it has since then evolved in the course of history through the interactions of various cultures populating the entire planet to what we call public international law today.⁵⁵ Modern public international law developed mainly from the concept of the (nation) state and its sovereignty⁵⁶. This was, however, not the case before the 18th century when the same body of law was rather based on the concept of peoples (*gentes*).⁵⁷ Still, in the German language public international law is named “*Völkerrecht*”, reminding us of the Latin term “*ius gentium*”.

Since then drastic changes have taken place, and are taking place, in the world, which affect and have affected the realm of international law. However, modern public international law is still referred to as the law governing the relations between different states, and between states and international organisations. The latter, nevertheless, are considered as entities created by these interstate activities. So far, the notion’s content can be said to imply nations

⁵⁵ For a short survey of the history of public international law, see Verdross, *supra* note 28 at 31-94.

⁵⁶ The meaning of sovereignty departed from the idea of a supreme legislative and political power within a state and since then has been subject to constant changes. Today sovereignty expresses the assumption that a state is independent and has exclusive legislative power over its territory and the people residing therein. This perception however is currently challenged by the increase in interdependence of the states forming the world’s community; see also Akehurst, *supra* note 6 at 15 *et seq.*

⁵⁷ It was in 1780 that Jeremy Bentham published his book “An Introduction to the Principles of Morals and Legislation”, in which he coined the notion of “international law”; see Daillier & Pellet, *supra* note 6 at 33.

and to a lesser extent peoples.⁵⁸ During the last decades, new actors have become increasingly involved in this field. These actors are international non-governmental organisations, multinational corporations, and finally private (natural and moral) persons, and they challenge the traditional definition of its scope of application. Their strong critique attacks the insufficient ability of public international law to deal with the reality of conflicts occurring in the world today, caused by its attachment to the traditional perception of states as the sole actors of international law.

b.) The Foundations of Public International law

The evolution of public international law on the one hand reveals the strong influences that theories exercise on the shape of law and its institutions; on the other hand the theories themselves are shaped by influences stemming from the factual developments occurring in this world. This becomes obvious when one considers the two main theories competing in international law: natural law and positive law, the first emphasising moral standards and the latter a more practical approach. While a naturalist view dominated the seventeenth and eighteenth centuries, the positivist view gained importance throughout the nineteenth century. The atrocities committed by the Nazi government that culminated in World War II, considerably revived the popularity of natural law. Since then, the naturalist and positivist view can be said to co-exist in parallel. Additionally, other new approaches have been undertaken to explain the existence and functioning of international law. The realist school, for example, used economic and political data; the behaviourist movement introduced elements of psychology, anthropology and sociology into the study of international law.⁵⁹

To turn from the theoretical to the practical side of international law, it is helpful to briefly contemplate the principal sources of public international law. These sources are laid down in general terms in Art 38 (1) of the Statute of the International Court of Justice, which reads as follows:

⁵⁸ The status of peoples in international law is recognised by the legal principle of self-determination as well as the Charter of the United Nations (Art 55); see I. Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979) at 593-596.

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁶⁰

The first two sources reflect to some extent the parallel existence of a positivist and a naturalist approach to international law. The first source, international conventions⁶¹ is – due to its widespread use – the most authoritative. International conventions are according to their binding effect classified as ‘contract-treaties’, or law-making treaties.⁶² Contract-treaties only bind the signing parties, whereas law-making treaties are intended to have a wider scope of application. The huge number of treaties signed, and the ongoing process of codification of general state practices, *i.e.* custom, is replacing more and more international customary law, the second important source of international law. International custom is defined as the evidence of a general state practice accepted as law. For an international customary rule to have legal value, the rule must consist of reported continuous and repetitive state practices, *opinio iuris sive necessitatis*, and the absence of persistent objection.⁶³ It also corresponds more to the naturalist thought and was the main source of

⁵⁹ For a discussion of these new approaches see Shaw, *supra* note 6 at 50-57.

⁶⁰ See the *Statute of the International Court of Justice*, online: International Court of Justice Homepage <<http://www.icj-cij.org/icjwww/ibasicdocuments.htm>> (last modified: 19 October 1999).

⁶¹ Note that the word ‘convention’ means a treaty. Other synonyms for treaties, or for particular types of treaties are agreement, pact, protocol, charter, statute, act, covenant, declaration, engagement, arrangement, accord, regulations, and provisions; see Akehurst, *supra* note 6 at 23.

⁶² *Ibid.* at 23 *et seq.*

⁶³ There must be clear evidence of repeated state practice, because according to the ICJ’s definition, a customary rule must be in accordance with “a constant and uniform usage practised by the states in question”. The evidence can be gained from various sources such as newspapers, historical records, diplomatic interchanges, official publications etc. The *opinio iuris* is the belief that a state activity is legally obligatory due to the existence of a rule of law. A single state that opposed the existence of a customary rule from its inception on (persistent objector) would not be bound by it; see Shaw, *supra* note 6 at 60-78.

international law as long as no relevant written material, in form of international treaties, existed. However, as long as the international legal order lacks a centralised organisation, international customary rules will continue to play an important role as a source of law.

The third source, general principles of law, is a further means to fill the gaps left by treaty and customary law within the international legal system. It is controversial whether the text of Article 38 (1) refers to general principles of national or of international law. Given the important role national general principles played in the process of the formation of international law and the increased mutual interplay of municipal and international law today, there is actually no reason why it should not refer to both.⁶⁴ In fact, general principles of law, by means of comparative research, provide a useful source for the establishment of a more coherent international legal order. The same is deemed true for judicial decisions and the teachings of learned writers, which are mentioned as a fourth source. The term judicial decisions, comprises (national and international) judicial, as well as arbitral, decisions. Judicial decisions serve as evidence of customary law and assist in the process of further developing international law. The Iran-United States Claims Tribunal was a benchmark in this respect.⁶⁵ Although reference to the writings of highly qualified publicists are still rare, a general increase in their importance can be stated.⁶⁶

As to the hierarchy between these sources, the judicial decisions and teachings of the most highly qualified publicists play a subordinate role. General principles complement custom and treaties and are therefore also considered as subsidiary sources to them. The hierarchical distinction between custom and treaties, the primary sources of international law, is more complicated, because on the one hand treaties codify existing custom, and on the other hand treaties themselves can be replaced by customary rules. Treaty law is the more frequently

⁶⁴ See Akehurst, *supra* note 6 at 34.

⁶⁵ The Iran-US claims tribunal was established by a claims agreement and granted the tribunal jurisdiction over claims by nationals of one party against another party as well as intergovernmental claims; see C.D. Gray, *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987) at 181-185.

⁶⁶ For example, the WTO dispute resolution system as established in 1995 – compared to its predecessor the GATT – has brought about a broader recourse to the writings of highly qualified publicist; see D. Palmeter & P.C. Mayroidis, "The WTO Legal System: Sources of Law" (1998) 92 A.J.I.L. 398 at 407 *et. seq.*

utilised instrument, but in contrast with customary law lacks universal binding force.⁶⁷ The universally binding force of custom is expressed in the concept of *ius cogens*, i.e. peremptory norms, which is based upon “an acceptance of fundamental and superior values within the system and in some respects is akin to the notion of public order or public policy in domestic legal orders”.⁶⁸ A further expression of the naturalist character expressed by custom is found in the concept of obligations *erga omnes*.⁶⁹ With full awareness of the major importance of the distinction between customary and treaty law as a ground for the decision of a particular dispute, it suffices here to highlight their complementary function as sources of international law.⁷⁰

As global integration proceeds, and the interdependence between the actors of international law increases, new sources emerge. In a non-exhaustive enumeration these new sources are: (1) The acts of international organisations.⁷¹ (2) Unilateral acts of states may under certain circumstances also give rise to international obligations.⁷² (3) Analogous to the recognition of local custom as a binding source, acts of regional organisations and their specific organs must be deemed to be an apt source of international law.⁷³ (4) Furthermore, considerations of

⁶⁷ See H.E. Chodosh, “An Interpretative Theory of International Law: The Distinction between Treaty and Customary Law” (1995) 28 Vand. J. Transnat’l L. 973 at 977.

⁶⁸ The Vienna Convention on the Law of the Treaties defines peremptory norm as one that is “accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”; see Shaw, *supra* note 6 at 89 *et seq.*

⁶⁹ See Chapter II. 2.6.a.).

⁷⁰ A useful interpretative approach for the distinction is provided in Chodosh, *supra* note 67.

⁷¹ *E.g.* organs such as the General Assembly of the United Nations, the International Law Commission, the United Nations Commission on International Trade (UNCITRAL), the United Nations Conference on Trade and Development (UNCTAD); special agencies such as the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and independent bodies such as the International Law Association and the Institut de Droit International; see Shaw, *supra* note 6 at 96 *et seq.* While the WTO was established on the basis of a treaty (Marrakesh Agreement), as mentioned in Article 38(1) a. of the Statute of the ICJ, the panel and Appellate Body reports issued by the dispute resolution body of the WTO in their turn are also deemed in classification to be acts of an international organisation.

⁷² *Ibid.* at 98.

⁷³ *E.g.* the EU, NAFTA, MERCOSUR, ASEAN, APEC, or the OSCE, the Council of Europe *et al.*

natural law and equity may also serve as a source and have already been mentioned in the context of customary law. (5) Finally, in view of the societal complexity caused by scientific and technological progress resulting in difficult legal problems, it remains to see how far insights of other branches of sciences (rather than social sciences) will be called to serve as a source for (international) law.

1.2. Private International Law

a.) Notion, History and Evolution

Although the beginnings of private international law date back to antiquity, its main foundations were laid in the twelfth century in the city states of northern Italy. From then until the eighteenth century the municipal laws of the various states were classified in three categories: (1) personal statutes, which principally have the person as their object; (2) real statutes, which have property as their object; and (3) mixed statutes, which concern both persons and property.⁷⁴ The nineteenth century was mainly characterised by the names of Joseph Story (1779-1845), Friedrich Karl v. Savigny (1779-1861) and Pasquale Stanislao Mancini (1817-1888).⁷⁵ In their various works, these scholars laid the foundations for modern private international law.

Modern private international law originated in the middle of the 19th century in parallel with the strengthening of the Law of Nations (public international law), and out of the need to confront problems arising from the concept of the nation-state and state sovereignty. The territoriality of the nation state had created greater stability of legal institutions within state territory, but at the same time it had made mutual interactions between different states more difficult. Joseph Story, the father of the notion of "private international law", like many scholars before and after him, was faced with the division of the Earth into "distinct Nations,

⁷⁴ See J. Story, *Commentaries on the Conflict of Laws, Foreign and Domestic*, 3rd ed. (Boston: Charles C. Little & James Brown, 1846) at 17.

⁷⁵ See M. Gutzwiller, "Internationalprivatrecht: Die drei Grossen des 19. Jahrhunderts" in P. Bäckli & H. Hinderling & K. Eichenberger & H.P. Tschudi, eds., *Festschrift für Frank Vischer zum 60. Geburtstag* (Zürich: Schulthess Polygraphischer Verlag, 1983) 131.

inhabiting different regions, speaking different languages, engaged in different forms of government”, recognised by “the existence of any general, or universal rights and obligations constituting a Law of Nations”.⁷⁶ In its beginning, the science of private international law was founded on the grounds of equity.⁷⁷ Its main challenge was, therefore, to guarantee a mutual intercourse free from friction, and thus to contribute to international (judicial) harmony.

The notions of private international law, or ‘conflict of laws’ – as it is commonly referred to in Anglo-American jurisprudence – are misleading, because there is neither international nor private law, nor is there a “real” conflict of laws. This branch of law is not international because its norms are of purely national character. Therefore, not the law but only the facts of the case are international. There is also no “conflict” because a national law does not directly compete with a foreign law; they only compete regarding the question which law is the more apt and just law in a given case.

b.) The Foundations of Private International Law

Conflict of laws in its widest sense deals with three distinct but interrelated subjects, namely jurisdiction, choice of law, and the recognition of foreign judgments. This field of law tries to answer questions arising out of a dispute with foreign elements, such as, where an action is to be brought, what law shall the tribunal apply when the case is litigated, and will the tribunal’s decision be respected in other states?⁷⁸ In general terms, the body of rules called private international law fulfils a coordinating function between legal orders of different states, in the search for a greater decisional harmony.

From a theoretical perspective the historical development of private international law was dominated by two major ideas; the first focused on the personal, and the second on the territorial quality of a social order. These two ideas crystallised in the principle of

⁷⁶ Story, *supra* note 74 at 1, 3, 13.

⁷⁷ See H.E. Yntema, “The Comity Doctrine” (1966) 65 Michigan L. R. 9 at 12 *et seq.*

⁷⁸ See F.K. Juenger, “The Need for a Comparative Approach to Choice-of-Law Problems” (1999) 73 Tul. L. Rev. 1309 at 1310 [hereinafter “Comparative Approach”].

territoriality and the principle of personality, which set forth the framework for further evolution.⁷⁹ As a sort of reconciliation between the two, a compromise of personal and territorial reference, the principle of domicile entered the foreground. The three principles were developed by different schools in different countries and shaped through their legal systems, which again depended mainly on economic and social factors.⁸⁰

The elementary evolution of private international law could be roughly divided, until now, into four main approaches to the recognition of foreign law within a state's territory. These are: (1) the *lex fori*, (2) the multilateral, (3) the unilateral and (4) the substantive law approach.⁸¹ The point of departure of conflicts of law rules was a total ignorance of foreign rights and laws. The only law that was applied was the law of the forum (*lex fori*). This phase parallels with a social structure of society that due to the similarity of its subjects did not make any differentiation of the applicable law necessary. Later, hand in hand with the increased interactions between members of different groups, the need to distinguish between local and foreign law was recognised and multilateral rules slowly emerged. The multilateral approach provides special rules, so-called "jurisdiction-selecting rules", that refer to either one or the other legal system as a means of resolution for a legal issue by means of "connecting factors".⁸² In search of greater decisional harmony, the unilateral approach focused less on the specific legal systems by avoiding the exclusive application of one or the other legal system. It rather inquired into the spatial purport of the potentially applicable domestic and foreign rules of decision. The last step in the evolution allows for a higher degree of decisional harmony and is provided by the substantive law approach. Hereby

⁷⁹ See A. Schnitzer, *Handbuch des internationalen Privatrechts*, vol. 1, 4th ed. (Basel: Recht und Gesellschaft, 1957) at 5-6.

⁸⁰ The first systematic consideration of the conflict between the territoriality and the personality principle was undertaken by the Italian school (9th-12th century). Adherents of this school (e.g. Aldricus) were called statistists, and their name derives from the distinction of *statuta personalia* and *statuta realia*. The French school (12th-14th century) also divided the norms in *coutumes réelles* and *coutumes personnelles*, but towards the end emphasised the territoriality principle.

For a general discussion of these schools, *ibid.* at 3-21; Kegel, *supra* note 6 at 125-163.

⁸¹ See "Comparative Approach", *supra* note 78 at 1314-1320.

⁸² *Ibid.* at 1315, 1316.

uniform rules, thus interstate or international rules that contain substantive norms (*Sachnormen*), are applied to the legal issue at stake.⁸³

The sources of private international law are – due to their national character, and the fact that they differ from country to country – hard to determine. In most cases the constitution and the form of government of a particular state will determine the question of the authoritative source of private international law. In the United States of America, for example, beside federal law (including the constitution, international agreements, federal statutes, federal courts law and federal common law), state law is the main source of private international law.⁸⁴ In Germany and Austria, two countries with a unified private international law, the existence of private international law has been sought by deduction from the principle of equality (*Gleichheitsgrundsatz*), i.e. the duty of the legislator to provide each individual with the same rights and possibilities.⁸⁵

Finally, it remains to state that the question as to whether public international law requires states to enact norms of private international law is currently widely ignored.⁸⁶ Since the question will be dealt with below, it suffices to highlight a possible danger at this point that might occur from the insufficient consideration of private international law within the realm of public international law: This danger is caused by the uncritical use of the concept of sovereignty and public policy.⁸⁷ Without due consideration of the international level, it becomes easier to apply the law of the forum (homing tendency of the courts), and aspirations with respect to a greater justice for the persons involved is denied. Furthermore, differences in culture or social institutions might equally cause the impression that the application of the *lex fori* is more appropriate.

⁸³ See Kegel, *supra* note 6 at 234-235.

⁸⁴ See Cheatham & Maier, *supra* note 6, stating that “state courts have carried well the burden of coordinating the private laws of the states with the laws of other countries. By accepting this responsibility, they have helped to make the international system work fairly well.”

⁸⁵ See C. Bar, *Internationales Privatrecht*, vol. 1 (München: C.H. Beck, 1987) at 209 *et seq.*; “Rechtsordnung”, *supra* note 6 at 21.

⁸⁶ See e.g. Bar, *supra* note 85 at 141, 209.

⁸⁷ See Cheatham & Maier, *supra* note 6 at 98.

2. *Preliminary Questions*

2.1. Public versus Private

a.) Individuality and Collectivity

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.⁸⁸ Therefore, before the various constellations between the dichotomies of public and private law as well as international and municipal law are discussed, a legally neutral approach towards the public/private distinction is undertaken.

In its widest sense, the public/private distinction forms the core element for many further dichotomies known in the world community.⁸⁹ The dichotomous character stems from the double nature of the human being, at the same time individualistic and a collective entity. The double nature can even be traced back to the psychological level of the subconscious where the distinction is rooted.⁹⁰ Thus, the human being is dual in nature. This duality

⁸⁸ 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 *Politics and Culture*, *supra* note 16 at 363.

⁸⁹ E.g. “state/society, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, freedom/coercion”; see D. Kennedy, “The Stages of the Decline of the Public/Private Distinction” (1982) 130 U. Pa. L. Rev. 1349 at 1349.

⁹⁰ C.G. Jung distinguishes two layers of the unconscious: the first resting upon a superficial layer which he calls the *personal unconscious* and the second resting upon a deeper layer called the *collective unconscious*. The difference between the two is that “the collective unconscious is part of the psyche which can be negatively distinguished from the personal unconscious by the fact that it does not, like the latter, owe its existence to personal experience and consequently is not a personal acquisition”. The personal unconscious is thus experienced, whereas the collective unconscious is inborn and furthermore not individual but universal. Universal means that “it has contents and modes of behaviour that are more or less the same everywhere and in all individuals”; C.G. Jung, *The Archetypes and the Collective Unconscious*, 2nd ed. (Princeton: Princeton University Press, 1968) at 3, 4, 42 *et seq.* [hereinafter *Archetypes*].

dominates the human perception and the way humans organise their life and their environment.

In political societies this duality is translated by the co-existence of public and private spheres, with the human being incessantly wandering between them. The genesis of the public/private distinction is closely linked to two movements in political theory and legal thought: First, the emergence of the nation-state and the theory of sovereignty in the sixteenth and seventeenth centuries strengthened the public realm. Secondly, as a reaction to the claims of monarchs and parliaments to the unrestrained power to make law, efforts to stake out distinctively private spheres free from the encroaching power of the state were undertaken.⁹¹ The nineteenth century analytical approach towards science fostered a further separation between different branches of science. In the beginning of the twentieth century, the role of the state as a promoter of public interest was well recognised. This view drastically changed with the emergence of fascism and totalitarianism, both overemphasising the role of the state and culminating in World War II.⁹²

In the decades after World War II, liberal democratic and socialist theories represented the two major concepts of a more private or a more public oriented organisation of state societies.⁹³ The two theoretical concepts laid the foundation for state organisation as a liberal democracy or a socialist country. Nonetheless, neither of the two concepts ever existed in its pure form; only the percentage of the elements dominating varied. Indeed, the political world in the 20th century was highly bipolar and could be roughly divided into liberal democratic and socialist countries.⁹⁴ By means of property rights, politics and economics are linked, and

⁹¹ See M.J. Horowitz, "The History of the Public/Private Distinction" (1982) 130 U. Pa. L. Rev. 1423 at 1423.

