

GLOBALISATION AND PRIVATE INTERNATIONAL LAW

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THE PROGRESSIVE EVOLUTION OF PRIVATE INTERNATIONAL LAW: FROM STATE CENTRALISATION TO DENATIONALISATION AND BEYOND

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I. Introduction

This paper analyses several aspects of the evolution of private international law (“PrIL,” or “conflict of laws,” as the discipline is called in some countries). With the aim of stressing a number of its features, at some points of this analysis PrIL will be treated as a human being.¹ With that in mind, the first observation I can make is that throughout its entire existence PrIL has had to accept the assumption that considers it to be a “domestic” discipline, despite the fact that it deals with international situations and problems. This traditional assumption was mainly established on the basis that PrIL rules were domestic and their primary (if not only) function was that of determining the applicable law in certain legal relationships. Living and developing in a local sphere, sharing his body in a group with peers that, unlike him, were only conceived for and concerned about domestic matters, has strongly marked the development of PrIL’s “personality.”

However, PrIL gradually got involved in other functions, such as jurisdictional issues and cooperation between the authorities of different countries, among others. This was enhanced with the current

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¹ I am borrowing this approach and several ideas from my contribution ‘El derecho internacional privado en el diván — Tribulaciones de un ser complejo’ in *Derecho internacional privado y derecho de la integración. Libro homenaje a Roberto Ruiz Díaz Labrano* (CEDEP 2013) 17.

(post-modern) phase of, and, at some point in its existence, PrIL realised that its role and influence had grown significantly with a potential impact across the globe. Thus, in addition to its shift from choice of law to a wider scope encompassing issues at the global level (jurisdiction, recognition and enforcement, cooperation, procedural issues, and, more recently, non-judicial dispute settlement), PrIL experienced a great evolution in several concrete aspects: a shift in its method and function from localisation to materialisation, a shift in its jurisdictional rationale from sovereignty to access to justice, and a greater openness towards Public International Law (PIL). But in the conservative legal field, old traditions never die. The past is always somehow present. As a consequence, PrIL is now at a complex stage of bipolar disorder.

This paper evokes the evolution of PrIL through all said stages, and its interaction with PIL. In order to do so, this paper is structured as follows. *First*, it explains the reality of PrIL, contesting the traditional assumption of its being considered a domestic discipline, which cannot be admitted nowadays. *Second*, it explains four concrete evolutionary trends experienced by PrIL, namely its involvement in functions other than the mere determination of the applicable law, its materialisation, its adoption of a jurisdictional approach based on access to justice, and its global ambition. *Third*, it pays attention to PrIL's current openness towards PIL. *Fourth*, the paper explores possible ways for PrIL to overcome its bipolar disorder. Finally, the paper concludes that despite its deep changes and its amazing success, PrIL still has to evolve and be ready to deal with future novel issues.

II. Overcoming the Trauma of Being Considered a “Domestic” Discipline

A. From the Original Nationalisation...

Decades ago Philip Jessup referred to the concept of “transnational law” as the body of law that “regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”² However, since PrIL nationalisation during the 19th century,³ PrIL

² C Philip Jessup, *Transnational Law* (Yale University Press 1956).

³ Which is, in a certain way, parallel to its configuration as an autonomous legal discipline.

and PIL have, with some minor exceptions, lived apart. Since then, it has generally been assumed that PrIL is a domestic discipline, despite its name. This traditional assumption was widely shared, to the point that there existed a supposed joke which answered the question about *the* difference between PIL and PrIL in this way: PIL is truly international but *not* real law, while PrIL is true law but *not* really international. The basis for such an assumption was that, while PrIL “deals” with international issues, it would be “conceived” in a domestic environment and would operate within a domestic system. This has frequently been linked with another powerful idea: PrIL is composed of conflict rules that merely indicate the domestic applicable law without any interest in the concrete, substantial outcome of that indication. Those conflict rules were mainly found in domestic legal bodies, in many cases along with domestic norms.

It is also linked to the central role played by the State in PrIL (centrality). First, the State is the “master of the game,” as it establishes the ultimate objective of PrIL, through its policymakers. For instance, it decides whether to establish a dualist or monist legal order, a conservative or vanguards system, among other aspects. Second, the State implements its policy objectives through its lawmaking power, embodied in the legislators. For instance, it creates conflict rules, or decides whether to compile those rules in the civil code or a stand-alone legislative act. Third, the State is also the referee of the game, as it adjudicates PrIL disputes, through its courts, in order to ensure that its rules and underlying policies are duly respected. In addition, since the contents of PrIL depend on the powers of the State, in theory, PrIL rules cannot but vary from country to country.