⁹² *Ibid.* at 1427.

⁹³ See D.R.C. Pongrace, "Stereotypification of the Fourth Amendments Public/Private Distinction: An Opportunity for Clarity" (1985) 34 Am. U.L. Rev. 1191 at 1194 *et seq.*

⁹⁴ Mainly during the time period of the Cold War the world could be divided in the two major conceptual political approaches, represented through their major proponents, the United States of America and the Soviet Union; see Huntington, *supra* note 10 at 21. Nonetheless, a third category was found in non-aligned and in neutral countries.

hence the same concepts influenced accordingly the economic system of each state.⁹⁵ The economy was either dominated by private activity in the framework of liberal free market economies, or by public planning of central market economies.

The major change came about with the end of the Cold War in the late 1980's. This time period was often linked with the final victory of liberal democracy over socialism, of capitalism over communism, or free market economies over centrally planned economies.⁹⁶ The arguments in favour of the victory were based on developments taking place in the former communist countries. Most of them, with the exception of Cuba and China perhaps, are now in transition from a centrally planned to a free market economy, and from socialism to liberal democracy. The post-Cold War developments, however, not only affected the formerly communist countries but also the liberal democratic countries themselves. Deprived of their natural hostile counterpart, room for self-reflection was created and internal problems, such as structural problems in respect of the market and the welfare system, or in political terms federalism and nationalism, surfaced. At the same time problems of the human family became increasingly universal. Mainly scientific and technological progress contributed to what is commonly called globalisation, and in its positive and negative effects it impinged upon the organisation of human life. Thus, in parallel to the process of movement towards globalisation, the importance of the local level rises constantly ("glocalisation")⁹⁷. Both divergent developments also impinge drastically upon human life in a private and a public sphere. These changes will be discussed in the following.

⁹⁵ See D. Weimer, "The Political Economy of Property Rights" in D. Weimer, ed., *The Political Economy of Property Rights: Institutional Change and Credibility in the Reform of Centrally Planned Economics* (Cambridge: University Press, 1997) 1.

⁹⁶ See e.g. F. Fukuyama, *The End of History and the Last Man* (New York: Avon Books, 1992). But see M. Gorbachev, *On My Country and the World* (New York: Columbia University Press, 2000) at 236.

⁹⁷ The term "glocalisation" describes the parallel coexistence of the local and the global level.

b.) Dynamism in the Public and Private Sphere: Dr. Jekyll and Mr. Hyde⁹⁸

Hitherto the private sphere was, as a sphere free from the coercive and regulatory power of the government, distinguished from the public sphere, a sphere where governmental coercion and regulation were considered legitimate.⁹⁹ Further distinctions were made depending on the perspective of the viewer: The term "private" referred to private property or wealth (*res privata*), to freedom, to a hidden place, to shame, to the family, to women, to spare time (*vita contemplativa*) as opposed to common property or wealth (*res publica*), to necessity, to publicity, to honour, to the community, to men, to labour (*vita activa*).¹⁰⁰ Despite these clear distinctive features a considerable overlap between the two spheres exists. Their main intersection is found in the genuine link between private individuals and the public body they form. This link is expressed in Jürgen Habermas' definition of the public sphere: "[the public sphere is] first of all a realm of our social life in which something approaching public opinion can be formed [and to which] access is guaranteed to all citizens". He continues, that "[c]itizens behave as a public body when they confer in an unrestricted fashion [...] about matters of general interest".¹⁰¹ This general interest is manifest, for example, in the fact that private property rights need government or public protection in order to be effectively and safely exercised.

At the present time, when we contemplate these associative distinctions, most of them are likely to cause the reader to shake his head. The lines separating the private from the public sphere have either been crossed, blurred, or the sides have changed. "Dr. Jekyll" and "Mr Hyde" finally became the one person they always were. The judiciary has narrowed the

⁹⁸ R.L. Stevenson, *The Strange Case of Dr. Jekyll and Mr. Hyde* (London: Longmans & Green, 1886).

⁹⁹ See R.H. Mnookin, "The Public/Private Dichotomy: Political Disagreement and Academic Repudiation" (1982) 130 U. Pa. L. Rev. 1429 at 1429.

¹⁰⁰ See e.g. H. Arendt, "The Public and the Private Realm" in S.E. Bronner, ed., *Twentieth Century Political Theory: A Reader* (New York: Routledge, 1997) 66; Charlesworth & Chinkin & Wright, *supra* note 6 at 626 ("At a deeper level one finds a public/private dichotomy based on gender"); .

¹⁰¹ J. Habermas, "The Public Sphere" in S.E. Bronner, ed., *Twentieth Century Political Theory: A Reader* (New York: Routledge, 1997) 21 at 21.

activities that fall within the private sphere.¹⁰² Not only has the curtain hiding the private sphere of public officials, heads of states and religious dignitaries been increasingly lifted, but so has that of the private individual. The statistical rise in numbers of sexual child abuse and other sexual offences arising mainly in the family sphere do not indicate that more crimes in this respect are being committed, but rather that the private sphere has become more transparent and, consequently, a matter of public interest. Gender equity and laws aiming at equal access to jobs for women have been enacted. The welfare state, through an immense amount of administrative legislation, regulates all areas that not long ago were only restricted by norms laid down in civil codes. Beside the traditional interest of criminal law in the mind of the putative perpetrator, intellectual and industrial property laws further advance their regulatory effect in the field of human thoughts and ideas. The economic realm in most so-called free market economies has become internationally subject to strict competition laws. These competition laws not only protect the weaker participant such as the consumer, but also regulate mergers and eventually sanction the market leader. The public sphere has clearly spread out its "wings" over the private sphere.

At the same time, the private sphere itself has fostered the fading away of the last barriers behind which the private individual found shelter. Companies sell addresses or other information of (potential) clients to other companies or pass them on to public authorities. Banks create secret lists evaluating the financial reliability or credit-worthiness of their clientele. Moreover, all sorts of innovative technical developments made possible by private companies merging into multinational corporations are further diminishing the space for privacy. Telecommunications (*e.g.* mobile phones), surveillance installations (*e.g.* in shops, or traffic), banking facilities (*e.g.* credit cards), and many more electronic devices (*e.g.* electronic health service cheque), and their mutual interconnection through data-processing interoperation (*e.g.* through the Internet) will give the possessor of the data the exact information of the location, physical condition and activity of the private individual. Employees are monitored and the personnel manager knows about the content of their

¹⁰² The US Supreme Court, for example, has restricted the privacy of prisoners in cells, of movement and of the car as a sphere of privacy; see Pongrace, *supra* note 93 at 1191 *et. seq.*

private correspondence, the time spent outside the office, and so on.¹⁰³ Ironically enough, these surveillance facilities can occasionally be used against the company itself.¹⁰⁴

Budget cuts have caused the reduction of personnel and the state has withdrawn its presence from a wide area of activity. As a result, the public sphere has undertaken various efforts to privatise its structures. The civil servant is displaced by short term contracts or contracts for services. Public services, such as the surveillance of parking meters, garbage collection and road construction etc., are often delegated to private companies. Additionally, former state-owned corporations are decentralised and privatised.¹⁰⁵ This development is described by the notion of the slim state.

c.) The Dual Human Nature

As for the relation between law and society, there is likewise a clear link between the human and society that can be summed up by "*ubi femina/homo, ibi societas*". A society is no doubt made out of humans, and humans tend to organise their environment and relations to other humans alternatively through the perspective of a single individual (private sphere), or through the eye of the collective group or society (public sphere). The dynamic developments making themselves felt in terms of globalisation represent a shift in the organisation of the private sphere within the public realm. A shift that for the moment inclines toward the private sphere in terminology, but which at the same time acquires many features of the public realm, so that it is necessary to speak of a general publicisation that is

¹⁰³ 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 D. Duclos, "Gründe für den fortgesetzten Angriff des Privaten auf das Private" *TAZ* (13 August 1999) 10, online: LEXIS (German, ALLNWS).

¹⁰⁴ The court in *US vs. MICROSOFT* had access to e-mails, the means by which almost every opinion and action is communicated within Microsoft; see "Microsoft and the Future" *The Economist* 353:8145 (13 November 1999) 21 at 21.

¹⁰⁵ See e.g. L. Urban, "Privatization as Institutional Change in Hungary" in D. Weimer, ed., *The Political Economy of Property Rights: Institutional Change and Credibility in the Reform of Centrally Planned Economics* (Cambridge: University Press, 1997) 239.

on its way. Therefore the obvious conclusion is that this shift is caused by the underlying dual human nature, by the fact that the human is both an individual and a collective entity.¹⁰⁶ And according to a rise in awareness, one element supersedes the other. Examples of the external manifestations of the psychological level are numerous and best shown in the emergence of the Internet and its structure.¹⁰⁷

Finally, it remains to conclude that an organic view of society, national or international, is more appropriate in order to explain the interdependence between the individual and the collective unconscious and the private and public sphere.¹⁰⁸ In this context organic means that the action of each individual has an impact on the collective sphere which in turn affects again the sphere of the individual. An argument for an organic approach is found in the fact that this organic view is, for example, well fitted to explain the reason for the wide success of democracy as a state form. Accordingly, democracy is built upon the paradoxical link between the individual and the collective. Elections, according to this view, not only serve as the sum of votes given by the part of the population that has reached voting age, but also serve as an adjustment of the individual will with the collective. By going to the ballot, a single individual, one could speculate, not only determines the future of his municipality, province or state, but also decides what his most urgent needs and goals are, as well as on the way the individual plans to achieve them.

¹⁰⁶ For an interesting discussion of the analogy between the development of the individual and its role in society, see S. Freud's treatise "Das Unbehagen in der Kultur" (1930) in S. Freud, *Abriss der Psychoanalyse – Das Unbehagen in der Kultur* (Frankfurt a. M.: Fischer, 1953).

¹⁰⁷ See L. Sfez, "Mehr Demokratie durch Internet!" *TAZ* (16 August 1999) 10, online: LEXIS (German, ALLNWS); K. Burmeister, "Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting" (1999) 9 *Fordham I. P., Media & Ent. L.J.* 625.

¹⁰⁸ Such an organic view has been also expressed regarding the organisation of foreign relations amongst states transgressing cultural borders; see *Future of Law*, *supra* note 15 at 168 *et seq.*

2.2. Private Law and Public Law

a.) *Law and Politics*

Transformed in the sphere of law, the private/public distinction is expressed in the two fields of public and private law, which at the same time provide the basis for the systematisation of law by modern science.¹⁰⁹ Modern legal science was very much concerned with a clear separation of law and politics. In its purely legal systematisation the term private law is generally used in contradistinction to public law.¹¹⁰ This contradistinction resembles to some extent a definition based on tautology (here *i.e.* describing a phenomenon by its opposite terms) and, thus, in the past has not led to a satisfactory definition of the terms and a clear delimitation of their interrelationship. The achievement of such a clear delimitation was further aggravated because of the differences within different legal systems. While, for example, in the civil law system the distinction between public and private law is of basic importance, this distinction is, in general, almost unknown to the common law system.¹¹¹ However, it must be noted, here too, that the civil/common law distinction is about to diminish in character.¹¹² In general, a separation of legal science from political reality can

¹⁰⁹ See H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1970) at 280.

¹¹⁰ "Private Law. As used in contradistinction to public law, the term means all the part of the law which is administered between citizen and citizen, or which is concerned with the definition, regulation, and enforcement of rights in cases where both the person whom the right inheres and the person upon whom the obligation is incident are private individuals. Public Law: [...] a law or statute that applies to the people generally of the nation or state adopting or enacting it, is denominated a public law, as contradistinguished from a private law, affecting only an individual or a small number of persons"; see *Black's Law Dictionary*, 4th ed. s.v. "private law" and "public law".

¹¹¹ See e.g. David & Brierley, *supra* note 6 at 339; J. Jowell & P. Birkinshaw, "English Report" in Jürgen Schwarze, ed., *Administrative Law under European Influence*, (London: Sweet & Maxwell, 1996) 273 at 326, stating that for British law the distinction is not clear and describing it as follows: "Public bodies exercising public powers may affect one's private interests in which case one's claim may best be pursued in private law procedure by way of a writ or an originating summons and rights which are of a private law nature in common law (e.g. contract and tort/delict) must be brought by private law procedure even where a public body is allegedly in breach of those rights, whereas private law bodies exercising *de facto* public powers may be challenged by way of public law judicial review".

¹¹² The civil/common law divide in Europe, as well as at the international level, is about to decrease in its sharpness because of the use of supranational and international sources in order to achieve legal consistency on the national level. Furthermore, the difference between the two families can be characterised as a difference in

only be adopted for methodological purposes and has to be abandoned when the theoretical result is examined with regard to reality.

The present time, though, is characterised to a large extent by a unitary trend towards a global society; a trend that eventually facilitates any attempt to highlight possible differences between private and public law. This is so because any difference between private and public law – if existent at all – becomes more and more similar in each society. Here, however, only the legal patterns for distinction will be discussed.

b.) The Legal Systematisation of Public and Private Law

The classical distinction is that public law governs the relations between the state and its nationals, while private law governs their relations amongst themselves.¹¹³ A purely descriptive distinction by subject matter reveals that public law generally is thought of as consisting mainly of constitutional law and administrative law. Constitutional law determines the principal foundation and organisation of the state, its competence, and its limits in terms of civil liberties towards the citizens, etc.¹¹⁴ Administrative law is defined as regulating the relations between the public authorities and private individuals but has literally exploded, and thus extended its field of application to a great variety of domains. These domains not only cover the traditional issues from the security area, such as the police and the army, but also general bureaucratic issues, from environmental protection and health care, education, and culture, to social and economic issues. Private (or civil) law, on the other hand, represents the classical domain of general civil (or private) law, dealing with

intellectual approach only, which in the long run is destined to meet; see e.g. M. Vranken, *Fundamentals of European Civil Law* (Sydney: The Federation Press, 1997) at 212-216. An example for the mutual approach of Common law and Civil Law systems is given by the adoption of the Unidroit Principles and the European Principles of European Contract Law; see V. Zeno-Zencovich, "The 'European Civil Code', European Legal Traditions and Neo-Positivism" (1998) 4 *Eur. Rev. Priv. L.* 349 at 361.

¹¹³ See J. Ghestin & G. Goubeaux, *Traité de droit civil: introduction générale*, 4th ed. (Paris: L.G.D.J., 1994) at 68.

¹¹⁴ See also B. Starck & H. Roland & L. Boyer, *Introduction au droit*, 4th ed. (Paris: Litec, 1996) at 83.

general provisions, property, obligations, family law and successions.¹¹⁵ Additionally, private law comprises special matters regulating the domain of merchants, the main parts of labour law, law relating to negotiable instruments and other securities, private insurance law, as well as intellectual and industrial property law (patents, trademarks, patterns).¹¹⁶ Both branches can be further subdivided into substantive and procedural categories.

Several criteria for the distinction between private and public law today are summed up in three major theories. These theories are the following:¹¹⁷

(a) Theory of interest (*Interessentheorie/théorie des intérêts*) – This classical line drawn between the adjectives “private” and “public” in connection with law goes back to the Romans, and states that private law is *quod ad utilitatem singulorum spectat* and public law is *quod ad statum rei publicae spectat*.¹¹⁸ This distinction is based on the question whether a legal norm addresses or serves the interest of the general public or the individual.

(b) Theory of subjection (*Subjektionstheorie*) – It aims at the organisational structure governing the relation of the subject: Private law represents a relation between coordinate subjects of equal standing legally and public law represents a relation between a superordinate and a subordinate subject.¹¹⁹ The former is based on the legal institute of the contract, a voluntary consensual tool, and the latter on a compulsory administrative command that is unilaterally imposed.

¹¹⁵ The French Civil Code (1804) is, for example, divided into three parts: (1) *Des Personnes*, 2e livre: *Des biens et des différentes modifications de la propriété*; (3) *Des différentes manières dont on acquiert la propriété* (*Successions, donations, contrats, régimes matrimoniaux, contrats spéciaux*); see Code Civil, 98th ed. (Paris: Dalloz, 1999); and the later German BGB (1900) is divided into five parts (*Allgemeiner Teil, Schuldrecht (Obligationenrecht), Sachenrecht, Familienrecht, Erbrecht*); see O. Palandt, *Bürgerliches Gesetzbuch*, vol. 7, 55th ed. (München: C.H. Beck, 1996) at 2.

¹¹⁶ See also Palandt, *supra* note 115 at 1.

¹¹⁷ See also H. Koziol & R. Welsch, *Grundriß des Bürgerlichen Gesetzbuches*, vol. I, 9th ed. (Wien: Manz, 1992) at 6-7, Palandt, *supra* note 115 at 1 and Starck & Roland & Boyer, *supra* note 114 at 85.

¹¹⁸ See Kegel, *supra* note 6 at 17.

¹¹⁹ See H. Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992) at 92 [hereinafter *Legal Theory*].

(c) Theory of Subject (*Subjektstheorie/Théorie des sujets*) – It refers to the quality by virtue of which a legal subject acts. An act is qualified as relating to the public domain if an especially authorised organ becomes active, while in the absence of such an authorisation the act is considered as private. This distinction also implies a difference with respect to the creation and sanction of a norm.

Neither alone nor together do the three theories manage to draw a clear line between public and private law, which is reflected in the criticisms raised in relation to each of them. The theory of interest simply ignores the fact that most laws serve both private and public interests. This is obvious in the case of criminal law which, considered as belonging to the public domain,¹²⁰ serves at the same time the interest of the general public by maintaining public safety and order (general prevention by deterrent effect) while sanctioning the individual delinquent (special prevention by diverse means of sanctions). The theory of subjection overlooks the fact that there are relations of subordination within private law, such as between parents and children, and that there are, equally, relations of equality, when different public authorities from the same level agree on a certain agreement of cooperation. And even the theory of subject shows itself incapable of defining where the public function of a single individual starts or ends. This is reflected in controversial questions concerning immunity and public liability.

c.) Conclusive Remarks

Finally it remains to conclude that neither of the three theories alone, nor the underlying criteria, is capable of drawing a clear line between public and private law. The reasons are manifold and seem to be found in the process of disintegration of the traditional borders between the categories of law due to the dynamics in the evolution of law. In the case of private law a “publicisation”, and in case of public law a “privatisation”, is taking place.¹²¹

¹²⁰ See Koziol & Welser, *supra* note 117 at 6; compare Starck & Roland & Boyer, *supra* note 114 at 80-81, 89.

¹²¹ This trend is reflected *e.g.* in the discussion around the effect of civil liberties on third parties (privatisation of public law), or in the restructuring of the administrative authorities, especially the steady abolition of the institute of civil servants, in accordance with private criteria (privatisation of public law); see also Starck & Roland & Boyer, *supra* note 114 at 86-88.

As a result of this dynamism the need for the dissolution, or at least a reconciliation, of public and private law is felt. This need is expressed either in the emergence of a third category of law, a mixed law (*droit mixte*)¹²², or in a theoretical approach that bridges the differences completely.¹²³

Together however, these theories provide useful criteria for distinctions and can serve as a starting point for the discussion of public and private international law.

2.3. International and Municipal (or Domestic, National) Law

a.) *The Hierarchical Pyramid of Law*

The difference between international and municipal law is one of a different subject-matter, traditionally translated by the following classification: International law governs the relations between sovereign nation-states, while municipal law applies within a state-territory and regulates the relations of its citizens with each other (private law) as well as with the public authorities (public law).¹²⁴ This definition makes clear that the distinction between public and private law within the dichotomy of municipal and international law is of no direct importance. The reason is that the distinction between international and municipal law is, in opposition to the public/private distinction, not placed on a horizontal level, but on a vertical level. It is not a difference of quality, but a relation of hierarchy. The placement of the conflict in a vertical axis leads to the perception of the legal order in the form of a pyramid, called the hierarchical ordering of legal systems (*Stufenbau der Rechtsordnung*).¹²⁵ In this

¹²² *Ibid.* at 88-93.

¹²³ Kelsen's Pure Theory of Law, for example, supports the conception of law as an organic and systematic whole and, thus, is of universalistic character; see *Legal Theory*, *supra* note 119 at 52-53, 93-96.

¹²⁴ See Brownlie, *supra* note 58 at 34.

¹²⁵ A. Merkl, coined the concept of the *Stufenbau der Rechtsordnung*. The hierarchy of norms can be deduced from three criteria: 1. The norm-producing capacity of norms, *i.e.* the norm that is produced from another norm is regarded as lower in the hierarchy. 2. The legal source: The subordination or superiority of norms derives from the fact that different kind of laws exist (constitutional laws, federal laws, state laws, regulations etc.). 3. The derogatory force of a norm, meaning that the derogated norm is inferior to the derogating norm; see R. Walter & H. Mayer, *Grundriß des Österreichischen Bundesverfassungsrechts*, 7th ed. (Wien: Manz, 1992) at 3.

hierarchical ordering international law takes, when using the (territorial) scope of the field of application as a reference, the highest position¹²⁶, while municipal law, comprising eventual distinctions of federal, state, provincial, or local laws, takes the lowest. Despite the hierarchy, there are conflicting answers to the question of which law prevails in case of a conflict before a national judge and how international tribunals are supposed to deal with municipal law. This conflict is about the supremacy of international law over municipal law and *vice versa*.

Additionally, throughout the last few decades, driven by globalisation, a third category has emerged and squeezed itself between the two. This is formally called "supranational law" and belongs to the area of the law fostering regional integration such as the law of the European Union¹²⁷ or other agreements of limited geographic scope.¹²⁸

Despite the vast diffusion of supranational law and the relative impact of this category on the classical distinction of international and municipal law, that can be interpreted as a mutual convergence, emphasis here is laid upon the classical distinction reflected in the following theoretical approaches towards the conflicting areas of international and municipal law.

b.) Monism versus Dualism

The three main theories dealing with the relation of international and municipal law are (a) the dualistic (or pluralistic) theory, (b) the monistic theory and (3) the theory of harmonisation.

¹²⁶ See e.g. Scelle, *supra* note 6 at 4: "C'est [le droit international public] un ordre juridique de superposition, l'ordre juridique terminal, dont les normes prévalent sur tous les autres systèmes de Droit sous-jacents, y compris les ordres nationaux, impériaux ou fédéraux."

¹²⁷ For a discussion of the European Union's legal nature and the reception of European law in the EU member states see S.C. Monaghan, "European Union Legal Personality Disorder: The Union's Legal Nature through the Prism of the German Federal Constitutional Court's Maastricht Decision" (1998) 12 *Emory Int'l L. Rev.* 1443.

¹²⁸ The radical emergence of supranational law is best highlighted in the domain of international trade. 198 regional trade agreements (RTAs) are notified to the GATT/WTO of which 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) [hereinafter *Regionalism*].

(a) Dualistic (Pluralistic) Theory – The dualistic concept was founded by Triepel and Anzilotti and it understands international law and municipal as two different equal, independent and separated systems of law.¹²⁹ According to this view, their independence is grounded in their different sources and legitimacy respectively (municipal law derives from the unilateral will of the state based on the constitution [public character], international law from the common will of several states based on international relations [private character]) and their different addressees (municipal law addresses the citizens in their mutual relations [private law] or in their relation with the state [public law]).¹³⁰ This theory denies a common ground between international law and municipal law.¹³¹ Despite the sharp distinction of the two different legal orders, primacy is granted in favour of municipal law.

(b) Monistic Theory – The monistic concept, on the other hand, is based on the existence of such a common ground, or rather on a unity between international and municipal law; *ergo* they belong to the same and thus form a single legal order. This single legal order consists of legal norms that are subordinated in their mutual relation. The monistic concept can itself be divided into two different concepts: radical and moderate monism. The first gives priority to norms of public international law before those of municipal law, and the latter recognises a general difference as well as a possible clash between the two, but accepts that these conflicts are not of a final nature and can be dissolved in the unity of the legal system.¹³² According to the hierarchy of the legal order of monistic conception, primacy is usually given to international law.¹³³ Nonetheless, there exists also a monistic conception that subordinates international law to municipal law.¹³⁴

¹²⁹ See C. Rousseau, *Droit international public*, vol. 1 (Paris: Sirey, 1970) at 39.

¹³⁰ *Ibid.*

¹³¹ See Verdross, *supra* note 28 at 111-112; but see Brownlie, *supra* note 58 at 33.

¹³² See Verdross, *supra* note 28 at 113.

¹³³ *Ibid.*; see Scelle, *supra* note 6 at 4; see especially *Legal Theory*, *supra* note 119 at 117-122.

¹³⁴ This concept is called “inverted monism” and bases the argument for the supremacy of municipal law on the absence of an international authority and the purely constitutional foundation of treaty making power; see Rousseau, *supra* note 129 at 43; D.P. O’Connell, *International Law*, vol. 1 (London: Stevens & Sons, 1965) at 42.

(c) Theory of Harmonisation – This theory can be described as denying monism and dualism or, equally, as accepting both at the same time. The point of departure of the reasoning is that law is life and life is law with the human being as its centre. Laws are rules for the solution of conflicts in life between humans. That is why monism in its pure form is unsuitable because a *civitas maxima*¹³⁵, i.e. a single legal order, is not yet achieved. The human being rather continues to live his life at the same time in the legal order of the state as well as in an international order. Dualism, on the other hand, misses the universality of human experience, in other words that by living in both jurisdictions, the two become one.¹³⁶

c.) Conclusive Critique

There is hardly any doubt that present circumstances make it impossible for the concept of the dualistic theory to be followed. The international realm has grown and its impact on the national legal order is undeniable. At the present time, the assumption that the two legal orders exist without any point of contact has to be rejected.¹³⁷ The sharp distinction between the two orders arose out of a historical context engendered by the evolutionary process of the formation of international law. A purely conceptual separation can still give useful information when the question of the transformation of an international legal norm into the national legal order has to be faced. Here also the monistic concept following the primacy of international law (that can be said to be supported by international practice)¹³⁸ has shortcomings, such as in responding to eventual particularities in some constitutions of some countries. This leads to the question of the manner of reception of international law in national legal systems, manifesting itself in the possible need for an act of transformation or an eventual direct application (self-executing treaties). This, however, due to its linkage with

¹³⁵ See *Dynamics*, *supra* note 38 at 2, 4, 107.

¹³⁶ See O'Connell, *supra* note 134 at 42-46.

¹³⁷ The traditional theories have simply been overthrown by new realities; see Perkins, *supra* note 7 at 434.

¹³⁸ See Rousseau, *supra* note 129 at 46-47; compare L. Ferrari-Bravo, "International and Municipal Law: The Complementarity of Legal Systems" in R.St.J. Macdonald & D.M. Johnston, eds., *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Dordrecht: Martinus Nijhoff, 1986) 715 at 735, mentioning some clear resistance towards the monistic approach by the (now) former Socialist states and some developing countries.

a country's constitution, rather belongs to the comparison of public law and public international law and will be discussed under point 2.4.

To conclude, the third and most dynamic theory, namely the theory of harmonisation, obviously allows for the best explanation of the present situation. It also dominates the practice in most civil law as well as Anglo-Saxon systems.¹³⁹ From this theory, it can be deduced that there is no real supremacy of one or the other legal regime. Monism and the deduced supremacy of international law lie in the nature of the cause, *i.e.* that international norms within international fora apply when two different municipal laws clash in an international dispute. On the other hand, the supremacy of municipal law over international law derived from dualism, is founded in the so-called *dédoublement fonctionnel*, the need for a legal order to provide sufficient institutional means for (efficient) sanctions.¹⁴⁰

Nowadays, any attempt to mitigate eventual conflicts between international and municipal law or to improve their mutual interplay by strictly referring to the classical doctrinal disputes between monists and dualists must be considered as obsolete.¹⁴¹ Preference must rather be given to the theory of harmonisation. The advantage of the theory of harmonisation is that it is fairly dynamic and does not limit itself to a static explanation of a present situation, but definitely highlights the complementary character of monist and dualist theory by describing them as two different stages in the process towards a single legal order in a *civitas maxima*.

¹³⁹ See O'Connell, *supra* note 134 at 87.

¹⁴⁰ 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*"); see Scelle, *supra* note 6 at 21-23.

¹⁴¹ See H. Keller, "Rechtsvergleichende Aspekte zur Monismus-Dualismus-Diskussion" (1999) 3 S.R.I.E.L. 225 at 231.

2.4. Public Law and Public International Law

a.) The Implementation of International Law

The relation of public law to public international law corresponds in some respects to the relation of international law and municipal law. Public international law corresponds to the notion of international law, since the traditional subjects of international law were states too. On the national level it is public law that through its major part, the constitution, determines the means of creating international law by determining the competence of the respective state authority for creating international law as well as the means of receiving international law within the municipal law of a state.¹⁴² Thus, constitutional law can be said to perform a *double rôle*, namely as the source of national norms as well as international norms. The way this reception of international law takes place depends on the main characteristics of the constitution and/or on the source of international law (treaty or customary law) being transformed. The way a state approaches this reception also depends on whether the state practice is influenced by the monist or dualist concept.¹⁴³

The reception and implementation of the international norm in the national realm is necessary because a state, the traditional subject of international law, can in some cases only achieve compliance with international obligations by assuring that the behaviour of its nationals is in conformity with the international obligations entered by the same state.¹⁴⁴ This

¹⁴² Compare Art 52 of the French Constitution which generally defers the power to negotiate and to ratify a treaty to the *President de la République*. Art 53, however, requires for ratification of certain types of treaties, such as *inter alia* peace or commercial treaties, or treaties in relation to international organisations, the authorisation by Parliament; see J.-M. Auby & J.-B. Auby, *Code de Droit Public* (Paris: PRAT/Europa, 1985) at 56 and B. Jeanneau, *Droit constitutionnel et institutions politiques*, 8th ed. (Paris: Dalloz, 1991) at 260-261.

¹⁴³ See J.H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis" (1992) 86 A.J.I.L. 310 at 315; compare Walter & Mayer, *supra* note 125 at 88, stating that the question of the type of transformation used by a state has nothing in common with the interrelation of international and municipal law (supremacy of one or the other, monism and dualism).

¹⁴⁴ In public international law, in general, the principle of collective liability is established; see generally Verdross, *supra* note 28 at 123-125. However, international criminal and international humanitarian law know a criminal responsibility of the individual whether acting in private (e.g. piracy, slavery, terrorism etc.) or public (e.g. crimes against peace, war crimes, crimes against humanity) function; see Daillier & Pellet, *supra* note 6 at 620-636.

dual nature of the state, a sort of paradoxical link between the state and its people, also supports the theory of harmonisation.

b.) Customary International Law and Treaties

A distinction has to be made between the reception of international customary law¹⁴⁵ and international treaties¹⁴⁶, the two main sources of international law according to the sources given in the Statute of the International Court of Justice.

(a) International customary law – Most countries – civil as well as common law jurisdictions – follow the principle of the incorporation (or adoption) of customary international law within national law. The result is that these principles are considered to be part of municipal law. The incorporation can – according to the respective constitutions – be made on the basis of a relevant constitutional provision or by judicial practice.¹⁴⁷ The principle of incorporation does not automatically give the international norm a higher standing within the national legal order (unless the constitution does provide explicitly for a higher standing of international law)¹⁴⁸. Consequently, a later national law is capable of nullifying the obligation set forth in the international norm according to the principle “*lex posterior derogat legi priori*”.¹⁴⁹ On

¹⁴⁵ The elements of customary law are duration, uniformity, consistency and generality of the practice as well as *opinio iuris et necessitatis*; see Brownlie, *supra* note 58 at 6-9.

¹⁴⁶ A treaty is defined by Article 2 (1) (a) – (Use of terms) of the Vienna Convention on the Law of the Treaties as follows: “‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”; see *United Nations Convention on the Law of the Treaties*, 23 May, 1969, 1155 U.N.T.S. 340 [hereinafter *Vienna Convention*]. There are, nevertheless, further classifications of treaties in “law making” and other treaties, or “treaty contract” and “treaty law”; *Ibid.* at 630-631. The distinction of treaty from convention or act is also problematic, but is of no further importance in this context; for a general survey see O’Connell, *supra* note 134 at 211-214.

¹⁴⁷ See Brownlie, *supra* note 58 at 45-49, 52-53.

¹⁴⁸ *E.g.* Art 25 of the Bonner Grundgesetz and Art 55 of the French Constitution; see Verdross, *supra* note 28 at 119 and Auby & Auby, *supra* note 142 at 56.

¹⁴⁹ See Verdross, *supra* note 28 at 119.

the other hand, in general, legislation has to be adopted in conformity with existing treaty obligations.¹⁵⁰

(b) Treaties – The way treaties are transformed into the national legal system not only depends on the constitution but also on the character of the international treaty. First, the constitution determines the process from the beginning of negotiations until the final administration of a negotiated treaty within a national legislation.¹⁵¹ From a constitutional point of view, the implementation of a treaty in the domestic legal system can take place through special or general transformation.¹⁵² According to special transformation an international norm, in order to be applicable before municipal courts, must be transformed into national law by the adoption of a national law or other kind of regulation. General transformation means that the international norm is declared part of municipal law without any further legislative act and is thus directly applicable in municipal courts. From an international perspective, the same distinction is made through the category of self- and non-self-executing treaties; the first requiring implementing legislation in order to be invocable, but not the latter. The classification of a treaty as self-executing or not is derived from the explicit intent of the contracting parties or must be deduced through interpretation.

¹⁵⁰ See for example the position of the United States, a traditionally dualist country, as expressed in § 114 of the Restatement (Third) of the Foreign Relations Law of the United States (1987) which reads: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law, or with an international agreement of the United States"; see Jackson, *supra* note 143 at 315.

¹⁵¹ John Jackson summarizes the constitutional issues regarding treaties in domestic law in the following points: (1) the power to negotiate; (2) the power to "sign" (usually *ad referendum*, only to certify the text); (3) the power to "accept" the treaty as a binding international law obligation; (4) the "validity" of the treaty under national constitutional law (closely related to (3)); (5) the power to implement the treaty obligations; (6) direct applicability of the treaty in domestic law; (7) invocability in municipal law (contasted with direct applicability); (8) a hierarchy of norms in domestic law when treaty norms conflict with norms of that law; and (9) the power to administer the treaty, which includes a series of issues, such as the procedure for formal "ratification"; the power to interpret the treaty for domestic application and as a matter of international law; the power to represent the country in institutional procedures relating to the treaty (e.g., bilateral or multilateral meetings); the power to "vote" in such procedures; the power to amend the treaty; and the power to terminate the treaty (on various grounds, including the exercise of a termination clause); *ibid.* at 316.

¹⁵² See Walter & Mayer, *supra* note 125 at 87-88; see Verdross, *supra* note 28 at 117.

c.) *An Evaluation of the Interplay between Public and Public International Law*

There can be no doubt that the present legal order is characterised by increased interplay between norms deriving from the international level and norms from the national level. For the question of the supremacy of international customary law over national law, the conflict – in accordance with the theory of harmonisation – is only an apparent one. Considering the broader scope of international law in terms of the field of regulation and application and probably the number of individuals concerned, it follows that international law is ranked in a higher position than the national equivalent. From the *dédoublement fonctionnel* however, the higher degree of institutional organisation on the national level, allowing for more efficient sanctions exercised by municipal courts, results in national law playing a major role in the achievement of the standards aimed at by the international norms.

Equally, there are advantages and disadvantages found in self- or non self-executing treaties allowing or disallowing for direct invocability of the international norm before a municipal court. Numerous arguments, such as an increase for the effectiveness of international law, a better fulfilment of relevant treaty obligations, a higher assurance of rights of individuals (if the obligations set forth in the treaty concern individuals), an overall increase in respect and awareness of international law, plead for direct applicability. On the other hand, criticism is raised against direct applicability when one considers the democratic participation in the international law making process, the adaptation of international norms to domestic particular circumstances, the adequate fulfilment of the respective international obligations, possible conflicts between the international and other nations norms or uniform interpretation.¹⁵³

The various conflicting arguments are well founded and an answer favouring one or the other approach can not be rendered. However, in the context of the public-private dichotomy dealt with in this essay, the question of direct applicability and access of private individuals to international norms is of primary importance. Access by private individuals goes hand in

¹⁵³ See Jackson, *supra* note 143 at 321-327, Ferrari-Bravo, *supra* note 138 at 726-727; see also *Einheitsrecht*, *supra* note 35 at 240-43, emphasising the principle of harmony of legal application (*Grundsatz der Harmonie der Rechtsanwendung*) for the realm of international (uniform) law.

hand with the interpretation of norms deriving from international agreements by national courts. So far, access by private individuals to international procedures can be said to be the exception rather than the rule.¹⁵⁴ Possible positive outcomes of such enhanced participation are that international law becomes more tangible and available to private individuals and their national lawyers, and that the precise meaning of an international norm can be better determined by various judgments by domestic courts rendered on a certain norm. Finally, it could help to close the gap between the current divergent trends of globalisation and nationalism. Increased judicial review through municipal courts can also help to clarify possible conflicts between international norms and domestic laws.¹⁵⁵ On the other hand, actors at the international level are likely to be subject to extended control in terms of democratic participation, the rule of law, and the quality of their work, which might in turn lead to an increase in the acceptance of international norms.

Enhanced participation of private individuals in the realm of international law through access of private individuals to international agreements, in connection with the interpretation of international agreements by municipal courts, can therefore be seen as a means for setting free synergetic effects which harmonise the arguments contrasted above, and result in better balancing the overall interrelation of international and municipal law.

¹⁵⁴ 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 M. Hilf, "New Frontiers in International Trade: The Role of National Courts in International Trade Relations" (1997) 18 *Mich. J. Int'l L.* 321 at 324, 332, 334-335.

¹⁵⁵ In this sense M. Rogoff writes that "the decisions of national courts interpreting and applying international agreements and the doctrinal rationales which national courts advance for particular approaches, are not only expressive of underlying ideas of international political community, but are also claims and arguments for the existence of community"; see M.A. Rogoff, "Interpretations of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court" (1996) 11 *Am.U.J. Int'l L. & Pol'y* 559 at 683.

2.5. Private Law and Private International Law

a.) A Complementary Identity

Like private law, conflict of laws (or private international law) also serves justice amongst individuals. Common to both categories is that they are rules of municipal origin and are thus dependent on public law or, more precisely, the state's constitution. Private law and private international law, as laws governing the relations between private individuals indirectly, also serve the aims pursued by public law, namely the well-being of the sum of all nationals gathered in the territory of a state. Because nationals of one state do not always stay within their own state, or at least their (legal) transactions are not always performed within the state's territory, private international law is needed. Just as private law ensures the safety, stability and harmony in the various transactions of nationals within their territory, the underlying *raison d'être* of private international law is to extend these virtues to the international level.¹⁵⁶ The existence of private international law is thus grounded in the need for international harmony.