This traditional assumption always annoyed PrIL and caused him “complex afflictions,” a phenomenon that has historically accompanied not only PrIL, but also many of its followers.⁴ And it is a “complex” affliction because PrIL has essentially been considered “international” by most of its first analysts, but then rapidly dragged to a rift between a body that is eminently “national” and a spirit that

⁴ In the always eloquent words of Friedrich K Juenger, ‘General Course on Private International Law (1983)’ (1985) 193 *Recueil des Cours* 253, “What can one expect of a discipline whose hallmarks have been vacillation and uncertainty since it was discovered in the Middle Ages?”

is “international” by definition.⁵ One feature has been key in the construction of the traditional view: in continental Europe –and later on three other continents — the “legalisation” of PrIL was embodied in the civil codes, local instrument *par excellence* and the true vector of the cultural particularities of the State.

B. ... to Progressive Denationalisation ...

Nowadays, the idea that PrIL is a domestic discipline only holds true from a mere formalistic point of view. Well regarded, it no longer stands. Of course, as a sovereign, the State may still define its political order (e.g. republic, monarchy, dictatorship), but over the past century, substantial inroads have been made as to the centrality of States in the international legal order.⁶ Globalisation has shifted the debate on PrIL situations, and the centrality of the State has suddenly faded.⁷ Without a shadow of doubt, State lawmakers still enact different types of rules on PrIL issues, as well as State courts still adjudicate PrIL cases. However, there is a panoply of factors undermining the traditional assumption, despite current manifestations of rampant nationalism.

To start with, there is an impressive proliferation of all kinds of international and transnational instruments related to trans-boundary legal relationships, which sometimes complement domestic statutes, but some other times cover situations that would otherwise not be regulated by domestic law. This is closely intertwined with the phenomenon of transnationalisation, which marks that a very significant part of the PrIL in force in the different legal orders is “national” only from an extremely formal point of view, given that its origins — and often its exact content — come from international or supranational codifying efforts. The PrIL norms that can be

⁵ Although very bound to their respective national realities, Savigny and Mancini served, and in their own way, against that split or, at least, against its effects. See, for example, Pasquale S Mancini, ‘Utilità di rendere obbligatorie per tutti gli Stati sotto forma di uno o più trattati internazionali alcune regole generali del diritto internazionale privato per assicurare la decisione uniforme tra le differenti legislazioni civili e criminali’ (1859) *Diritto internazionale* 377.

⁶ Susan L Karamanian, ‘Public International Law versus Private International Law: Reconsidering the Distinction’ (2013) XL OAS Course on International Law 40.

⁷ See, in this vein, the reflection of Chief Justice Sundaresh Menon, *Impact of Public International Law in the Commercial Sphere and its Significance to Asia*, Lecture jointly organised by the International Council of Jurists and the University of Mumbai (19 April 2013) § 10.

considered genuinely “national” are increasingly rarer and, when they do exist, many times turn out to be practically inapplicable.

The evidence of this in the context of the European Union (EU) would not require further comments. Actually, for PrIL purposes, the EU acts as another (super)State,⁸ making PrIL rules that supersede those made by its Member States, and reserving for the EU Court of Justice the last word on the interpretation of EU PrIL rules⁹ and of the interaction between them and domestic and international law. It is apparent that the Member States of the European Union are increasingly bound by regional policies and rules, and their freedom to enter into international agreements in matters of PrIL has been drastically curbed. Within this context, it can hardly be maintained that the primary source of modern conflict law is national law.

But the truth is also that out of the EU context States have been limiting their legislative capacity and decision-making powers by means of accession to a large series of international compromises (treaties relating to trade, protection of investments, recognition and execution of foreign judgments, etc.), whose violation can trigger severe economic sanctions and whose denunciation can drastically affect the reputation of the State in question. And, even more simply, States have adopted numerous international instruments whose application take precedence over internal PrIL statutory rules or that directly replace them (by means of so-called *erga omnes* conventions).

Of course, notwithstanding the quantitative significance of the foregoing, from a qualitative perspective what is even more striking is the effect caused by the *humanrightisation* of PrIL relationships.¹⁰ Human rights treaties have a strong impact on State legislation and jurisprudence in PrIL, an impact that is exerted on various issues and in different circumstances to guarantee, for example, access to justice, workers’ rights, or the interests of children and adolescents.