Their common link is private autonomy. In private law private autonomy is defined as the freedom of each private individual to organise her or his legal relations according to her or his own preferences. The main field of application within civil law is the law of obligations, and its main form of expression is the contract. This freedom is, however, limited, as for example by the concept of *bonos mores*. Private autonomy in the field of conflict of laws is translated into the freedom of private individuals to chose the applicable law for some of

¹⁵⁶ The extension to the international level is achieved through the application of foreign law within a state's territory. Regarding the question of how this foreign law is applied within a domestic legal system, namely whether it is classified as a law or as a fact, there exists a vivid controversy in legal theory. If foreign law is considered as law (law theory), it will be proven and interpreted as such whereas if it is considered a matter of fact (fact theory), it will be applied only if the parties to the case plead its application and prove its content and effectiveness. Generally, most civil law countries see foreign law as a law (multilateral or universalistic approach) while in the common law countries the theory that foreign law is a matter of fact prevails (unilateral approach); see J. Dolinger, "Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law" (1995) 12 *Ariz. J. Int'l & Comp. Law* 225.

their legal actions. The choice is subject to certain limits, such as international peremptory norms (*ius cogens*) or evasion (*fraude à la loi*)¹⁵⁷.

These freedoms granted through private autonomy are at the same time authorised and limited by public law. They are based on the idea that positive legal regulation does not always serve the interests of the legislator best, and that sometimes a desired outcome is better achieved through non-intervention. This is made clear in the realm of constitutional fundamental rights, where a '*status activus*' is distinguished from a '*status negativus*'.¹⁵⁸ The first requires the state authority to guarantee a right, while the second is understood as protection against state intervention and requires the state to refrain from positive action. In the case of private law the state allows its citizens to deal with some of their legal actions according to their ideas, and in the case of private international law the permission is extended to actions with foreign elements.

Their relation of complementarity, that is the pursuance of the same goal through different means, is also expressed in the different character of the norms each category uses. Private law makes use of substantive norms (*Sachnormen*), *i.e.* norms that provide the information necessary to decide a case. Private international law, on the other hand, comprises formal or remitting norms (*Verweisungsnormen*), that only provide normative guidance in the search for the relevant substantive norm within different legal orders. These different legal orders can be classified according to territorial, personal, and temporal characteristics. Depending on these characteristics conflicts of laws rules know situations of conflicts which manifest themselves in five different types: (1) international conflicts, that is, conflicts between two or more different sovereign states; (2) interstate (or interprovincial) conflicts, occurring within countries with a federal structure; (3) interlocal conflicts, occurring in a unitary country; (4) interpersonal conflicts, *i.e.* conflicts between different social groups within a country as well as interreligious conflicts, between adherents to different beliefs; and (5) intertemporal

¹⁵⁷ *Fraude à la loi* is accomplished if a party intentionally changes the elements constituting the connecting factors in order to "attract or prevent the application of the rules of a particular system"; see O. Kahn-Freund, *General Problems of Private International Law* (Leyden: Sijthoff, 1976) at 284.

¹⁵⁸ See K. Heller, *Outline of Austrian Constitutional Law* (Deventer: Kluwer Law and Taxation Publishers, 1989) at 32 [hereinafter *Austrian Constitutional Law*].

conflicts, arising between earlier and later legislation (*lex posterior derogat legi priori*). These classifications, however, are of minor importance here, since the main area of interest in this context is the conflict arising between different sovereign states. Nonetheless, the classification emphasises the basic thought behind private international law, namely the search for the optimum substantive norm. Additionally, the territorial subdivision of conflict of laws into international, interstate and interlocal conflicts corresponds directly to the process of unification or harmonisation of laws on the national level throughout history. This process is continuing and represents a trend that reveals much of the interrelation of private and private international law.

b.) The Common Denominator: Unification of Private Law through Private International Law

The complementary character of the private and private international law relationship can be summed up as follows: The more severe the difference in private substantive norms is, the greater is the necessity of having conflict rules at hand. Or, the more private law is harmonised or the closer it is to unification, the less conflict rules will be necessary. In the current world order, the existence of private international law is made necessary because of the partition of the world into a multitude of different legal jurisdictions, *i.e.* legal territories with different legal systems.¹⁵⁹ Since today's world is confronted with an enormous increase in mobility of people, transcending state borders or engaging in cross-border activities, friction caused by the various legal systems is more likely to occur.

In order to prevent friction and to foster the international movement of goods, services, persons and capital, the legal response lies in the ultimate goal of unification of laws. Unification of laws in general designs the process of creating uniform laws or rules prevalent in different jurisdictions. So far this process of unification has widely taken place within states and is now shifting to the international level.¹⁶⁰ The principal international

¹⁵⁹ See Kahn-Freund, *supra* note 157 at 12. The number of national legal systems in the world today is close to 200; see Vranken, *supra* note 112 at 10.

¹⁶⁰ Many states in this world have not, or not entirely, even unified their own private law, thus making the application of interlocal conflict rules necessary. Most continental European countries have unified their

organisations in the field of unification and harmonisation of private law are the Hague Conference on Private International Law, the United Nations Commission on International Trade (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the Specialized Conferences on Private International Law (CIDIPs) sponsored by the Organization of American States (OAS).¹⁶¹ International unification, however, is a long process that proceeds in various forms. The preliminary step is the comparison of the different laws at which the unification is aimed. Comparative work must be undertaken to know the differences of the laws involved in order to find common ground or general principles for the content of uniform law. A further step is found in the process of harmonisation of laws. International harmonisation takes into account the great diversity amongst legal systems that serves the aim of an interaction and application of different laws, national and foreign, free from conflict.¹⁶² In the field of harmonisation of laws, the national legislator still has some freedom as to how to achieve the aim set out. The last step results in the adoption of uniform laws that are identical in their legal content and interpretation.¹⁶³

Presently, the ultimate objective of a global unified private law, or any other category of law, lacks a competent international institutional authority and must therefore be considered as

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; see Kegel, *supra* note 6 at 38.

R. David and J.E.C. 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, *supra* note 6 at 10.

¹⁶¹ See Burman, *supra* note 6 at 368).

¹⁶² See generally H.P. Glenn, "Harmonization of Law, Foreign Law and Private International Law" (1993) 1 *Eur. Rev. Priv. L.* 47.

¹⁶³ A good equivalent for the difference between a comparative approach, an approach to harmonise, and one to unify, is found in the legislative instruments of the European Union: (1) recommendations and opinions, which since they have no binding force, are ineffective in law and only of persuasive authority; (2) a decision which is binding in its entirety to whom it is addressed; (3) a directive which is binding as to the result to be achieved upon each member state to which it is addressed, but shall leave to the national authorities the choice of forms and methods; and (4) a regulation which shall have general application and is binding in its entirety and is directly applicable in all member states; see J. Steiner & L. Woods, *Textbook on EC Law*, 6th ed. (London: Blackstone Press Ltd, 1998) at 40 *et seq.*

highly utopian.¹⁶⁴ Therefore, efforts of unification on the regional level, as for example undertaken in the process of European integration,¹⁶⁵ seem more appropriate. First, the regional (trade) agreements have to establish a certain level of integration, a workable judiciary and executive, as well as legislative institutions in order to reach a certain degree of unification of their laws.¹⁶⁶ Once this process is stabilised the adoption of a few world-wide so-called "interregional conflict of laws" would suffice, before further steps in direction towards a global unification of laws can be taken.

c.) Conclusion

The interrelation of private law and private international law, initially purely a matter of domestic law within the category of private law, now provides the basis for a great many interactions between first, the public and private law realm and second, national, supranational, and public international law. In short, the interactions can be structured as follows: Authorised by the constitution or more generally by public law, private law governs a wide range of legal transactions of national individuals within the territory of one country. Because of legal interactions taking place between nationals and foreign individuals transcending the state's territory, the state, on the basis of considerations of substantive justice and equality adopts conflict of law rules. Since these conflict of law rules are adopted by different countries on a national level, they are susceptible to inconsistencies in their application. Therefore, a state enters negotiations with other states of the world's community to reach harmonisation of their respective laws. Since most legal interactions will occur

¹⁶⁴ See e.g. F.K. Juenger, "A Hague Judgments Convention?" (1998) 24 Brooklyn J. Int'l L. 111 at 121, favouring bilateral negotiations and calling the obstacles for reaching an agreement on a multilateral convention on judgment recognition "insurmountable". But see C. Kessedjian, "First Impressions of the Transnational Rules of Civil Procedure From Paris and The Hague" (1998) 33 Tex. Int'l L.J. 477 at 477 *et seq.*

¹⁶⁵ 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 E. Hondius, "Towards a European Civil Code" in A. Hartkamp & M. Hesselink & E. Hondius & C. Joustra & E. Perron, *Towards a European Civil Code*, 2nd ed. (The Hague: Kluwer Law International, 1998) 3.

¹⁶⁶ For a discussion of the different degree of integration in NAFTA and the EU, see J.P. 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" (1996) 19 Hous. J. Int'l L. 1.

between neighbouring states and states on the same continent, the preliminary steps to harmonise their respective legislation will be agreements signed on the supranational level. Only when the interactions have reached a considerable density going beyond these regional blocks, will incentives be created for a global approach to unification of the laws.

2.6. Public Law and Private International Law

a.) Territoriality versus Equal Personal Justice

The interrelation of public law and private international law has not been subject to frequent comparative approaches.¹⁶⁷ Their relations appear within a domestic context, that is the relationship of the conflict of laws of the forum and the latter's own public law, and also within a *quasi*-international context, that is the relationship between the conflict of laws of the forum and foreign public law.¹⁶⁸ Therefore a conflict rule is of a dual character because its function is international but its origin is municipal.¹⁶⁹ Therefore, the implications of the application of foreign public law only appear through the "path" made accessible through the forum's proper private international law. Due to private international law's purely domestic nature, the first relationship will mark the starting point for this analysis.

In a domestic legal system, a common standpoint is generally that private international law is private law and, thus, distinct from public law.¹⁷⁰ Equally, when its norms stipulate the application of a foreign *lex causae*, only norms of foreign private law but not of foreign public law are meant to be applied.¹⁷¹ This omission is regrettable, because many important

¹⁶⁷ See Bar, *supra* note 85 at 208; J. Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 Can. Bar Rev. 271 at 272.

¹⁶⁸ See "Conflict of Laws", *supra* note 6 at 115.

¹⁶⁹ See F.A. Mann, "The Doctrine of Jurisdiction in International Law" (1964) 111 Rec. des Cours 1 at 14 [hereinafter "Doctrine"].

¹⁷⁰ See Schnitzer, *supra* note 79 at 25-27. But see Story, *supra* note 74 at 13 classifying private international law as a branch of public law.

¹⁷¹ Professor Baade mentions a bias against foreign public law, because "[A]ssertions based on foreign public law did not benefit from the general spirit of internationalism and cultural solidarity which did so much for the development of private international law"; see H.W. Baade, "The Operation of Foreign Public Law" (1995) 30

current developments stand in close context with the interplay of public and private international law. For example, many criteria that form the basis for a judgment depend on their relation and, thus, fundamentally determine the outcome of the judgment rendered in a particular case. Herein lies a major reason for disharmony on the international level and a challenge to the *ratio legis* of private international law. A good example for such disharmony is found in limping legal acts, of which the *matrimonium claudicans*,¹⁷² as pointed out by Kahn-Freund¹⁷³, is the "ultimate shame of private international law".¹⁷⁴

The main reason for disharmony lies in the nature of statehood itself. Statehood is defined as the exercise of undelegated governmental power, over a definite population, in a specific territory.¹⁷⁵ Herein lies the territorial character of public law (or constitutional) law. This principle stands in close relation to the theory of the sovereignty of the state. According to the idea of a state's sovereignty, a state may exercise legislative jurisdiction, that is the state's international right to create legal rules and to enforce them, only within its own territory and over its own subjects.¹⁷⁶ Both together form the idea that public law, in general, is inapplicable outside a state's territory. The territorial element in its strictest form is found in the field of criminal or revenue law.¹⁷⁷ Equally, the dominant opinion holds that a state's

Tex. Int'l L.J. 429 at 438; see also Bar, *supra* note 85 at 196, writing that public law to the contrary of private law insists on the application of a state's own domestic public law.

¹⁷² 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, *supra* note 79 at 355.

¹⁷³ Kahn-Freund, *supra* note 157 at 14.

¹⁷⁴ Limping legal acts are acts that are treated differently in different countries and, thus, give rise to international disharmony; see Bar, *supra* note 85 at 163-164.

¹⁷⁵ See Baade, *supra* note 171 at 441. Compare Art 1 of the Montevideo Convention on Rights and Duties of States 1933, which reads as follows: "The State as a person of international law should possess the following qualifications: "(a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with other States"; see D.J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 102.

¹⁷⁶ See "Doctrine", *supra* note 169 at 14.

¹⁷⁷ See Baade, *supra* note 171 at 438, 441-442.

legislative jurisdiction is limited by the same state's borders.¹⁷⁸ Therefore the Canadian legislator, for example, only adopts "Canadian" laws and the courts decide cases on base of this Canadian law, just as the French legislator adopts French and the Italian legislator Italian law. The only apparent exception to this sovereign power – if one sets aside the limitation exercised by the realm of international law –¹⁷⁹ is provided by conflict of law rules, which in return are limited by public law rules. From this it follows, that the interrelation of public law and private international law appears solely on the national level, *ergo* within a particular state. This is because a conflict rule is a rule of municipal law.¹⁸⁰ The term "international" relates, therefore only to the fact that the case initiating a trial involves a foreign, and hence, an international element, and does not refer to the origin of the rule itself. As a national law, the relation of private international law to a country's public law depends entirely on the constitution and the structure of the country's legal system.

Despite the fact that the interrelation of public law and private international law is originally an issue of purely domestic concern, international law plays an increasingly important role therein. The reason for this is found in the fact that the traditional limits of extraterritorial exercise of sovereign power of one state in another state, as imposed by public international law, are fading away, as the enhanced daily presence of the international community is increasingly felt by each state. The emergence of obligations *erga omnes* anchored in the International Court's (ICJ) dictum in the *Barcelona Traction* case underlines this trend.¹⁸¹

¹⁷⁸ See K. Lipstein, "Öffentliches Recht und internationales Privatrecht" in W. Holl & U. Klink, eds., *Internationales Privatrecht – Internationales Wirtschaftsrecht* (München: Heymann, 1985) 39 at 39 [hereinafter "Öffentliches Recht"]; Kegel, *supra* note 6 at 847-849.

¹⁷⁹ See "Doctrine", *supra* note 169 at 17.

¹⁸⁰ *Ibid.* at 20.

¹⁸¹ Continuous efforts to overcome the rigid character of relations among sovereign states based solely on consent were being made over a long time-period. These efforts culminated in the ICJ's dictum in the *Barcelona Traction* case enumerating four examples of obligations *erga omnes*: 1. Outlawing Acts of Aggression; 2. Outlawing Acts of Genocide; 3. Protection from Slavery, and 4. Protection from Racial Discrimination.

Obligations *erga omnes* indicate that they are to the concern of all states and, thus, binding 'towards all'. Their two main characteristics are *universality*, in the sense that they are binding on all States without exception and *solidarity*, in the sense that every State is deemed to have a legal interest in their protection; see M. Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Clarendon Press, 1997).

Another reason lies in the *double rôle* of constitutional law as mentioned above.¹⁸² Therefore, even strictly territorial categories of (public) law, such as criminal or revenue laws, see their territorial limits being blurred by increased international interactions.¹⁸³ Nevertheless, in this chapter emphasis will be placed on the various domestic implications arising from the interplay between public law and private international law.

b.) Distinction and Points of Contact

In order to locate the points of contact between public law and private international law, the border between them must be drawn. Due to the purely domestic character of both public law and conflicts of law rules, their content differs largely from state to state. The nature of the relation can be characterised as being paradoxical, because both categories are situated on the domestic level, yet public law (through the constitution) procreates private international law, and finds itself undermined in its territorial sovereignty through the reference made to a foreign law by conflicts of law rules.

Nevertheless, three general distinctions can be made: (1) Traditionally, private international law is considered as being a part of private law, so that the differences are generally the same as between private and public law. The main exception is that (2) private international law consists almost solely of procedural norms, or more precisely so-called conflict-of-law rules, while public law largely consists of substantive norms. Their difference is that substantive norms decide cases, conflict-of-law rules only choose the substantive norm that is to be applied.¹⁸⁴ (3) Finally, because public law is generally excluded from extraterritorial application it can be said to correspond to *ius cogens* while private international law

¹⁸² See Chapter II. 2.4.a.); see also Baade, *supra* note 171 at 446-447, dividing public law into three subcategories, namely (1) public international law, (2) constitutional law and (3) administrative law.

¹⁸³ Examples of a growing awareness of foreign public law in general and foreign criminal law in particular are the consideration of prior foreign convictions of repeated offenders (recidivists), the prohibition of double jeopardy (*ne bis in idem*) and the policy to attempt resocialisation of persons sentenced for crimes committed abroad within the country of their national origin. In the field of revenue laws, similar examples are the attempts to diminish double taxation or to grant persons credits on their domestic tax liability for foreign taxes they paid; *ibid.* at 449-451.

¹⁸⁴ See Bar, *supra* note 85 at 195-196.

classifies rather as *ius dispositivus*. From these main distinctive characteristics, the following possible points of contact can now be deduced:

(a) The most obvious point of contact between public law and private international law is found in the concept of *ordre public* (public policy). *Ordre public* can be divided into a positive and a negative concept.¹⁸⁵ The positive concept requires the application of some norms of the *lex fori* regardless of foreign law referred to by the conflicts of law rules when these laws are so-called “*lois d'application immediate*”. Through the concept of the negative *ordre public*, a state's public law restricts the application of foreign law within domestic courts by the way of reference authorised by its own conflicts of law rules. The restriction only applies to foreign law that contradicts major principles of a state's legal order. Without doubt both concepts of the *ordre public* fulfil an important role in the development of conflict of laws and in the overall improvement of international judicial harmony, as long as its application is not abused. Moreover, the impact of international law must increasingly be taken into consideration. This necessity is reflected in the notional distinction of a “national” *ordre public* and an international *ordre public*.¹⁸⁶ The international *ordre public* focuses on the harmonisation of values determining the employment of the *ordre public*. In this respect public international law assists as a tool for interpretation by the means of various international conventions for the protection of human rights.¹⁸⁷ International human rights standards launch a second important question related to public and private (international) law through their national counterpart, constitutional civil rights and liberties. In this respect a highly controversial discussion arises whether these fundamental rights have an effect on

¹⁸⁵ See M. Keller & K. Siehr, *Allgemeine Lehren des internationalen Privatrechts* (Zürich: Schulthess Polygraphischer Verlag, 1986) at 536-540.

¹⁸⁶ The distinction made here is not to be confused with the distinction made by the French law, where the *ordre public internationale* corresponds to the *ordre public* as used in the field of private international law while the notion of “*ordre public interne*” corresponds to what is usually referred to as public order; see M. Keller & K. Siehr, *Allgemeine Lehren des internationalen Privatrechts* (Zürich: Schulthess Polygraphischer Verlag, 1986) at 540.

¹⁸⁷ See Bar, *supra* note 85 at 542, specifying the utility of such an international (or universal) *ordre public* for the permanent adaptation of values forming the national *ordre public* in accordance with ideas of ethics and justice existing in the international community.

third parties (*Drittwirkung der Grundrechte*).¹⁸⁸ Hidden behind this notion is the question whether civil liberties only apply to the relation between the state and its nationals or should apply amongst nationals themselves. The effect can either be direct, meaning that it affects the relation between private individuals or indirect, meaning that fundamental rights only exercise their influence through the legislation adopted by state authorities that govern these relations. Fundamental rights, mostly by the principle of equality and their continual strive for (equal) justice, have also served as a legitimisation of conflict of laws.¹⁸⁹ As a further consequence, the common distinction of protection of nationals (*Bürgerrechte*), e.g. the right to vote, and protection of everybody (*Menschenrechte*), e.g. personal freedom, must be discussed and needs further clarification. This is also important with regard to the question whether fundamental rights only serve private persons or moral persons as well.