⁸ In fact, it produces an “internal” law. In this vein, Advocate General Poiares Maduro has described EU law in Case C-402/05, Kadi, § 21 [2008] ECR I-6351, as a “municipal legal order of transnational dimension.”

⁹ See, among many other examples, French Cour de cassation, Judgment n° 1053 of 7 October 2015.

¹⁰ See Erik Jayme, ‘Menschenrechte und Theorie des Internationalen Privatrechts’ in E Jayme, *Internationale Privatrecht und Völkerrecht* (CF Müller 2003) 95; E Jayme, ‘Völkerrecht und Internationales Privatrecht — Eine entwicklungsgeschichtliche Betrachtung’ in S Leible and M Ruffert (eds), *Völkerrecht und IPR* (Jenaer Wissenschaftliche Verlagsgesellschaft 2006) 23.

In all cases, the influence is decisive and requires that PrIL avoid the futile and perverse temptation to confront it,¹¹ preparing itself, instead, to cooperate with it.¹²

The constant activity of international courts of human rights has been one of the main vectors of their rise. Private international relationships could not remain outside of this trend.¹³ As a result, human rights issues have become a central element of the theory¹⁴ and practice¹⁵ of PrIL. Thus, obvious trends towards the facilitation of access to justice, like other human rights manifestations, have become more and more visible in issues concerning jurisdiction, recognition and enforcement of foreign judgments, and international cooperation.¹⁶ Certainly, the determination of the precise content and scope of human rights in the global sphere is logically more complicated than in a local environment. However, even though talking about fundamental rights implies assuming a positivistic manifestation of them (and, thus, “framed” in a particular legal order — which can be domestic, international or supranational), their raw

¹¹ See, however, Yves Lequette, ‘Les mutations du droit international privé: vers un changement de paradigme? Cours general de droit international privé (2015)’ (2018) 387 *Recueil des Cours* 9. It is certainly illustrative that when a court utilises considerations of human rights there is someone that is encouraged by analysing the decision through PrIL orthodoxy. See the decision of the Social Chamber of the French *Cour de Cassation*, 10 May 2006, *Epx Moukarim v. Isopehi* and the note of Sylvain Bollée in *JCP* (2006) 1405.

¹² See Horatia Muir Watt, *Concurrence ou confluence? Droit international privé et droits fondamentaux dans la gouvernance globale*, in *Mélanges Patrick Courbe* (Dalloz 2012) 459.

¹³ Without ignoring the obvious political aspects of this approach, the logical compatibility — in legal terms but also as to its *metalegal* context — between human rights and PrIL is apparent. See Patrick Kinsch, ‘Droits de l’homme, droits fondamentaux et droit international privé’ (2005) 318 *Recueil des Cours* 21-22. The universal vocation of both is assumed even in some regional (purported closed) frameworks. See Sébastien Touzé, ‘Le droit européen des droits de l’homme sera international ou ne sera pas ... pour une approche autopoïétique du droit international’ (2018) *Revue générale de droit international public* 5.

¹⁴ Muir Watt (n 10) 459.

¹⁵ The European Court of Human Rights (ECHR) has rendered a number of decisions in matters of PrIL. See, among the early ones: *Neulinger et Shuruk v. Switzerland* (6 July 2010) 41615/07; *MacDonald v. France* (29 April 2008) 18648/04; *Négrépontis-Giannisis v. Greece* (3 May 2011) 56759/08. See also Paul Beaumont, ‘The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction’ (2008) 335 *Recueil des Cours* 9.

¹⁶ Thus, the ECHR has endorsed the compatibility between the elimination of exequatur by the Brussels II Regulation and the European Convention on Human Rights in *Povse c Austria* (18 June 2013) 3890/11.

materials (human rights) cannot but have a universal vocation. Consequently, the rise of human rights considerations in PrIL necessarily fosters its denationalisation.¹⁷

C. ... and Beyond

While conflict law may be national law, on a comparative basis, its rules are surprisingly universal.¹⁸ Besides, nowadays, the rules of the PrIL game are not solely based on rules created at the domestic level. Initially, there used to be little debate about the point of departure of “modern” PrIL’s conflict of laws: it was mostly the local law; but nowadays this is not always the case. Globalisation features manifest in many fields and all of them have a more or less direct impact on PrIL cases, PrIL rules and/or PrIL decisions. That is true in fields such as the economy, financial markets, global chain supplies, technology (e.g. communication, transport, blockchain, smart contracts, cryptocurrencies), sociology (essentially, massive migrations), culture, etc. The capacity of sovereign States is insufficient to effectively tackle the novel problems arising out of (or fostered by) globalisation.¹⁹