(b) Another major point of contact concerns the relevance of foreign public law to the application of foreign law within domestic law. Several theories for the application of foreign law within a domestic court have been elaborated and have tried to overcome the strict concept of state sovereignty.¹⁹⁰ Their success was – if at all – only with regard to the application of rights deriving from private law, and not from those of public law. With the emergence of the welfare state and the parallel explosion of public law, mainly due to administrative regulatory norms, many questions arising in private law conflicts increasingly

¹⁸⁸ See *Austrian Constitutional Law*, *supra* note 158 at 43; Walter & Mayer, *supra* note 125 at 466-467; K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: C.F. Müller Juristischer Verlag, 1988) at 140-143.

¹⁸⁹ The foundation of the principle of equality in the constitution requires the legislator to adopt (national) conflicts of law rules in conformity with it. By doing so in various countries it fulfils, according to Savigny, an international function by creating a methodical obligation to take equally into consideration the relevant foreign legal order touching upon a case of transnational elements. See e.g. "Rechtsordnung", *supra* note 6 at 21; see also Bar, *supra* note 85 at 209-210.

¹⁹⁰ Ulrich Huber argued that the laws of one state are only binding within its own territory, but their rights deriving therefrom can be recognised by other states. His opinion prepared the way for the later "comity" doctrine of Joseph Story, according to which the recognition of foreign laws is based on courtesy, rather than on a legal obligation. The "vested rights theory" overcomes the tension between the application of foreign law within a sovereign state's territory by regarding a right that has been created in another state as a mere fact. The "local law theory" recognises the application of foreign laws by creating a domestic norm that corresponds ideally to a maximum degree to the content of the foreign norm; see Kegel, *supra* note 6 at 151-152 and "Rechtsordnung" *supra* note 6 at 14-17; Bar, *supra* note 85 at 425.

depend on preliminary questions formed by public law.¹⁹¹ F.A. Mann argues that “[...] the distinction between private and public law has become blurred and deprived from much of its usefulness it ever had [...] and that if foreign law is applicable it should in principle, be applied as it is, without regard to legal classifications of provisions or rules”.¹⁹² Therefore, Mann also generally disapproves of the emergence of an international public law (or conflict of public laws) as suggested by German practice.¹⁹³ In conformity with this trend the *Institut de Droit International* recommended in 1975 the enhanced inclusion of foreign public law in the field of conflict of laws. The recommendation stated in particular that a choice of law made by parties referring to the laws of a foreign country shall also include the public law of this country.¹⁹⁴

(c) The third important question relates to the position of private international law, or the foreign law referred to, within a state’s hierarchical ordering of the legal system. With the growing interdependence of public and private norms, conflicts between foreign laws (that are referred to through the means of conflicts of laws rules) and domestic laws, are increasingly likely to occur. The same development is promoted through the enlarging impact of national fundamental rights and international human rights standards, as well as their mutual interplay. One question relates to the conformity of private international law with its own constitution, because constitutional law clearly guides the application of private international law.¹⁹⁵ Another question relates to the problem of whether the forum is allowed to examine the conformity of a foreign law with its own constitution. Since a law should never be read entirely out of its natural context, for both questions the answer should be in the affirmative, but, of course, within reasonable limits.

¹⁹¹ E.g. the outcome of a claim for damages deriving from a car accident can depend on the possession of a valid driving license, the compliance with road traffic regulations, or other legal acts from the administrative field.

¹⁹² See “Conflict of Laws”, *supra* note 6 at 116, 117.

¹⁹³ *Ibid.* at 118; but see Bar, *supra* note 85 at 216-249; Kegel, *supra* note 6 at 843-907.

¹⁹⁴ See “Öffentliches Recht”, *supra* note 178 at 40.

¹⁹⁵ The 14th Amendment of the American Constitution restricts conflict of laws through the “due process of law clause” and the “full faith and credit clause”; see Swan, *supra* note 167 at 277-281, 287-288.

c.) Public Law: Shelter for Private International Law

The question of the interrelation between public and private international law can be answered by stating that each of them pursues an aim opposite to the other. The state's sovereignty and its public laws solely aim for the well-being and safety of its citizens within their territory. Conflicts of law rules allow the borders of sovereignty to be crossed. But in order to preserve this safety despite the exchange of people, goods or services with other states, public law authorises the application of foreign laws within its territory. This aim is achieved through conflicts of law rules.

2.7. Private Law and Public International Law

a.) "L'état c'est moi!" and Analogies of Acts of Private Persons and of States

The relation of private law and public international law has changed throughout history. In times when the law of nations emerged as a new category of law, recourse to private or Roman law was generally considered to be usual and practical, as long as it was not undertaken absurdly. The nation state and absolute sovereign power in the hand of one single person suggested a fictitious belief in a unity of the state and the sovereign, as expressed by Louis XIV (1638-1715) in the adage "*L'état c'est moi!*" With the lack of an international law proper, private or Roman law was considered to be the apt law governing the relations of sovereigns.¹⁹⁶ The more public international law developed as a proper legal category, the more the influence of private law was rejected as "threatening the independence and scientific character of international law".¹⁹⁷

In the present century, public international law has developed rapidly and has established itself as a proper legal category. Still, its overall organisation is not as dense as that of private law; e.g. there is no well-established court structure covering the surface of the planet

¹⁹⁶ See Lauterpacht, *supra* note 52 at 11

¹⁹⁷ *Ibid.* at 297; see also Ferrari-Bravo, *supra* note 138 at 716.

and no efficient enforcement mechanisms.¹⁹⁸ However, the independence and the scientific character of public international law is no longer threatened. Therefore, the relation of private and public international law must be re-examined given the increase in dynamism of the world of today. Especially, it must be asked whether the former “threat” has not changed and now rather lies in the extensive separation of private law from public international law, both in practice and in science. Indeed, possible mutual interactions as well as benefits from one for the other category have been fairly neglected in literature. The only exception so far is the book *Private Law Sources and Analogies of International Law* written by Sir Hersch Lauterpacht and published in 1927, which – despite his call for further research in this field – so far remains the only systematic monograph dealing with this problem.¹⁹⁹ At the same time the title reveals the most interesting connecting factor between private law and public international law, namely whether analogies can be drawn from private law for public international law. The most frequent example of such analogy is the comparison of the law of the contract with the law of treaties.²⁰⁰

However, the rapid evolution of public international law in the era of globalisation is marked by an increased impact of public international law on municipal law. Today, despite the clear unilinear flow from experiences drawn from private law for the domain of public international law throughout history, it is more appropriate to speak of mutual analogies between private and public international law. This is because a reflux of legal experience from the international level to that of private law – beside the mentioned utility of international law for the unification of private law – should not *a priori* be excluded.

¹⁹⁸ “The question of judicial remedies has generally been regarded as peripheral to the main study of international law; attention has been centred on the substantive rules with little consideration of the consequences of their violation in general or judicial remedies in particular. This reflects the lack of any compulsory jurisdiction in the international legal system, the low incidence of modern judicial and arbitral settlement, the decentralized nature of the international legal system, and the resulting predominant role of self-help”; see Gray, *supra* note 65 at 1.

¹⁹⁹ “In the whole field of international law there is hardly a question of equal practical and theoretical importance to which less systematic attention has been paid than the problem of private law sources and analogies in public international law”; see Lauterpacht, *supra* note 52 at 5.

Therefore, the question of the relation between private law and public international law must be stated in terms of whether analogies between terminology, legal institutes, concepts and principles exist between the two categories of law.

b.) Areas of Contact

According to Lauterpacht the various points of contact between private law and public international law can be grouped into three classes:

(1) The first relates to rights and obligations of States as political entities endowed with attributes of government, and comprises accordingly all cases in which legal relations normally forming the subject-matter of international public law proper are being shaped in accordance with or after the analogy of a conception of private law [...]; (2) To the second group belong cases in which states, in their capacity as *fisci* or through their administrative organs, contract business with one another without any direct relation to rights and duties of *imperium* [...]; and (3) The third class embraces all those instances in which international law determines or influences private rights [...].²⁰¹

The question of analogies between private law and public international law also touches upon a further important issue, namely the question of the applicable law. The dynamic developments of the last five decades brought about the matter of access of private individuals to international law.²⁰² The three classes enumerated above only concern state-to-

²⁰⁰ E.g. the rule *pacta tertiis neque nocent neque prosunt* and the *clausula rebus sic stantibus* are common to the general theory of contracts as well as to that of international treaties; see Ferrari-Bravo, *supra* note 138 at 716-717.

²⁰¹ Examples given are: ad. 1) the decision of a question of sovereignty over a portion of territory by application of rules of prescription, the construction of restrictions of territorial sovereignty after the analogy of easements or servitudes, the determination of certain rights and duties in cases of changes in sovereignty by analogy to rules of inheritance and succession and further rules of private law such as rules of evidence etc.; ad. 2) when a state grants a loan or a purely economic lease to another state, or when two states enter a joint arrangement for the purpose of constructing and maintaining a bridge on a river dividing their territories; and ad. 3.) rights such as those resulting indirectly from the internationally recognised position of aliens, or from the rules relating to private enemy property in time of war, or from the exercise of the right of angary or embargo.

See Lauterpacht, *supra* note 52 at 3-5.

²⁰² Examples for the increased participation of individuals or private parties in the field of international law are, beside the traditional field of human rights and regional integration (e.g. NAFTA chapter 19, and the ECJ in

state relations and the fact that relations between states and private individuals are left out is probably explained by the historical context.²⁰³ In state and private individuals relations, just as in the second and third group of state-to-state relations, the key question concerns the quality of the governing law. Is it public international law or private law? If answered in favour of private law, which country's private law that governs the legal relationship between the subjects involved is going to be applied? In searching for an answer the distinction of acts *de iure imperii* or *de iure privatorum* has to be taken into consideration.

All these relations are equally concerned with the question as to what extent private and public international law can be separated, or how far analogies can be drawn. The field of analogous application of private law in the field of international law is vast and affects in a non-exhaustive enumeration: the formation, validity, and termination of treaties; the acquisition and loss of territory (including the concept of the freedom of territorial waters and freedom of the air); the law of peace; international tort and problems of state responsibility; the measure of damages; the question of interest, moratory, and compensatory; the theory of state succession; prescription; quasi-contracts, conception of sovereignty, bankruptcy, *condominium*, self-help and necessity, equality of states; international servitudes; leases; international mandates; private law rules of evidence and procedure (*estoppel* and *res iudicata*). Direct recourse to private law sources also frequently appears in the settlement of international disputes and by states appearing before international tribunals.²⁰⁴

Given the variety of points of contact between private law and public international law the question of whether analogies exist between the two categories of law must be answered in the affirmative. Despite their rich mutual interplay, there are some differences in degree that

the EU), found in national claims commissions, mixed international arbitration (e.g. the Iran/US Claims Tribunal) and international commercial arbitration; see Gray, *supra* note 65 at 178-209.

²⁰³ Although Lauterpacht is generally in favour of private individuals as being subject to international law, and efforts were made by the Commission of Jurists in charge of the drafting of the statute of the Permanent Court of Justice to grant private parties access to the Courts proceedings, the principle of sovereignty and the assumption that only states can be subject to international law prevailed at the time; see Lauterpacht, *supra* note 52 at 73, 78, 79,

²⁰⁴ *Ibid.* at 5-6, 91-211, 302-303.

call for cautious consideration when recourse is had to private law in the field of international law. These general differences are four in number and can be traced back to the following factors: (1) Difference of geographic scope: There is a danger of asserting too quickly analogies between a private law rule of only local outreach for the immense field of international law. It must therefore be kept in mind that only general principles of law recognised by the main systems of jurisprudence and ascertained by comparative study, and if possible, declared by scientific legal opinion, are a suitable object of analogy; (2) Difference in nature: Some essential differences between the nature of states and private individuals might be forgotten and could lead to absurd results; (3) Difference of system: To maintain the character of international law as a proper category of law makes it necessary to exhaust its means before having recourse to private law, otherwise its coherence might be undermined; and (4) Difference of legal organisation: There can be stated a clear difference in the stage of attainment of legal organisation in the international community.²⁰⁵

c.) Conclusion

Throughout history, private law and analogies drawn from private law have served as a strong means of support in the development of public international law as a proper legal category. Furthermore any possible danger of a threat of loss of independence of international law have evaporated. Equally, the achievement of unacceptable results based on undue recourse to analogy with private law, disregarding some essential differences between their nature and field of operation, is inhibited when reasonably interpreted and applied. Today, the situation has drastically changed. The dynamic increase in interactions between states, as well as states and private individuals, in tandem with a decline of the public/private distinction, again vivifies the question of analogies. On the one hand, international law provides a useful tool in the field of international harmonisation of private law which is mainly felt in the field of international commerce and international commercial dispute resolution. Thus the analogies can be drawn mutually from both categories of law. On the other hand, the analogies that exist between the two categories bear a great opportunity for the response to some imminent questions that refer to the applicable law in legal transactions

²⁰⁵ *ibid.* at 84-86.

between states and private individuals. As was shown above, public law goes through a process of privatisation while private law goes through a process of publicisation. Thus, a general mutual approach of public and private as well as private and public international law is currently taking place. Accompanied by the huge production of legislative material, the necessity to build upon the legal universality of some notions common to all branches of law, so-called 'conceptions of universal jurisprudence', becomes more and more urgent.²⁰⁶ The elaboration of these notions can be achieved through a general science of law that is built upon comparative research and the detection of analogies leading to the elaboration of conceptions common to all branches of law. This proceeding will, amongst other factors, gradually establish a universal jurisprudence.²⁰⁷

3. Summary

During the past few decades the boundaries between the public and the private sphere have been fading away due to the dynamic evolution of human society. Paradoxically, former fields of activity of the public realm are transferred to the private realm and *vice versa*. In consonance with this shift in society, a precise separation of the categories of private law and public law as well as between municipal and international law is no longer possible as their boundaries blur due to an increase in the interactions between the various traditional actors of both spheres. This shift is recognised from a factual perspective and confirmed from a theoretical perspective. The strict theoretical distinction between public and private law, just like the one between municipal and international law, must therefore be abandoned. The emergence of a *droit mixte* and the support for the theory of harmonisation testify to that. Such abandonment of a strict separation does not mean that the respective distinctive features no longer exist. Quite the contrary, since their distinctive character must be well preserved, but the fact that they originate from different categories does not exclude their

²⁰⁶ *Ibid.* at 19-23.

²⁰⁷ Some such concomitants for the establishment of a general science of jurisprudence are e.g. the European Union's ERASMUS program (European Community Action Scheme for the Mobility of University Students) on a European level and bilateral agreements between universities on different continents on a global level as well as the practice of big law firms; see M.R. Deckert, "Der 'Binnenmarkt für Juristenausbildung': Europäische Impulse für Forschung und Lehre" (1998) 6 Eur. Rev. Priv. L. 1.

parallel consideration or application. As for international customary law and for international treaties, the existence of two different modes of implementation, namely through constitutional provision or judicial practice (international customary law), and through self- or non-self executing treaties (international treaty law), does not hinder their application, but rather leaves some room for their best adaptation to the respective country's conditions. The complementary character of distinctions based upon a terminological dichotomy is brought to light by the irresolvable linkage of private law and private international law where the degree of harmonisation of private law is decisive upon the quantitative requirement of conflict of law rules. Furthermore, a general impossibility of comparing two categories of law without making reference to a third one became obvious in relation of private law to private international law. These two categories, although they belong principally to the private domestic legal realm, require that reference to the international as well as to the public sphere be made. It was mentioned earlier that Joseph Story, initially, even described private international law as a branch of public law.²⁰⁸ The international element also has an impact on the relation of public law and private international law. From private law and its relation to public law, it can be concluded that private law has provided essential tools for the formation and development of public international law. In the meantime, it is public international law that exercises an enormous impact on the various private laws of different states by the harmonisation and unification of their laws.

Therefore, one must conclude that most disciplinary distinctions owe their precision to a certain moment in time and in space. Principally, the conceptual separation of two systems serves a functional utility. It may provide a helpful tool for the discussion or solution of a particular problem. However, due to the dynamic evolutionary character of law such separation needs to be permanently reconsidered and eventually be abandoned or renewed. Considering this dynamism, the following examination of the present relation of private international law and public international law will be made.

²⁰⁸ *Supra* note 170.

III. PUBLIC AND PRIVATE INTERNATIONAL LAW

In this chapter, the separate consideration of private international law and public international law, as it was predominant in the past century, will be critically examined. For this purpose three main fields – law, economics and politics – will serve as the major fields of this legal analysis to clarify how the two historically independent legal systems are embedded in the current dynamic global legal order. The subdivision of society in triplicate is meant to reflect the dynamic insoluble interdependence between the main pillars on which a society rests. It is an attempt to emphasise the unity that law, economics and politics naturally form. The term “economics” is chosen here because of the exemplary character of the developments currently underway in the realm of international economic law, commonly summed up in the emergence of a new *lex mercatoria*. In order to highlight their unity, their interrelation is perceived as a circle forming a “tangled hierarchy”²⁰⁹, as distinguished from a vertical one. This means that in such a dynamic process no predominance of one field over the other exists, *ergo* a monocausal approach is rejected. From their dynamic interaction, the great variety of societal activities in the world today is born. The point of departure is a given legal, economic, and political situation, and focus is put on their future mutual interaction.

The overarching question in this chapter is whether the separation of the two categories of law can still be preserved for the present dynamic world situation, since they eventually intersect, and since potential benefits lie in an approach or a common consideration of the two categories of law for the current international legal order.

1. *Law*

1.1. *Public International Law as a Foundation for Private International Law?*

With regard to the realm of public international law, its expansion and strengthening on a global level are undisputed. Further trends, such as increased access of private persons to

²⁰⁹ “‘Tangled hierarchies’ is the term used by Hofstadter to describe the phenomenon whereby the highest level in a hierarchy ‘loops into’ the lowest one”; see *Autopoietic System*, *supra* note 46 at 3.

international instruments of public international law, and the shift from states as the sole actors of public international law towards non-governmental organisations equally persist. To what extent, however, is private international law affected by these recent developments? First, from a legal perspective, the question whether private international law (or conflict of laws) is a source of national or international law has to be addressed due to its major importance for the relation between public and private international law. It is also decisive for the response to many questions that arise from the application of foreign law within domestic courts, especially with regard to the integration of foreign norms and their hierarchical standing in the domestic legal system. The reason is that in the process of their integration, the position of the rules of private international law in respect of the rules of constitutional and public international law is determinative to the application of foreign law.

In the past, the separation of conflict of laws and public international law gave rise to a controversy between two major schools, the "international school" (universalists) and the "national school" (particularists).²¹⁰ The national school perceived the branch of conflict of laws as a branch of municipal law. According to this view, any bearing of international law upon conflict of laws was at its best a matter of comity.²¹¹ The internationalists, on the other hand, emphasised that "every state must have a system of private international law" and "that states may not exclude the application of foreign law altogether".²¹² While the national school was considered obsolete a long time ago, the international school today still lacks full

²¹⁰ See *Conflict of Laws before International Tribunals*, *supra* note 6 at 22 *et seq.*

²¹¹ 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 "Comity", *supra* note 6 at 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 F. Wharton, *A Treatise on the Conflict of Laws*, 2nd ed. (Philadelphia: Kay and Brother, 1881) at 5; see also Maier, *supra* note 6 at 281, writing that "comity is discretionary and international law is obligatory".