In recent decades, within the very legal field, there has been a notable increase in the creation of non-national rules or soft law codification (which can be characterised as “sets of principles” or, in short, “principles”), which has given rise to a normative pluralism that, in some cases, has taken the form of truly parallel non-national legal orders.²⁰ A dense network of non-binding private and public rules is progressively gaining space.²¹ By all means, States keep their

¹⁷ While human rights treaties generally impose a duty on the State to respect, protect, and fulfil human rights, PrIL may instruct that national law requires respect for the same principles (typically embodied in the constitution), and thus allow tort claims by individuals against corporations, so in interpreting and applying a human rights treaty, one cannot ignore applicable state municipal law. Karamanian (n 6) 43.

¹⁸ Ted de Boer, ‘Living Apart Together: The Relationship Between Public and Private International Law’ (2010) 57-2 *Netherlands International Law Review* 12.

¹⁹ Robert Wai, ‘Private v private: transnational private law and contestation in global economic governance’ in H Muir Watt and DP Fernández Arroyo (eds), *Private international law and global governance* (OUP 2014) 38-39.

²⁰ Diego P Fernández Arroyo, ‘The Growing Significance of Sets of Principles to Govern Trans-boundary Private Relationships’ in *The Age of Uniform Law — Essays in honour of Michael Joachim Bonell* (UNIDROIT 2016) 272.

²¹ See Eric Loquin, ‘Les règles matérielles internationales’ (2006) 322 *Recueil des Cours* 9; G Kaufmann-Kohler, ‘La codificación y la normatividad del *soft law* en el arbitraje internacional’ in J Basedow, DP Fernández Arroyo and J A Moreno Rodríguez (eds), *¿Cómo se codifica hoy el derecho comercial internacional?* (Thomson Reuters/CEDEP 2010) 107.

law-making power as a notable expression of sovereignty; there are daily demonstrations of that. However, as evident as this is, State power is the configuration of a dense network of coexisting non-national rules applicable to trans-boundary legal relationships. So far, the experience of principles-making has been positive from several points of view. On the one hand, the principles have confirmed the denationalisation of law. More precisely, they stress the end of the State's monopoly on normative production (assuming such a monopoly ever existed). Overcoming the unjustified distinction between State law and non-State law, the principles permit law to evolve in different ways, particularly in relation to the emergence of a post-post-modern private international law. On the other hand, the principles may bring court and arbitral practice closer together, once the former is persuaded that there is no reason to leave the monopoly of application of non-State law to arbitrators.

Finally, PrIL has reached the peak of private adjudication through the use of arbitration as the primary dispute resolution method for international commerce. A great part of the volume of international private disputes has moved to the terrain of arbitral tribunals, where the influence and control of the State is rather weak. Arbitral tribunals may have the freedom to determine which rules of law are more appropriate to a specific case and directly apply non-State rules which are equally or better suited to resolve an international issue. The law that the arbitral tribunal applies to the dispute may depend on the parties' agreement. If there is not such an agreement, the current predominant trend in arbitration rules and legislative acts allows the arbitral tribunal to apply the rules of law (and not *the* (national) law) it finds more appropriate.²² This shows a mature PrIL that has created a system to carve out the undesirable results of the random choice of "law rules roulette."

III. Evolutionary Trends

The globalisation related changes and the overcoming of the traditional assumption described above have shaped several aspects of PrIL and lead to four lines of evolution. These evolutionary trends are trying to answer the questions opened by those changes. They are explained in the following sections.

²² Ad ex, 2017 ICC Arbitration Rules, art 21(1), 2018 Argentinian Act on International Commercial Arbitration, art 80.