²¹² See *Conflict of Laws*, *supra* note 6 at 146.

support, despite the fact that its principal tenets have been fulfilled over the course of time.²¹³ All countries of the world have enacted rules of private international law and consequently allow – to a varying extent – the application of foreign law. Thus, the question of public international law has been answered by reality and must be accepted as general practice of the states. Beside specific international conventions containing rules of conflict of laws, the existence of an identical rule of customary international law can therefore be assumed. The international character of private international law is also supported by the general recognition of the general principles of international law by most constitutions.²¹⁴ Moreover, the practice of international tribunals and so-called mixed arbitral tribunals contributes further to the internationalisation of private international law. International tribunals mediate conflicts between states, and mixed arbitral tribunals between states and private individuals. In doing so, they rely upon general principles of law deriving from national laws. The tribunals themselves, though, are not subject to any particular national legal system. Thus, through their practice, namely the application and further development of these general principles of law, they also contribute largely to the international character of conflict of laws.²¹⁵

The “internationalisation” of conflicts of law can be observed in choice of law rules and the delocalisation of substantive law. The traditional view allowed the parties’ free choice to determine the substantive law to be applied in the arbitration only when authorised by the *lex fori*. The new approach – undertaken by the Institut de droit international in 1979 and supported by various municipal systems of conflict of laws – assumes that the choice of substantive rules is a matter of free will and need not derive from any particular state system,

²¹³ See *Conflict of Laws*, *supra* note 6 at 145, 148; but see A. Bleckmann, *Die völkerrechtlichen Grundlagen des internationalen Kollisionsrechts* (Köln: Carl Heymanns Verlag, 1992) at 1-4, 59 dissenting from the prevailing present doctrine that locates the source of private international law – with the exception of international conventions dealing with its matter – in the realm of national domestic law.

²¹⁴ Compare E. Jayme, “Staatsverträge zum Internationalen Privatrecht: Internationalprivatrechtliche, staatsrechtliche, völkerrechtliche Aspekte” in *Berichte der Deutschen Gesellschaft für Völkerrecht*, ed., *Staatsverträge zum Internationalen Privatrecht* (Karlsruhe: C.F. Müller Juristischer Verlag, 1975) 7 at 28.

²¹⁵ See Bleckmann, *supra* note 213 at 59.

but is in fact a “general principle of private international law”.²¹⁶ This trend persists in the shift from the state to non-governmental actors as law-makers. Finally, many rules of conflict of laws in different states show similar approaches to issues of private international law, and thus have developed universal principles even for very specific topics.²¹⁷

1.2. Unification of Private Law through International Conventions

As a result of the increased interdependence between states and the interactions between their nationals, private international law faces new serious problems, such as forum shopping (*i.e.* the possibility for parties to choose the forum and to eventually liberate themselves from noxious rules and, thus, to influence essentially the outcome of the case) and competing litigation (*i.e.* the synchronic litigation in multiple forums) that challenge the certainty and predictability of law, as much in commercial affairs as in issues of family law.²¹⁸ These new problems caused by ‘internationalisation’ were accompanied by the attempt to formulate proposals for their solution through the adoption of international legal texts. This process of harmonisation or unification of private international law through international conventions is an example of the undisputed entanglement of public and private international law, more particularly the claimed ability of public international law to come to the aid of private international law.²¹⁹ This help consists in the process of international codification of conflicts of law rules. The two main possibilities for such international codification are bilateral, and multilateral, conventions, which can have the character of self- or non-self-executing treaties.²²⁰ While bilateral treaties have the advantage of allowing for a more specific regulatory scope, multilateral treaties have the advantage of a wider geographic regulatory scope. On the other hand, it is easier to elaborate a common point of view in bilateral negotiations, whereas multilateral treaties also often face resistance of national parliaments

²¹⁶ See S.J. Toope, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge: Grotius Publications Ltd., 1990) at 45-48.

²¹⁷ See Bleckmann, *supra* note 213 at 60.

²¹⁸ See “Forum Shopping”, *supra* note 6 at 314.

²¹⁹ *Ibid.* at 314.

²²⁰ See *Einheitsrecht*, *supra* note 35 at 98-104.

during the process of transformation.²²¹ The main inconvenience of both together is that they have contributed to a large number of legal texts multiplying voices speaking of a true “crisis of international codification policy”.²²² The crisis consists mainly of the proliferation of legal material manifested in a huge quantity of existing conventions; a so-called “*embarras de richesse*”²²³ produced by a “*fuite en avant*”. Unfortunately, the number of international conventions also stands in disproportional relation to the number of ratifications.²²⁴ A further aggravating element of the crisis is the fact that many of these conventions overlap or even contradict each other.²²⁵ One cause of this problem, with severe consequences, is the lack of coordination among the various actors, governmental and non-governmental, as well as national, regional and international, in the field.²²⁶ Finally, the uncontrolled proliferation of legal material in this field reflects the conceptual separation between private international and public international law.

²²¹ *Ibid.* at 95.

²²² See K.M. Meessen, “Staatsverträge zum Internationalen Privatrecht: Völkerrechtliche und verfassungsrechtliche Aspekte” in *Berichte der Deutschen Gesellschaft für Völkerrecht*, ed., *Staatsverträge zum Internationalen Privatrecht* (Karlsruhe: C.F. Müller Juristischer Verlag, 1975) 49 at 49-52 [hereinafter “Staatsverträge”].

²²³ *Ibid.* at 50.

²²⁴ *Ibid.*

²²⁵ *Ibid.* at 55 *et seq.*

²²⁶ Some of the most important organisations active in the unification process are: 1. International Organisations: the Economic and Social Council (ECOSOC), the United Nations Commission on International Trade (UNCITRAL), the International Labour Organisation (ILO), the Economic Commission for Europe (ECE), the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law, the International Civil Aviation Organisation (ICAO), the Intergovernmental Maritime Consultative Organization (IMCO), the World Intellectual Property Organisation (WIPO), and the World Trade Organisation (WTO); 2. Regional Organisations: the European Union (EU), the Council of Europe, the International Commission on Civil Status (CIEC), the Council for Mutual Economic Assistance (CMEA) [abolished on 1 January 1991], the Organization of American States (OAS); and 3. Non-Governmental Organisations: International Chamber of Commerce (ICC), International Law Association (ILA), *Institut de Droit international*, the International Maritime Committee (IMC), Baltic and International Maritime Conference (BIMCO), and the International Air Transport Association (IATA); see *Einheitsrecht*, *supra* note 35 at 43-92.

1.3. A Conflict of Laws for International Conventions?

The uncontrolled proliferation of legal material, however, has not only affected the field of private international law, it is rather a general trend that increasingly seizes the international legal order. A wide range of conventions dealing with trade law, environmental law, human rights, and international administrative law have been adopted. Additionally, beside the traditional categories of municipal and international law, a third level of law, that of supranational law, was created by the process of regional integration. Within the field of trade law, a large number of regional trade agreements (RTAs) have been signed on all continents of the world.²²⁷

The large number of international conventions has led to a great variety of real and possible future conflicts. These conflicts – due to the structure of the current international legal order – can be roughly classified in two general categories, plus a third one formed by a combination of the two:

Conflicts on a vertical level – The vertical axis ranges from a broader geographical scope to a narrower one. *In concreto*, agreements with a fairly global outreach are opposed to agreements limited to a particular region or other features common to only a few countries.²²⁸ In a dynamic approach no hierarchical distinction can be made. The broader geographical outreach on a global level is, in most cases, compensated by a higher degree of integration realised on a regional level. Therefore, the question of a hierarchy between the global and the regional level must be scrutinised on a case-by-case basis depending on the criteria.

²²⁷ 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, *supra* note 128.

²²⁸ In the Convention of Lomé for example, concluded between 70 ACP states and the 15 member states of the European Union, trade facilities are granted to states in Africa, the Caribbean and in the Pacific; see *The Fourth ACP-EEC Convention of Lomé* (signed on 15 December 1989), *Official Journal* L 229, 17.08.1991, pp. 3-280, online: European Union Homepage, <<http://europa.eu.int/eur-lex/en/treaties/index.html>> (date accessed: 28 January 2000).

An example of a conflict arising on the vertical axis is a conflict between rules adopted by the WTO and rules adopted in the framework of the NAFTA or the EU. Such a clash raises the question of the prevalence of one agreement over the other. Despite the fact that many international agreements contain rules determining their scope of application and their relation to other agreements, conflicts or the inconvenient phenomenon of forum shopping occur.²²⁹ Forum shopping can fundamentally influence the outcome of a case. For example, article 2005 (1) NAFTA stipulates that “disputes regarding any matter arising under both, this agreement and the General Agreement on Tariffs and Trade, any agreement negotiated thereunder, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining party”. In the *Periodicals case*,²³⁰ a dispute centred around the controversial issue of cultural industries. The plaintiff (the U.S.) chose to try the defendant (Canada) in the framework of the WTO Dispute Settlement Body (DSB), instead of the dispute settlement procedures provided by NAFTA, because NAFTA – as opposed to GATT – contains an exemption clause for cultural industries.²³¹ Most of the measures taken by Canada were held inconsistent with the prevalent GATT regime by the Panel and upheld by the Appellate Body.²³²

Conflicts on a horizontal level – This category describes conflicts arising on the same level, and even within the same system. The “same” level designates the relation between the

²²⁹ The WTO agreement provides that, if there is a conflict between a provision of the WTO Agreement and a provision of any of the Multilateral Agreements, the WTO Agreement prevails to the extent of the conflict. On the other hand Article 103 NAFTA (“Relations to other Agreements”) for example includes the GATT in its reference to other agreements and stipulates that NAFTA prevails to the extent of any inconsistencies; see J.R. Johnson, *International Trade Law* (Concorde: Irwin Law, 1998) at 46 and S.E. Gaines, “Comments on Dispute Settlement Issues under NAFTA” (1993) 1 U.S. Mexico L.J. 35 at 35.

²³⁰ Compare *Canada – Certain Measures Concerning Periodicals* (Complaint by the United States) (1997), WTO Doc. WT/DS31/R (Panel Report) online: WTO <<http://www.wto.org/wto/dispute/distab.htm>> (last modified: 23 December 1999) [hereinafter *Periodicals Panel Report*] and *Canada – Certain Measures Concerning Periodicals* (Complaint by the United States) (1997), WTO Doc. WT/DS31/AB/R (Appellate Body Report) online: WTO <<http://www.wto.org/wto/dispute/distab.htm>> (last modified: 23 December 1999) [hereinafter *Periodicals Appellate Body Report*].

²³¹ Art. 2107 NAFTA defines cultural industry (carried over from Art. 2012 of the CAN-US FTA).

²³² See *Periodicals Panel Report*, *supra* note 230 and *Periodicals Appellate Body Report*, *supra* note 230.

norms in respect of their creation by other norms, just like e.g. an inconsistency of a federal law with the constitution.

An example of a conflict on the same level is found in an eventual clash between the United Nations system and the WTO system.²³³ A further example of a clash on the same level but also within one system is found in an eventual inconsistency between the GATT and the General Agreement on Trade in Services (GATS). A clear distinction between a “service” and a “good” is not always easy to achieve, as was seen in the audio-visual sector, highly disputed in the context of the European Union’s Televisions without Frontiers Directive.²³⁴ While the EU representatives saw television programming as a service, the Americans perceived it as a good.²³⁵

A combination of horizontal and vertical conflicts – A recent example of a clash combining the vertical and the horizontal level was the conflict of competence within the UN system itself and the UN (Security Council) and the North Atlantic Treaty Organization (NATO), for instance as it appeared during the Kosovo crisis. The controversy over the legality of the NATO action in respect of Kosovo appeared in light of a conflict between the UN Charter²³⁶ and other UN documents, such as e.g. the Universal Declaration of Human Rights, and between the UN Charter and NATO: On the one hand, Article 2 (3) of the UN Charter obliges members to “settle their disputes by peaceful means in such a manner that international peace and security, are not endangered” and Article 2 (4) stipulates that they “shall refrain in their international relations from the threat or use of force against the

²³³ See e.g. A.F. Perez, “WTO and U.N. Law: Institutional Comity in National Security” (1998) 23 Yale J. Int’l L. 301, analysing a clash of competence between the UN system and the WTO system in regard of national security interests.

²³⁴ The “*Television without Frontiers*” directive (89/552/EEC) amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending *Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*, O.J. L 202, online: EU Homepage <http://europa.eu.int/eur-lex/en/lif/dat/en_397L0036.html> (date accessed: 28 December 1998).

²³⁵ See S.P. O’Connell, “Television Without Frontiers: The European Union’s Continuing Struggle for Cultural Survival” (1996) 28 Case W. Res. J. Int’l L. 501 at 526-527.

²³⁶ See *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No 7 [hereinafter *Charter*].

territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". The Universal Declaration of Human Rights (UDHR)²³⁷ and subsequent human rights conventions (the International Bill of Human Rights)²³⁸, on the other hand, establish a so-called right to humanitarian intervention. With respect to the relation between the UN Charter and NATO, Article 53 of the Charter says "that no enforcement action shall be taken under regional arrangements or by regional agencies without the authorisation of the Security Council".²³⁹ NATO did not have such an authorisation from the Security Council.

The three examples show the possible space for conflicts arising from the quantity of norms and legal texts as well as a lack of coordination between them. In addition to the problem of quantity, the achievement of uniform interpretation of the existing international conventions is a complicated process. These two major flaws are a significant source of legal conflicts in the international legal order. The multitude of international conventions gives rise to claims for an "interlegal law", an "international conflict of laws", or an "intrasystemic law of conflicts".²⁴⁰ Hence a body of rules coordinating different subsystems of law is necessary. One international convention that approximately fulfils the function of a conflict of laws for the realm of public international law, is the United Nations Convention on the Law of the

²³⁷ See *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71. Initially only a declaration without legally binding character, the Universal Declaration of Human Rights has meanwhile developed normative character through the achievement of the status of customary international law; see Harris, *supra* note 175 at 636.

²³⁸ Beside the UDHR, the International Bill of Human Rights consists of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Optional Protocols to the International Covenant on Civil and Political Rights, and the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty; see United Nations, ed., *The International Bill of Human Rights* (New York: United Nations, 1988) and United Nations, ed., *A Compilation of International Instruments*, vol. 1 (New York: United Nations, 1994).

²³⁹ See Charter, *supra* note 236.

²⁴⁰ See *Autopoietic System*, *supra* note 46 at 100-122; see also E. Wolff in *Conflict of Laws*, *supra* note 6 at 177, who states that "[I]f I say that an international system of conflict of laws is at present almost non-existent, that does not exclude, of course, that such a system can be created gradually by decisions of international tribunals".

Treaties, signed at Vienna in 1969.²⁴¹ In 85 articles, the Convention considers the fundamental role of treaties in international relations and provides useful guidance in the interpretation (Art. 31-33) and mutual relation of international treaties, e.g. as to their territorial (Art. 29) and temporal (Art. 28, 30) scope of application. The Convention, however, only applies to international treaties concluded between States and not to other subjects of international law (Art. 3) and thus its value for the present international legal order is clearly limited. Further, it is noteworthy that the United States of America is not among the 83 states that became parties to the Convention through ratification, accession or succession.²⁴²

Finally, the problems raised and the suggestions made above not only apply between legal international legal sources but apply equally to the relations between international law and several competing systems of municipal law. The same conflict arises at the national level, where more intrasystemic conflicts arise the more the categorisation proceeds. The branches of civil law, criminal law and public law are more likely to clash as their interactions grow. Intrasystemic conflicts can even be traced to one legal category, such as specialisation within the realm of civil law and, as a result, its proceeding fragmentation in torts law. Therefore, from a dualist perspective, the two levels of law are equal and reflect the current situation of the legal order as a single system of law. Moreover, in a dynamic global society conflicts are also likely to arise between state law and social quasi-legal orders.

2. *Economics*

2.1. The Commercial Sector as a Pioneer of "Globalisation"

The global dynamism, with the juridification it has brought about, blurred most of the boundaries that used to categorically separate different areas of law from each other. It was shown that many different legal conflicts are caused by the web of complex legal norms trying to deal with and to control the manifold transnational activities taking place at the

²⁴¹ See *Vienna Convention*, *supra* 146.

²⁴² See *Multilateral Treaties Deposited with the Secretary-General*, online: United Nations Organizations Homepage <<http://untreaty.un.org>> (last modified: 19 January 2000).

global level. More of such conflicts, in number as well as in importance, are likely to occur in the future. In this development – commonly called “globalisation” – the economic sector plays a pioneer role. Nonetheless, it is worth recalling here that economics is firmly embedded in the unity of politics and law. Economic activity, through its main motor of industry and trade, influences strongly the entire spectrum of societal activities in a “civil society”, such as Arts, Science, Culture, Welfare, Environment, Philanthropy, Religion, and again Law and Politics. Business is undertaken by people for people and its expansion across borders incites people’s migration. Economic integration at a certain point requires political integration, which is introduced through laws. Keeping in mind this genuine link, the following paragraphs will – from a legal perspective – deal with the purely commercial activities as reflected in the notions of “transnational law”, “transnational commercial law”, “international law of contracts”, “law of international trade”, “*Droit du commerce international*”, or “new law merchant (*lex mercatoria*)”.²⁴³ Over the years the notion of *lex mercatoria* has gained wide acceptance. This great variety of notions is mirrored in the same number of definitions and is the cause for hot debate for more than three decades now.²⁴⁴ In the centre of the controversy stands the question of the existence of an independent law of a proper law merchant, or *lex mercatoria*; in the periphery its scope, its legal character and theoretical foundation are disputed.²⁴⁵ The *lex mercatoria* itself forms a family, comprising in itself many subcategories such as the *lex petrolea*, the *lex electronica*, the *lex constructionis*, the *lex maritima*, and the international law of contracts.²⁴⁶ For this essay, emphasis will be put on the unity of the legal system, and therefore the *lex mercatoria* is perceived as a revived conceptual model of a new *ius commune*, a law common to many

²⁴³ See generally A.F.M. Maniruzzaman, “The Lex Mercatoria and International Contracts: A Challenge for International Arbitration” (1999) 14 Am. U. Int’l L. Rev. 657 at 660-670 and Siehr, *supra* note 33 at 112-113.

²⁴⁴ See E. Gaillard, “Thirty Years of Lex Mercatoria: Towards the Discriminating Application of Transnational Rules” in A.J. Van Den Berg, ed., *International Council for Commercial Arbitration – Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* (The Hague: Kluwer Law International, 1996) 570.

²⁴⁵ See H.-M. Mertens, “Lex Mercatoria: A Self-Applying System Beyond National Law?” in G. Teubner, ed., *Global Law without a State* (Aldershot: Dartmouth, 1994) 31 at 31.

²⁴⁶ See Maniruzzaman, *supra* note 243 at 669.

different jurisdictions and many different actors. The main interest here consists in locating the points of contact of the *lex mercatoria* with public and private international law.

2.2. The '*Lex Mercatoria*': Missing Link or a Third Legal Order?

The present order of international trade law has departed from a strict distinction of private and public international law. Still the gap between these two categories is open. On the one side, the international trade regime is governed by the WTO and several regional Organisations (e.g. NAFTA, MERCOSUR, EU, ASEAN, APEC) that have been created under the auspices of public international law. On the other side, the activities of private parties involved in transnational commercial activities are generally regulated by their respective national legal systems and the respective conflict of laws. Accordingly, judicial review of international trade disputes occur on two different levels, that of inter-state dispute resolution provided by the Dispute Settlement Body (DSB) of the WTO, and that of private individuals provided by their relevant national court system.²⁴⁷ The general rule was that dispute procedures under public international law had no immediate impact on the legal status of the private individual, whereas the consideration of decisions rendered by national courts within the realm of international organisations formed an exception.²⁴⁸

With the dynamism reigning in the commercial sector, transnational interactions between states and private parties are increasing and call for further closure of the gap. International contracts concluded between states and private parties are on the forefront of current problems caused by the lack of coordination between the private and public as well as international and municipal elements. The main problems encompass primarily the search for an applicable law (choice of law), and in case of conflict the question of an appropriate forum for the resolution of the dispute (and again the law applied therein) and the enforcement of a judgment or award bringing the dispute to an end.

Admittedly, the need for closure of the gap is partly recognised in improved possibilities for private individuals to have access to the dispute resolution mechanisms provided by regional

²⁴⁷ See Hilf, *supra* note 154 at 322.

²⁴⁸ *Ibid.* at 330 *et seq.*

trade agreements (e.g. NAFTA) or supranational organisations (e.g. the European Court of Justice (ECJ)). However, developments in the commercial sector proceed faster, and political authorities lag behind in the creation and implementation of workable norms and institutional mechanisms meeting the requirements of business relations of today.

It is from this vacuum that the concept of a new *lex mercatoria* was born. Given the vacuum between two traditionally distinct areas of law, it might be legitimate for the moment to deny the strict legal character of *lex mercatoria*, or at least to perceive it as an independent “third legal order”. A closer look at the constituting elements of the *lex mercatoria*, however, might shed some light on its factual character. As constituting elements, the following sources serve: (1) public international law; (2) uniform laws; (3) the general principles of law, (4) the rules of international organisations; (5) customs and usages; (6) standard form contracts; (7) reporting of arbitral awards; (8) judicial decisions and jurisprudential contributions; and (9) private international law.²⁴⁹ From this listing of constituting elements, hardly any doubts concerning the legal character of the *lex mercatoria* are likely to appear. The *lex mercatoria* even fulfils the classical standards of a legal order: it is normative, institutionalised, and coercive.²⁵⁰ A mere comparison with the standards of national legal systems however would begin with the wrong premise, because of the transcending supranational function of the *lex*

²⁴⁹ The first seven elements are listed in Maniruzzaman, *supra* note 243 at 672. The eighth element “judicial decisions and jurisprudential contributions” must be included from an empirical perspective as well as in light of Article 38 (1) (d.) of the Statute of the ICJ (“judicial decisions and the teachings of the most highly qualified publicists”). For “judicial decisions” see Siehr, *supra* note 33 at 114. Finally, the last element “private international law” is taken into consideration because of the ordering quality of conflict rules in “intra-” and “intersystemic” conflicts [see chapter III. 1.3]. Furthermore, it is believed here that from a pluralist perspective of law at the present time, the purpose of the *lex mercatoria* cannot be a total displacement of private international law as proposed by some writers; see Maniruzzaman, *supra* note 243 at 680-682. But see Gaillard, *supra* note 244 at 578.

²⁵⁰ See Maniruzzaman, *supra* note 243 at 698 *et seq.*

mercatoria.²⁵¹ Nonetheless, it suffices here for the time being to indicate that rules originating from the concept of a '*lex mercatoria*' exist and that they are applied.²⁵²

2.3. Transnational Contracts between States and Private Parties

A common field of application of private international and public international law for the *lex mercatoria* in international practice is found in the work of international judicial organs and especially in the work of international mixed arbitral tribunals resolving disputes arising from contractual relationships involving states and private parties. These international judicial organs mitigate conflicts of systems of municipal law and consequently apply rules that "are evolved by these international organs in a process of selection and abstraction from the conflict of laws rules of a number of systems of municipal law".²⁵³ In their practical use, these transnational contracts and dispute resolution mechanisms challenge the gap between private and public international law that the *lex mercatoria* is supposed to bridge; and there is broad evidence that the law of transnational contracts forms part of the *lex mercatoria*.²⁵⁴ The difficulties arising in context with such transnational business relations are the search for an applicable law (choice of law), an appropriate forum and the law it applies for eventual disputes and the enforcement of decisions rendered by these fora. The main controversy touches upon the possibility for the delocalisation of the procedural and substantive law of arbitrations between states and private entities.²⁵⁵ As for the choice of law, the free will of the parties is widely accepted, whereas the idea of a contract with no governing law (*contrat*

²⁵¹ "In measuring the *lex mercatoria* against the standards of national legal orders it would be a grave error to describe the differences as 'deficiencies' inherent in *lex mercatoria* and conclude that it is of a no-yet-developed legal order on the global scale"; see G. Teubner, "'Global Bukowina': Legal Pluralism in the World Society" in G. Teubner, ed., *Global Law without a State* (Aldershot: Dartmouth, 1994) 3 at 19.

²⁵² See K.P. Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International, 1999) at 234; Maniruzzaman, *supra* note 243 at 694-697; and see also W. Tetley, "The General Maritime Law – The Lex Maritima" (1994) 20 *Syracuse J. Int'l L. & Com.* 105 at 135-137, 144-145.

²⁵³ See G. Schwarzenberger, *International Law*, vol. 1, 3rd ed. (London: Stevens & Sons, 1957) at 75.

²⁵⁴ See Maniruzzaman, *supra* note 243 at 664.

²⁵⁵ See Toope, *supra* note 216 at 17-97.

sans loi) has been rejected.²⁵⁶ The issue of delocalisation in contracts between parties involving a state and a private person plays an important role due to the unequal status of a private and a state party. A state is usually in the stronger position because of its legislative power, which is capable of influencing the contract's legal environment. Therefore, if transnational contracts involving a state and a private party were not delocalised in some cases, their major parts or their entire validity would eventually be threatened through public policy or the "*fait du prince*"²⁵⁷. The same problem is conceivable for contracts between international organisations and states, or state-owned as well as private enterprises.²⁵⁸ On the other hand, a total delocalisation is also not desirable once it comes to the question of the recognition and enforcement of an arbitral award.

Finally, a discussion of the controversy of the *lex mercatoria*'s nature, whether it is legal or not, is not the purpose of this essay. It must be stated that as a matter of fact, a body of rules of global economic law exists and transnational contracts governing business relations between states and private parties are concluded. Furthermore, international mixed arbitrations resolve disputes once conflicts have arisen in the contractual relationship. The awards rendered by such international tribunals are recognised and enforced through national courts. From these facts is derived the clear challenge for the public/private as well as international/municipal law distinction. The current legal framework of international trade is clearly built upon such a distinction that created a vacuum in which the *lex mercatoria* developed. Out of these reasons, the *lex mercatoria* does not have to gain legal character or become a third separate legal order because it is placed between various strongly established legal categories. The *lex mercatoria* is thus a pioneer in the development of a pluralistic

²⁵⁶ See Gaillard, *supra* note 244 at 574, 576.

²⁵⁷ The "*fait du prince*" is an obstacle to perform a contractual obligation caused by the intervention of state authorities; compare M. Fontaine, "Les clauses de force majeure dans les contrats internationaux" (1979), 5 *Dr. & P.C.I.* 469 at 479.

²⁵⁸ The danger of non-delocalisation of the contract is, for example, apparent in the case of loan agreements provided by bodies such as the World Bank or other multilateral development banks. Here, a choice of law provision in an international contract making such a loan agreement subject to a national system of law could in extreme circumstances question the validity of the agreement itself and thus inflict serious problems upon the lender; see J.W. Head, "Evolution of the Governing Law for Loan Agreements of the World Bank and other Multilateral Development Bank" (1996) 90 *A.J.I.L.* 214 at 214 *et seq.*

global law to cope with the requirements of a world society, and must be taken as a representative of the various sectors that together form a universal category of law.

3. *Politics*

3.1. Law and Politics: A Gordian Knot?

The last two decades of the twentieth century have been marked by drastic changes in world politics. As a result of the world's interconnectedness 'world politics', however, cannot be solely understood as the traditional field for international relations, but also implies national and municipal levels. Mainly the threat of nuclear war, and the fact that the current nuclear arsenal is sufficient to wipe out humanity as a whole, contributed drastically to awareness of the world's unprecedented interconnectedness and the interwovenness of world affairs. Mikhail Gorbachev, after commenting on the global nuclear threat and explaining the *new thinking* in politics that ended the Cold War, describes the development of a new political and economical world due to a global information and cultural system as follows: "Under these conditions everything became interconnected; all problems – both national and international – were tied in a single knot that had to be unravelled. And this had to be done in the name of one's own national interests (which coincided with the interests of all countries) and for the survival of the human race".²⁵⁹

This 'knot' represents once more the paradox in the current trends:

On the one hand, a fusion of the national with the international level, both public and private, in politics occurred. At the same pace as changes in politics occurred, changes in law occurred or changes in policies brought about new laws. The link between law and politics on the national level (first of all through its legislative branch) is obvious; and with the steady growth of the international legal order, law and international relations became more closely tied together as well.²⁶⁰ It is noteworthy that it is of no matter whether law exercises

²⁵⁹ Gorbachev, *supra* note 96 at 175.

²⁶⁰ 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, *supra* note 44 at 209.

influence on politics first or *vice versa*; their relation must rather be regarded as a circular interaction bringing changes by a process of evolution. The public and private sector is included in this 'knot' because it highlights the irreversible correlation between the individual and the collective, the *conditio sine qua non* of any society, whether municipal, provincial, federal, supranational, or global.

On the other hand, despite imminent grave problems of a global outreach, law and politics proceed in their work without enough coordination and lack of mutual consideration. And this is the reason why the 'knot' needs to be unravelled, because it covers the fact that law and politics are two ends of the same rope: The paradox of the 'knot' consists, therefore, in a *circulus vitiosus* of their common factual connection and their separate theoretical perception. The consequences of a perception of isolating a part from the entity it belongs to, become obvious when compared to a form of medical treatment, according to which an injury to a leg will be treated by amputation: Certainly, the injury is gone, but so is the leg. This therapeutic approach corresponds to some extent to the political attempts of conflict resolution through warfare and military intervention. Here a "new thinking" is urgently required. An effort has to be made to further strive for a transition from power politics to a coordinated system of peaceful coexistence between states and the people inhabiting this planet. In this effort, law can provide the necessary means if only it shows sufficient consistency and coherence.

3.2. The Decline of Sovereignty: Comity and Extraterritoriality

The consistency of law in respect of the numerous interactions between states and private parties connecting the national with the international level, is far from being achieved. The gap between private international and public international law remains equally un-bridged in the political sphere. Due consideration of the private individual in the public sphere of politics is not given. The state is still strictly perceived as a territory without a people in individual terms, and is strongly influenced by the traditional concept of a single sovereign as a country's ruler. However, the importance of sovereignty is rapidly fading away. The first step in this direction was undertaken by Ulricus Huber, a seventeenth century Dutch

scholar, who conceived the comity doctrine.²⁶¹ According to his view, the recognition of foreign-derived law in domestic courts happened out of courtesy rather than a legal obligation. From Joseph Story on, comity slowly moved from courtesy towards a legal principle. In his article "Comity in International Law", J.R. Paul even goes a step further, and defines it as follows: "Comity mitigates the conflict between sovereigns and between private and public law by blurring the lines that divide domestic and international law and policy. In this way, comity obscures the underlying policy conflict without necessarily insuring reciprocal respect for domestic law, facilitating international commerce, or avoiding interference with foreign relations".²⁶²

The last point, namely eventual interference with foreign relations, is situated at the core of the problems between law and politics on the one hand, and between public and private international law on the other hand. Anne-Marie Burley's "liberal internationalist model" of transnational relations highlights this conflict by a division of a "zone of law" and a "zone of politics".²⁶³ The "zone of law" designates the transnational relations between liberal states and the "zone of politics" those between nonliberal states. This distinction is important because only in case of conflict is the significance and efficiency of law within the political sphere shown. For example, the same problem appears in internal affairs with respect to the fundamental freedoms a state's constitution grants, but which can be suspended in case of turmoil or in any state of emergency. Thus, it is obvious that in the case of conflict a state's commitment to the (international) rule of law is tested. Political scientists have shown in many studies that wars hardly ever occur between liberal states whereas they occur mostly

²⁶¹ In his book "*De Conflictu Legum*", U. Huber formulated the comity doctrine in three axioms:

1. The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.
2. Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily.
3. Those who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state, or its subjects.

See Maier, *supra* note 6 at 282.

²⁶² See "Comity", *supra* note 6 at 77.

²⁶³ A-M. Burley, "Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine" (1992) 92 Colum. L. Rev. 1907.

between liberal and nonliberal, or among nonliberal, states.²⁶⁴ Only the intersection between the “zone of law” and the “zone of politics” is of interest here, because the relation of nonliberal states among themselves, operating solely in the “zone of politics”, hardly leaves any room for legal considerations. The transnational legal relations between liberal and nonliberal states, however, give rise to an astonishing paradox, what A-M. Burley calls the ‘sovereignty paradox’. This paradox states that “in many circumstances the courts of liberal states are more likely to evaluate and sometimes reject or override the laws of other liberal states than the laws of nonliberal states”.²⁶⁵

Thus, the conclusion is that the application and the effectiveness of foreign law depends to some extent on the political situation in the country from which the foreign law derives. The theoretical tool in taking into account the political conditions in the application of law is the “act of state doctrine”, which stands in close relation to comity.

The act of state doctrine sets forth the rule that, once foreign law is received within a domestic court, this court is prevented from examining the “validity of foreign nationalization measures notwithstanding the apparent inconsistency of those measures with minimal international standards of justice”.²⁶⁶ The doctrine is neither a strict international legal obligation, nor a constitutional mandate; the act of state doctrine is generally more a self-imposed judicial restraint to avoid “embarrassment to the Executive in the conduct of foreign relations”.²⁶⁷ The doctrine itself, although developed as a tool for reconciliation of law and politics, has undergone various mutations, shifting from a legal towards a political

²⁶⁴ *Ibid.* at 1914 *et seq.*

²⁶⁵ As an example, Burley gives the practice of US courts which “at least until 1989, were willing to “respect the independence” of states such as Czechoslovakia, East Germany, Iran, Libya, Cuba and the former Soviet Union – allowing challenged acts by these states to stand unreviewed even when they clearly contravened U.S. law”, and on the other hand, “in cases involving challenged acts of states such as Australia, Canada, Great Britain, Israel, Japan, the Netherlands, New Zealand, and Switzerland, U.S. courts have either evaluated the validity of the challenged act under U.S. or foreign law or chosen to override the foreign law based on superior U.S. interests”; see Burley, *supra* note 263 at 1910.

²⁶⁶ See Comment, “The Act of State Doctrine – Its Relation to Private and Public International Law” (1962) 62 Colum. L. Rev. 1278 at 1278.

²⁶⁷ *Ibid.* at 1286.

concept. Originally perceived as a conflict of laws rule, it later became a doctrine of delimitation of competence based on separation of powers principles.²⁶⁸ Moreover, based on the comity of nations, the act of state doctrine has been characterised as a rule of public international law.²⁶⁹

Generally, the act of state doctrine raises grave problems with regard to the classification of an "act of state". Usually an act of state designates an executive, administrative, or legislative, *i.e.* a public, exercise of sovereign power. Then the question arises whether to classify foreign judgments that usually stem from conflicts between private individuals as public or private acts? It also raises the important question as to whether recognition of a state (or not) by another state affects the validity of a foreign act or judgment within that respective state?²⁷⁰

In the dynamic world of interconnectedness, these questions are more difficult to answer. With respect to the link between foreign relations and the application of foreign law, in times of a strengthening of the international legal order and the emergence of universal human rights standards and international obligations *erga omnes*, embarrassment is more likely to occur when the compliance of acts of states with international standards is not established. In so far as the act of state doctrine reflects a strong influence of sovereignty and a far-reaching neglect of private participants in the international sphere, it must be considered to be outdated.²⁷¹

²⁶⁸ The two major cases responsible for this shift are: *Underhill v. Hernandez*, 168 U.S. 250 (1897) and *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); see Burley, *supra* note 263 at 1910, 1911.

²⁶⁹ See Comment, *supra* note 266 at 1282.

²⁷⁰ See H.J. Sonnenberger, "Anerkennung der Staatsangehörigkeit und effektive Staatsangehörigkeit natürlicher Personen im Völkerrecht und im Internationalen Privatrecht" in *Berichte der Deutschen Gesellschaft für Völkerrecht*, ed., *Anerkennung der Staatsangehörigkeit und effektive Staatsangehörigkeit natürlicher Personen im Völkerrecht und im Internationalen Privatrecht* (Karlsruhe: C.F. Müller Juristischer Verlag, 1988) 9 at 22 *et seq.*

²⁷¹ See generally A. D'Amato, "The Significance and Determination of Customary International Human Rights Law: Human Rights as Part of Customary International Law: A Plea for a Change of Paradigms" (1995) 25 *Ga. J. Int'l & Comp. L.* 47.

The reverse problem of the reception of foreign law through comity, is found in the notion of extraterritorial jurisdiction. Extraterritorial jurisdiction is a further example of the transgression of sovereign state boundaries, a sort of reverse comity. Extraterritoriality designates the expansion of national jurisdiction over individuals and property outside the state's territorial borders. Extraterritorial laws are usually designed to sanction and to pressure states by legal means that are not committed to the international rule of law, so-called nonliberal countries. The extraterritorial effect, however, also reaches countries that are in line with the rule of law. Sanctions, in general, raise important legal as well as political questions and affect both states, whether liberal or not, and private individuals. Therefore, sanctions can be qualified as one of the core elements in the interactions of law and politics, public and private international law, and liberal and nonliberal states alike.

3.3. Sanctions and Embargoes²⁷²

Sanctions, especially economic sanctions, are used to change the situation in, or the behaviour of, a particular country as alternative to military action. Use of force for the resolution of conflicts is generally outlawed by rules of public international law. Thus, sanctions, alongside diplomatic and other means of persuasive pressure, serve as one legal way of conflict solution. However economic sanctions and embargoes are difficult to evaluate in their effect, due to their interdisciplinary outreach. Furthermore, many different aspects in regard to economic coercion must be distinguished, such as whether economic coercion is exercised by one state or a collective group of states, or whether the form of

²⁷² Sanction, in the original sense of the word, denominates "a penalty or punishment provided as a means of enforcing obedience to law". An embargo is "a proclamation or order of state, usually issued in time of war or threatened hostilities, prohibiting the departure of ships or goods from some or all the ports of such state until further order"; see *Black's Law Dictionary*, 4th ed. s.v. "sanction" and "embargo". More generally, both terms, however, are used in order to describe restrictions imposed unilaterally on the exchange of goods, information, or legal relations between the respective states.

economic pressure is permissible or impermissible, in the light of the prohibition of the intervention in international law.²⁷³

As a matter of fact, even as early as 1987, the decline of effectiveness of all means of influencing other states was mentioned.²⁷⁴ Considering the most recent sanctions, their impact on the political level must be critically analysed. Most of the recent sanctions against Iraq, Iran, Cuba, Libya, North Korea, or Sudan have not brought about any change apart from worsening in different degrees the living conditions of the population. Only recently have the terrible and devastating effect on its population of the sanctions imposed on Iraq, more than nine years ago, been reported.²⁷⁵ The most obvious result of economic sanctions is the weakening of the members of civil society on which the governments destiny sooner or later rests.

The major problem lies in the traditional perception of sanctions as a tool of the "law of nations" disregarding totally the individual level. It is considered an entirely public matter without due consideration of private individuals forming the civil society. As a positive effect of the strengthening process of democratisation, civil society has gained influence in determining the fate of its country. From a political perspective, this negligence is, for example, reflected in the absence of studies on the role of conflict of laws in the outbreak of an ethnic conflict, such as in former Yugoslavia. Such absence is equally regrettable with regard to pre- as well as post-conflict considerations. Sanctions, however, not only impose restrictions on the state against which the measures are directed, but also on nationals and permanent residents of third states as well as of the origin state. Property rights and the right

²⁷³ See W.A. Kewenig, "Die Anwendung wirtschaftlicher Zwangsmaßnahmen im Völkerrecht" in *Berichte der Deutschen Gesellschaft für Völkerrecht*, ed., *Die Anwendung wirtschaftlicher Zwangsmaßnahmen im Völkerrecht und im Internationalen Privatrecht* (Karlsruhe: C.F. Müller Juristischer Verlag, 1982) 7 at 33.

²⁷⁴ See K.W. Abbott, "Coercion and Communication: Frameworks for Evaluation of Economic Sanctions" (1987) 19 N.Y.U. J. Int'l L. & Pol. 781 at 796.