A. A Shift of Axis in PrIL

This is perhaps the more obvious evolution of PrIL of the last half century. The choice of law sector, which (particularly in some concrete jurisdictions) for a long time has been used as almost a synonym of PrIL, is no longer the centre of the PrIL constellation. The decline of the importance of applicable law issues has a direct link with the exponential increase in cases of PrIL or, in other words, the jump from an academic PrIL to a 'real' PrIL.²³ Many reasons explain this phenomenon. First, the observation of the evolution of the regulation relating to applicable law issues over recent decades shows that old divergent solutions pertaining to the "general part" of PrIL have given way to more homogenous new solutions and, in some cases, have been partially amended by way of unification of substantive issues. Hence, a significant part of the fears (but not all) sparked by the historical discussion relating to nationality and domicile as connecting factors for personal relationships has lost their importance with the generalisation of the habitual residence as a connecting factor. Substantive unification efforts such as the Vienna Convention on the International Sale of Goods (1980) or the UNIDROIT Principles on International Commercial Contracts (1994/2004) have also contributed to the lessened impact of the difficulties arising out of the usage of connecting factors such as the place of celebration or place of performance of the contract. In the meantime, many questions which were previously considered exclusively from the perspective of the determination of the applicable law are now treated from the perspective of the cooperation of authorities. The evolution of the treatment of the protection of minors by the Hague Conference throughout the last century is an obvious example.

²³ Bernard Audit, 'Le droit international privé en quête d'universalité. Cours général (2001)' (2003) 305 *Recueil des Cours* 478 ("*la situation a changé du tout au tout avec le développement véritable des relations privées internationales au cours du XXe siècle, jusqu'à mettre aujourd'hui au premier plan les questions liées à l'administration par les juridictions des États de la justice internationale de droit privé*"). At the same time, another concomitant phenomenon is taking place. Growing internationalisation leads scholars traditionally devoted to mere domestic law to pay attention to international issues. In other words: as a consequence of the internationalisation of private law relationships, "pure" private law is reducing its scope dealing with real cases. Not surprisingly, academic programmes on commercial, civil, or procedural law now include topics such as UNIDROIT Principles, child abduction, or enforcement of foreign judgments.

There are also practical reasons for the shift of axis in PrIL. On one side, judges still continue to apply the *lex fori* in a large number of cases, which contributes towards diminishing the importance of applicable law issues. In several legal orders, this attitude is based on the consideration that foreign law is a “fact” which parties have to invoke and prove. On the other side, since many cases are limited to discussing jurisdictional issues, courts have more opportunities to discuss this matter. Finally, issues of efficiency and the cooperation of authorities are often presented in an autonomous manner, and are scarcely concerned with applicable law issues.

All these reasons justify why the determination of the applicable law is no longer at the core of PrIL (and this is all the more true when applicable law issues are designed in an old conflictual fashion) and that this “star” position is now occupied by aspects relating to procedure and international cooperation, among which judicial jurisdiction has singularly grown in importance. A substantial part of the discussions of contemporaneous PrIL deals with the best way to allocate international private disputes among the various dispute settlement mechanisms while ensuring the fundamental right of access to justice in its private international dimension.²⁴

B. A Shift in Its Method and Function

PrIL has experienced a shift in terms of its method and function, from mere “localisation” to “materialisation.”²⁵ PrIL was conceived under a liberal paradigm and in the Westphalian framework, and was given one main mission: determine the applicable substantive law in international situations; so it was seen as a method for the selection of the applicable law in an international legal situation. While it may sound like ancient history that PrIL should have this sole function, this was actually the dominant view for a long time in

²⁴ This situation is clear not only in the case law, but it is also reflected in the agenda of the most important international organisations such as the Hague Conference. Even the very content of national PrIL acts indicates the increasing presence of rules on procedure and international cooperation.

²⁵ See, however, the interesting attempt to make compatible Savigny’s localisation with global situations made by Pascal de Vareilles-Sommières, ‘Localisation et globalisation en droit international privé. *Esprit de Savigny es-tu là ?*’ in *Mélanges en l’honneur du professeur Bertrand Ancel* (LGDJ 2018) 1555.

a considerable part of the world.²⁶ This was so much so that what was considered until fairly recently to be a “General Part” of PrIL was in fact nothing more than the treatment of the problems of applying conflict norms, that is, the norms that embodied this principal (if not unique) function of PrIL. The fact is that a large part of the theoretical efforts were directed for decades to the development of this supposed “General Part” which was nothing more than a series of tools supplied by varying degrees of artificiality connected with only one type of PrIL rule (although it was the paradigmatic one) corresponding to only one of the “sectors” of PrIL.

The Latin American slant of PrIL was not unconnected to this trend. One could almost say that it cultivated it until the climax. Thus, it is possible to say that the so-called General Part was one of the fundamental points of the creed of one of the most influential conflict scholars in the region, the German erudite Werner Goldschmidt, who not only shared that idea of the “General Part” but further awarded to this a disproportionate dimension.²⁷ Do not believe that this only occurred in distant times. This was the prevailing doctrine up until, so to speak, a few days ago. And to confirm this, one has only to turn to the title given to the development claimed as the most important and characteristic of modern Latin-American PrIL,²⁸ the Inter-American Convention on the General Norms of Private International Law,

²⁶ The change of PrIL method(s) was a popular topic among scholars forty years ago. See, for instance, in addition to the masterful General Course of Juenger (n 4), Bernard Audit, ‘Le caractère fonctionnel de la règle de conflit (sur la crise des conflits de lois)’ (1984) 186 *Recueil des Cours* 219; Paolo Michele Pattochi, *Règles de rattachement localisatrices et règles de rattachement à caractère substantial. De quelques aspects de la diversification de la méthode conflictuelle en Europe* (Georg 1985). The topic seems to be gaining scholars’ favour one more time. See, among others, Marc-Philippe Weller, ‘Vom Staat zum Menschen: Die Methodentrias des Internationales Privatrechts unserer Zeit’ (2017) 81 *RebelsZ* 747; Sagi Peari, *Foundation of Choice of Law. Choice and Equality* (OUP 2018); Horatia Muir Watt, ‘Discours sur les méthodes du droit international privé (des forms juridiques de l’inter-altérité). Cours général de droit international privé’ (2018) 389 *Recueil des Cours* 9.

²⁷ Werner Goldschmidt, *Derecho internacional privado. Derecho de la tolerancia* (5th edn, Depalma 1985). To be just, it is also necessary to say that a not negligible part of the prestige of modern Latin American PrIL is due to this author, who studied and diffused it with a passion. See Mario J A Oyarzábal, ‘Das Internationale Privatrecht von Werner Goldschmidt. In Memoriam’ (2008) 72 *RebelsZ* 601.

²⁸ On the scope of the characterisation of a formally inter-American instrument as Latin American, one can consult my work *Derecho internacional privado interamericano. Evolución y perspectivas* (2nd edn, UAS/Porrúa 2003).

adopted in Montevideo in 1979.²⁹ Then again, it is not necessary to make too much of this; in the EU, more than thirty years later, some seemed to be crying out for their own CIDIP on general norms.³⁰

But those days of pure “conflictualism” are certainly over. PrIL’s progressive interest (or materialisation) towards substantial justice has existed for a long time.³¹ Even when it had a limited role, internally, PrIL was always concerned with the concrete result of the application of the ultimate applicable law.³² Today, it is impossible to accept that PrIL’s functions as a “neutral” instrument is limited to assigning competencies. PrIL has evolved into a multitask device able not only to determine the applicable law, but also to tackle jurisdictional issues, provide substantive solutions, resolve procedural questions, coordinate cooperation between tribunals and other entities from different jurisdictions, as well as deal with recognition and enforcement of judicial and arbitral decisions. The exponential multiplication of multi-connected cases provokes a progressive redefinition of PrIL’s function, and it is now evident that all sectors of PrIL fulfil broader objectives, of a political, economic, and social nature.³³

²⁹ However, one should not fail to underline the transcendence of its Article 1 that seeks to limit the impact of the 19th-century nationalisation of PrIL and to open the path to modernisation of national systems through awarding priority to international instruments, including new ones. No less important is Article 2 that, under the form of the “theory of legal use,” comes to reclaim the ex officio application of foreign law. See Diego P Fernández Arroyo and Paula M All, ‘Argentina: The Changing Character of Foreign Law in Argentinian Legal System’ in Y Nishitani (ed), *Treatment of Foreign Law — Dynamics towards Convergence?* (Springer 2017) 452, 457-458.

³⁰ See Stefan Leible and Hannes Umberath, *Brauchen wir eine Rom 0-Verordnung? Überlegungen zu einem Allgemeinen Teil des europäischen IPR* (Sellier 2013). It is probable that “the German spirit” of both propositions is not a mere coincidence. This is not to say, in any way, that there are not issues with the name “General Part” that pose serious and interesting problems in the present. What is highlighted and criticised here is the centrality of that discourse.

³¹ See the general courses of Erik Jayme, ‘Identité culturelle et integration : le droit international privé postmoderne’ (1995) 251 *Recueil des Cours* 9, and Julio D González Campos, ‘Diversification, spécialisation, flexibilisation et matérialisation des règles de droit international privé’ (2000) 287 *Recueil des Cours* 9.