²⁷⁵ The embargo has damaged the economy resulting in low salaries paid to civil servants, teachers, social workers, medical doctors, and nurses. The humanitarian situation is catastrophic, and the social and sanitary infrastructure is eroded; see R. Elkouri, "Des observateurs canadiens dénoncent l'impact des sanctions" *La Presse* (19 January 2000) A14.

to travel can be seriously endangered and their effect impaired.²⁷⁶ Further violations of human rights are conceivable.

In trade, extraterritorial sanctions can be followed by countermeasures of third countries leaving the private persons, both natural and moral, of all countries involved in an insoluble dilemma as to whether to violate the sanctioning law or the blocking statutes. Both kinds of laws sanction violations by the use of criminal and administrative provisions.²⁷⁷ From these inconsistencies immeasurable harm can be brought to the overall credibility of law.

4. *A Synthesis: "...et in omnes se effuderit gentes humanas"*²⁷⁸

The variations of referential relations between the different categories of public or private and international or municipal law culminate in the relation between private international and public international law. Their relation encompasses problems in a global society from the individual level (private law) to the collective level (public law); it also raises questions from the smallest organisational entity, such as a parish (municipal law), to the largest like the United Nations (international law). Their rich interplay is nurtured by a dynamic force inherent in all things in the universe.²⁷⁹ This force is responsible for what in human history is called evolution; '*panta rei*' (or perpetual flux) as Heraclitus called it. The human evolution as a whole is paralleled by a legal evolution (*ubi societas, ibi ius*) and *vice versa*. The constant evolution of humanity also represents the major challenge to law, because the efficiency and legitimacy of a law depends upon its relation to the respective state of human society. For Schnitzer, this challenge is met when a law is just, and a law is just when it is

²⁷⁶ See e.g. L.B. Boudin, "Economic Sanctions and Individual Rights" (1987) 19 N.Y.U. J. Int'l L. & Pol. 803 at 804-813.

²⁷⁷ "For example, under the Trading With the Enemy Act and other measures, punishment for wilful violations of the embargoes of Cuba and North Korea can include fines of \$250,000 and imprisonment for ten years for individuals (including officers, directors, and agents of corporate offenders), and fines of \$1 million for companies"; see H.L. Clark, "Dealing with U.S. Extraterritorial Sanctions and Foreign Countermeasures" (1999) 20 U. Pa. J. Int'l Econ. L. 61 at 71.

²⁷⁸ See Gentilis in Lauterpacht, *supra* note 52 at 11.

²⁷⁹ See e.g. Capra, *supra* note 43 at 209-227.

adequate for a respective state and orders it with a minimum of friction.²⁸⁰ The linkage of law and human kind is clearly expressed in the statement of Gentilis “[...] *et in omnes se effuderit gentes humanas*”. But additionally, human kind is subject to a (double) paradox that is found in the dual nature inherent in the *gens humana*. The paradox consists of the fact that all human beings are part in a collective entity, *i.e.* a society, and at the same time of individual character which is further divided into two different sexes (*ubi femina/homo, ibi societas*). Together, these tenets ought to direct the attention toward two important requirements of legal discourse. First, at this critical point, the tendency of juridification and its resulting concerns call for an increased attention to the human being, that – whether obvious or not – is the centre of the legal interest. Second, possible solutions for the problems of human kind must be sought primarily within the human being or the human realm itself and only subsequently in the legal sphere.

This double paradox consists, thus, of a *quaternio* ordered in a horizontal dichotomy between the individual and the collective, and of a horizontal dichotomy between the female and the male. Herein, the clear linkage of human to legal evolution is manifested. Metaphorically, the female/male dichotomy corresponds to the private/public and the individual/collective dichotomy to the municipal/international one.²⁸¹ On a further degree of abstraction, the paradox translated into a binary code of thinking in the human is the origin of all dichotomies.²⁸² From this human duality, and the mutual attraction of the different pairs of opposites, result the constant attempts undertaken by both parts to overcome the difference through the unification with the opposite. Called “*mysterium coniunctionis*”²⁸³ by Jung, it is the main factor causing the dynamic evolutionary process.

²⁸⁰ “*Richtiges Recht* ist für uns dasjenige, das dem jeweiligen Zustand adäquat ist, ihn also mit einem Minimum von Reibungen ordnet”; see Schnitzer, *supra* note 79 at 23.

²⁸¹ See also Charlesworth & Chinkin & Wright, *supra* note 6.

²⁸² “Otherness is a fundamental category of human thought”; see S. de Beauvoir, “Introduction to *The Second Sex*” in S.E. Bronner, ed., *Twentieth Century Political Theory: A Reader* (New York: Routledge, 1997) 319 at 321.

²⁸³ See C.G. Jung, *Mysterium coniunctionis: Untersuchungen über die Trennung und Zusammensetzung der seelischen Gegensätze in der Alchemie*, vol. 1, 4th ed., (Olten & Freiburg im Breisgau: Walter-Verlag, 1984) [hereinafter *Mysterium coniunctionis*].

The *quaternio* of the human nature, as outlined above, is identical to the *quaternio* underlying the private and public international law distinction, which combines the several links between public/private law and municipal/international law. The permanent attraction between these different dichotomies that causes the dynamism in evolution made it necessary to translate it from the human mind to the language of legal reasoning. The four main interpretative tools of legal methodology follow the same dynamic process: the *argumentum e contrario* tends toward the *argumentum per analogiam*, and the *argumentum de minore ad maiorem* toward the *argumentum de maiore ad minorem*. While the *argumentum e contrario* is a relatively static point of departure, the *argumentum per analogiam* reflects a state of dynamic motion.²⁸⁴ A more practical example of the trend from a static opposition to the dynamic identity of its element is given by H.E. Chodosh, who uses six possible interrelationships to highlight the nature of potential cross-referential relationships between any two opposite terms from difference to identity, which are *in concreto* the distinction of treaty and customary law.²⁸⁵ The six different stages are: (1) dichotomy – the string may divide the two semantic holes into hermetically sealed meanings; (2) overlap – the net may fold onto itself; (3) relativity – if the string moves from time to time, the meaning is not fixed; (4) interdependence – one hole may be shaped by the other, or the two holes may rely upon the same string; (5) equivalence – when the string deteriorates, the two holes may become one; or (6) indeterminacy – the string may be too weak to determine a boundary of meaning.²⁸⁶ The advantage of this method lies in the greater accuracy of the information gained through a higher precision in the determination of the exact stage of the relationship in the shift from static inertia toward dynamic motion. It

²⁸⁴ 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, *supra* note 28 at 19 [translated by author].

²⁸⁵ Chodosh, *supra* note 67.

²⁸⁶ Chodosh refers to the notion “hole” on the basis of statement by Martti Koskenniemi underscoring the relational quality of language in a metaphor which reads as follows: “[e]xpressions are like holes in a net. Each is empty in itself and has identity only through the strings which separate it from the neighbouring holes”; *ibid.* at 994-995.

allows for faster adaptation of the law to the respective situation in human life, and in so doing, serves the purpose of justice.

From the observations made, it results empirically that opposed elements always strive towards unification. This holds true for science in general and especially for jurisprudence, as it is reflected in the statement given by Georg Schwarzenberger in his book "The Dynamics of International Law" where he writes that "Research tends towards synthesis."²⁸⁷ This trend is underlined in the convergence of public and private law in a '*droit mixte*', in the theory of harmonisation reconciling the monistic and dualistic approach, and finally, as result of the gap between private and public international law, in the emergence of a '*lex mercatoria*' or a "global law". However, beside its function of regulating a given order (*de lege lata*), law also serves a normative purpose. This purpose consists of a *de lege ferenda* approach, looking for a suitable regulatory framework for future actions and developments.

The same observation can also be deduced from the dual nature of human beings, because of the fact that the individual and the collective element inherent in every human being coexist within each human being. Therefore, given the observation of a trend towards unification made before, the implications of this duality can, in a *de lege ferenda* approach, be extended to a wider spectrum. In accordance with Jung's terminology, a 'principle of conjunction' (*principium coniunctionis*) can be established. Such a principle introduces the duty to connect all phenomena from their prior dichotomous distinction to their later identity. The connection is established *a priori* and not *a posteriori*, as would happen in litigation or other conflict solution procedures. It forces dynamic thinking, which means that a specific problem will be approached in two ways. First, a static perspective is taken, allowing the lines of distinction to be drawn between two elements forming a competing interest, and second, a dynamic perspective considers their mutual interaction and its outcome. It is a circular consideration of the cause and the effect, of an action and its reaction, whereby the thoughts must constantly interrelate the long-range meaning of the findings and their short term implications. It supports also a heuristic approach, namely an inclusion of more available data in the process of balancing divergent interests against each other. Moreover, it

²⁸⁷ *Dynamics*, *supra* note 38 at 107.

postulates the linking of all elements of information, the consideration of a part and of the whole in their dynamic complementary interaction. In practical terms it calls for a fortified interdisciplinary²⁸⁸, and even intra-disciplinary²⁸⁹, approach. This way of dynamic thinking does not exactly build upon a multivalent fuzzy logic that blurs any line of distinction. It is rather a parallel thinking which recognises difference and identity at the same time, hereby emphasising their complementarity. A good example for such an approach is found in the principle of intergenerational equity, which links the past to the future generation, and time to the place.²⁹⁰ Another example is found in the increased recourse to alternative dispute resolution mechanisms, such as arbitration or mediation.²⁹¹ In alternative dispute resolution, no party is considered plaintiff or defendant and later “winner” or “loser”. The parties’ equal standing is guaranteed by the arbitration agreement. Their complementary relation to the problem is thus recognised.

Finally, it is necessary to briefly comment on possible negative and positive effects of the consideration of the principle of conjunction for the private and public international law dichotomy. The imminent inconvenience is the beginning of its practical implementation. In times of a huge quantity of legal texts regulating all areas of human life, at a first glance this effort seems quite impossible. It definitely requires a greater input initially, but will help to save time and energy towards the end. Equally, it will be easier to master once different categories of law join their efforts. Hence, public internationalists alone will not be able to

²⁸⁸ See e.g. *Future of Law*, *supra* note 15 at X-XI stating that the individual scholar “cannot be bound by any one academic discipline, but must instead accept the entire range of the humanities and social sciences as his field of operations; and this means that he must often rely on wisdom gathered by others, be they predecessors or contemporaries”; “Interdisciplinary Approaches”, *supra* note 6 at 608-609, who gives an example for how the understanding of multiple points of observation is increased and chaos may become ordered when the interpretation of social phenomena by various different observers is linked.

²⁸⁹ The preceding fragmentation and destruction of the conceptual dogmatic unity within different categories of law was confirmed, for example, with respect to private law; see *Autopoietic System*, *supra* note 46 at 106.

²⁹⁰ The principle of intergenerational equity critically asks whether a country has an obligation resulting from the actions by a prior generation towards a future generation in another country. E. Brown Weiss postulates in her proposed theory of intergenerational equity that “all countries have an intergenerational obligation to future generations as a class, regardless of nationality”; see Brown Weiss, *supra* note 41 at 26.

²⁹¹ See e.g. R. Csillag, “Faith in the Law” *The Globe and Mail* (7 February 2000) R4, commenting on the efficiency of alternative dispute resolution as provided by religious courts in Canada.

change the situation without the assistance of private internationalists. A common consideration compensates the greater input in the beginning with less friction and decreases the need for constant input for maintenance in the future. Theoretical implications include allowance for a smooth transition. There is no need for a revolution or any other drastic change of means. The existing legal framework, both in private and public international law is fairly adequate, and only needs intelligent coordination in order to prevent a further *fuite en avance* through an uncontrolled enactment of legal texts that are only poorly ratified. The parallel consideration of public and private international law at the educational level must be realised and will bring about the desired changes in a long term view.

The overall benefit of the parallel consideration of the individual and the collective is that it helps to reduce friction in the evolution of societal life. It allows for a faster adaptation of the laws to current needs and causes less friction. In so doing it serves the objective of just laws. In turn, just laws are more likely to be obeyed and further friction is avoided. The principle of conjunction also takes away the sour taste of legal pluralism, because it is not a state of chaos built upon a multitude of legal systems, but a reconciliation of the dichotomy of diversity and unity, just as between the individual and the collective. And the due consideration of the dual character, both individual and collective, of the human being is necessary in order to establish justice. John Stuart Mill, in his definition of justice, reconciles both sides of the human being. For him 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".²⁹²

²⁹² J.S. Mill, *Utilitarianism, Liberty, and Representative Government* (London: J.M. Dent & Sons Ltd., 1910) at 48.

IV. CONCLUSION

Only when the lines of distinction
blur, the relations between the parts
appear. Then, despite a little data,
one hereby recognises the "system".²⁹³

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. 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 not only adequate when it regulates a present state with the least friction possible, but it also has to secure the adequacy of its framework for what is to come in the future.

At the dawn of an emerging global society in which interactions between a great variety of actors, both public and private, have accelerated, 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. The gain in legal certainty, predictability, and legitimacy, is then often paid for by a loss in orientation, efficiency, and equal justice. The international level has not been spared from 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 with its context of the principle of self-determination, 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 Eurocentric or Western approach to international law. Legal pluralism

²⁹³ "Erst wenn die Trennlinien verschwimmen, treten die Beziehungen zwischen den Teilen hervor. Trotz weniger Daten erkennt man so auf einmal das "System"." See F. Vester, online: The Cybernetic Website of Frederic Vester, <<http://www.frederic-vester.de/index.htm>> (date accessed: 04 October 1999) [translation by author].

and legal polycentricity are the response to the legitimate request for equal standing in the world community.

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 brought about 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 diversity 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 new 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 at the forefront. "Transnational law" was coined in 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. 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. 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. The growing participation of non-governmental actors, and the strengthening of a civil society all over the world, is recognised by the notion of "global law". 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". These various elements incorporated in the various notions stand for 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 1895.²⁹⁴ In his judgment, Justice Gray defined international law as including public international law as well as private international law. At the time of the judgment, the two categories of law were regarded as two distinct categories of law. 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 among the national laws of different countries. It is purely a matter of domestic law, and the subjects to its rules are private persons, both natural and moral. Despite their complementary relation and 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.²⁹⁵ In his judgment, Judge La Forest renewed 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. Despite the fact that major changes have taken place in the human environment, and that a paradigm shift has started to seize science as whole, the separation between private and public international law prevails in theory (and education) as in practice.

The reasons for their separate consideration are not quite clear, and are hard to understand when one considers their various points of contact, 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/private law distinction, as well as differing in their position on a vertical level, which is found in the international/municipal law distinction. The relation of public international law and private international law therefore consists of several cross-referential relationships between these four basic legal categories.

²⁹⁴ *Hilton v. Guyot* (Supreme Court of the United States, 1895), 159 U.S. 113.

Before some light can be shed on the seven possible links between the private/public, it is necessary to question generally the constituents that underlie the two dichotomies. Due to 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*". As a matter of fact law is, as it determines human life, human-made law. This is why law must also consider the human being to be the centre of its interest. On the other hand, it explains why law is organised according to the constitution of the human being. From this paradox of 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.²⁹⁶ 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 it the "*mysterium coniunctionis*" and it is the main driving force in evolution. Second, he explains a further dual nature inherent in every human being's unconscious. This duality expresses itself in a superficial layer called the "personal unconscious" and a deeper layer 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 this follows that each human being is at the same time an individual and a collective entity.

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 the current dynamic developments in most societies where the boundaries between the public and the private sphere have become blurred. 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, engage themselves in many fields, such as social welfare, that were previously left within the realm

²⁹⁵ *Hunt v. Lac d'Amiante Québec Ltée* [1993] 109 D.L.R. (4th) 19.

²⁹⁶ See *Mysterium coniunctionis*, *supra* note 283 and *Archetypes*, *supra* note 90 at 3, 4, 42 *et seq.*

of the state. Private companies also survey their clients and employees and, in so doing, diminish their private sphere. 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 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. Rather a third category, that of a *droit mixte*, a category bridging the differences between the two, has emerged. The same fate is shared by the distinction of municipal and international law. The competing theories of monism and dualism were forced to give way to a theory of harmonisation that comprises elements from both initial theoretical approaches. 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. 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. 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 the substantive norms of private law. Or in other words, the more private law is harmonised or even unified, the less conflicts of law rules will be necessary. The relationship between public law and private international law stands also in context with international law, depending on whether foreign or domestic public law is focused on. In a purely domestic approach, public law is

the basis for the enactment of conflicts of law rules. Their main touching point is found 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 everybody (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. More recently, the view has prevailed 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 refer to the same terminology and the same legal tools, such as *pacta sunt servanda*, and 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.

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 the dynamism in the developments that are taking place in the world. This dynamism, fostered by new insights gained in the field of physics, has blurred the lines of distinction between several fields and categories. The entire system of labour division 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 longer be upheld. The nature of the relation of a *pars pro toto* must be permanently kept in mind. With regard to the public international law and private international law dichotomy, this is particularly true for the triple link of law, economics, and politics. In each field the discussed dichotomies play an important role, and they also affect their interrelations as a whole.

In law, at the present stage, three principal areas of entanglement between public and private international law are conceivable. The realm of law reveals some of the major differences between the two categories of law but as well their complementary relationship. As a matter of fact, 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. The national school (particularists) perceived private international law as a purely domestic matter and any consideration of foreign law is at its best based on comity. In the past few decades, new realities have proven the national school to be too limited, and tend towards the approach of the international school. At the same time a strong process of unification of 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 great quantity of norms. Since many new actors, such as international and supranational organisations as well as NGOs have entered the legislative realm that was previously exclusively exercised 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. These conflicts manifest themselves on a vertical and a horizontal level as well as in a combination of both levels, as many recent examples have shown. In the process of mitigation of these various constellations of conflicts, experiences drawn from private international law can come to be of help 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.

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 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, rather 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, 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 of 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. In national courts, on the other hand, regulations stemming from such supranational or international bodies can rarely be invoked directly either. Hence, international trade and transnational commercial activities are faced with a 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 presented some thirty years ago. 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 law, both nationally and internationally. The assumption 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, starting from the delocalisation of contracts from national legal systems, on to transnational contracts between states and private parties, and

further to alternative dispute resolution mechanisms, especially in the form of mixed arbitral tribunals.

Politics is equally faced with a great dynamism in its interaction with law, and an insufficiency in dealing with the private and public distinction. 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 cross 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 determinant 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 the division of transnational relations between states acting in a "zone of law" and others in a "zone of politics".²⁹⁷ The zone of law describes transnational relations between liberal states and the zone of politics those between liberal and nonliberal or 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. Once foreign law is received in a domestic court, the doctrine prevents this court from examining the

²⁹⁷ Burley, *supra* note 263.

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 and highlighted through the concept of obligations *erga omnes* and the responsibility of individuals, both public and private persons, 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 by cases of a conflict. Therefore, the interplay between law and politics is best 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.

At the beginning of this work, the requirement of law to provide a just regulatory framework for its society was mentioned. In a modern global society, comprised of a great diversity of societal subsystems with the 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. While private international law renders justice to 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 dual 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 qualification of a certain situation as just or

unjust.²⁹⁸ Hence, a situation can only be fully judged as just or unjust when the individual level and the collective level are considered and balanced against each other.

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*) is proposed. In accordance with C.G. Jung's terminology, it introduces the duty to connect all relevant phenomena and lead them from their dichotomous distinction to their later identity, as it is reflected in the dynamic evolutionary process as faced by legal methodology, where the *argumentum e contrario* tends towards the *argumentum per analogiam* just as the *argumentum de minore ad maiorem* tends towards the *argumentum de maiore ad minorem*.

Applied to the interrelation of public international law and private international law, the principle of conjunction's most urgent task 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 realm 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

²⁹⁸ *Supra* note 292.

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 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 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.

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