³² Juenger (n 4), spec 263 ff.

³³ From certain angles and certainly with diverse reach, this is what courses of The Hague Academy of International Law remind us, like those of Bruno Opettit (1992), Horatia Muir Watt (2004), Andrea Bucher (2009), and Patrick Kinsch (2013). See also David P Stewart, ‘How Private International Law Contributes to Economic Development

C. A Shift in the Basis of Jurisdiction Rationale

A third line of evolution experienced by PrIL was a shift in its jurisdictional rationale. Historically, in the era of State centrality, PrIL was an expression of sovereignty; it was a prerogative of the States to regulate situations having a connection with their territory. Today, the focus is different; jurisdiction is not (exclusively) seen as a State prerogative, but rather as a function to ensure an effective access to justice. A part of this assumption is all but new: already old *forum non conveniens* and — more clearly — not so old *forum necessitatis* are (or, at least, should be) similarly based on this foundation. Without going out from jurisdiction, constructions on civil universal jurisdiction also go in this direction.³⁴ Nevertheless, the “fundamental” character of the right to access to justice should make of it the main jurisdictional basis,³⁵ with an obvious extension to the right to enforcement.³⁶

Traditionally, the conflict rules of one State could direct that an international situation linked to another State should be adjudicated by the courts of the latter. But this “logical” approach seemed more interested in geography than in real justice. Occasionally, this logical rule would yield unjust results. For instance, in terms of jurisdiction, it may happen that the plaintiff has no resources to pursue an action in the other State, or if he has a claim against the Government which is not worth pursuing locally. For good reasons, the principle of access to justice has now turned into a fundamental transnational right, so in order to tackle these situations PrIL is opening alternatives to classical rules.

In matters of the cooperation of authorities, international instruments such as those relating to the adoption or restitution of minors clearly aim at concrete material results without any intention

and the Rule of Law’ in DP Fernández Arroyo and C Lima Marques (eds), *Derecho internacional privado y derecho internacional público: un encuentro necesario* (CEDEP/ASADIP 2010) 81.

³⁴ Among many other examples, see the multitude of comments on USSC, *Kiobel v Royal Dutch Petroleum*, No 10-1491 (17 April 2013). See also Andreas Bucher, ‘La compétence universelle civile’ (2014) 372 *Recueil des Cours* 9.

³⁵ This is the rationale underlying, for instance, the ASADIP Principles on Transnational Access to Justice (TRANSJUS), available at <http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf>.

³⁶ *Ibid* art 7(1) “The extraterritorial effect of decisions is a fundamental right, closely related to the right to access to justice and fundamental due process rights. Therefore, judges and other State authorities shall always endeavor to favor the effect of foreign decisions when interpreting and applying the requirements those decisions are submitted to.”

to help the States govern their territories by guaranteeing the application of their own law. The impact of this conception should not be limited to issues related to jurisdiction and cooperation, but should also extend to other aspects, such as applicable law, or the recognition and enforcement of judicial and arbitral decisions.

D. An Ambition to Go Global

A further line of evolution of PrIL relates to its ambition to have global reach. After conquering new territories as mentioned above (e.g. jurisdiction, cooperation, enforcement), PrIL realised its enormous potential and an ambition grew inside PrIL to develop further functions and goals. Different phenomena associated with globalisation arose with many related issues that require modern solutions and therefore created the perfect scenario for PrIL to take a new role. PrIL seized this opportunity and stole the show, becoming a tool of global governance.³⁷ As mere examples, PrIL should be ready to act globally in favour of financial stability³⁸ or to cope with some of the aspects of massive migrations.³⁹ The vision of a PrIL that only responds to local needs is, again, overcome. Global requirements are at stake — although sometimes with particular local dressing — and there is a need for global answers. PrIL may, and certainly shall, provide a part of them. In this vein, for instance, the formation of a true branch of PrIL on corporate social responsibility is gaining pace.⁴⁰ Closely related, concrete initiatives oriented to the protection of the environment are shaping the post-modern global PrIL.⁴¹

³⁷ Alex Mills, 'Variable geometry, peer governance, and the public international perspective on private international law' in H Muir Watt and DP Fernández Arroyo (eds), *Private international law and global governance* (OUP 2014) 248. See also London Court of Appeal, *Lungowe v Vedanta* (14 October 2017) regarding the parent company's duty of care in relation to overseas operation of a subsidiary. [This decision has been confirmed by the Supreme Court on 10 April 2019, [2019] UKSC 20].

³⁸ Bram van der Eem, 'Financial stability as a global public good and private international law as an instrument for its transnational governance — some basic thoughts' in H Muir Watt and DP Fernández Arroyo (n 35) 300.

³⁹ Hans van Loon, 'The Global Horizon of Private International Law' (2015) 380 *Recueil des Cours* 72-82.

⁴⁰ See the amazing comparative study directed by Catherine Kessedjian (ed), *Questions de droit international privé de la responsabilité sociétale des entreprises / Private international law for Corporate Social Responsibility* (Springer, forthcoming — prepared under the auspices of the International Academy of Comparative Law).

⁴¹ See Hans van Loon, 'Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters' (2018) 23-2 *Uniform Law Review* 298.

IV. The Difficult but Worthy Relationship between Private and Public International Law

A. A Troubled Relationship...

The common understanding has been that there is a dividing line between traditional PIL, which deals with relations between States, and PrIL which was left to deal with situations involving private actors. Even if this division has different degrees depending on the considered legal system, it can be generally said that nothing marked PrIL's "personality" more than the emphasis placed on its private character. Although the notion of "conflict of laws" reveals a vision that is in a certain sense "publicist," the truth is that the affirmation of that personality was sustained principally on its emancipation with respect to general international law. That is to say, the "nationalisation" provoked by its State codification not only was paradoxical for a discipline supposedly nourished by an international vocation, it had as a consequence, additionally, the privatisation of almost all of PrIL's interests and purposes.

Indeed, it was as if in order to define its profiles with clarity PrIL would have needed to abruptly cut the ties that united it with PIL, in a similar way as the well-known psychological need to kill the "father." It was not sufficient for PrIL that the fields of one and the other were indeed different. It seemed necessary to break at the same time both with the international (at least from the perspectives of the sources) character and with the public character.⁴² In the same way that usually occurs during the first stage of the independent life of a country previously submitted to a long period of colonisation, it was apparently understood that nothing good could come of the conceptual "metropolis." Similarly, in the case of PrIL, the predominant attitude for more or less a century was that of rejecting almost everything that its father represented, leading up to its negation.

The relative lack of success (to avoid using the painful word "failure") of the efforts to codify the PrIL at the international level did not do more than to reaffirm this attitude. It is clear that this stubbornness was, as it could be no other way, traumatic. There were

⁴² de Boer (n 16); Ralf Michaels, 'Public And Private International Law: German Views On Global Issues' (2008) 4-1 *Journal of Private International Law* 122.

so many points in common such as their mutual needs (in particular those of the son relative to the father) that the break, in addition to not being fully completed, left a myriad of incoherencies and contradictions.⁴³ For instance, international treaties created at a PIL level are great instruments to overcome the undesired differences between domestic conflict rules,⁴⁴ thus assisting the evolution of PrIL. Treaties on PrIL would be useless without basic rules on the law of the treaties that guarantee that the State parties to those instruments would respect their commitments therein.

B. ... Which Becomes More and More Inescapable

More than a century and a half later, the presence of PIL is still persistent in PrIL. It is true that it is less like a father and more like a brother, possibly an older one, but in any event it appears cloaked in all possible garments: in human rights law, investment law, international banking law, international finance law, international environmental law, international business law in its broadest meaning, treaty law, the law of international organisations ... the context leaves no doubt as to the persistent influence of PIL. As has already been pointed out, PrIL was conceived under a liberal paradigm and in the Westphalian framework; its basic task was that of distributing competencies among the State authorities. Conversely, the PrIL of today lives immersed, with all of its contradictions and heterogeneities, in a framework impregnated with the paradigms of human rights and legal pluralism. The presence of the father was perhaps dispensable in that earlier moment. Today that presence is unavoidable.

Of course, it is also possible to say, in contrast, that the matters with most relevance to PIL also have an aspect, often a fundamental one, in

⁴³ Returning to the metaphor of the independent nations, it is possible to see that something like this was what happened, over a very long period of time, with the American countries that cut their ties with the Spanish crown at the dawn of the 19th century. To name only what happened in the legal realm, in the context of this contribution, the new independent States made an effort to construct their legal regimes at the margin of, when not in opposition to, their Hispanic heritage, without being able to avoid that some pieces of it remained if not indelible then at least perceptible. But in contrast to this, such was the spirit of the break that some went to seek out inspiration from beyond the outlines of their legal family, especially in the North American constitutional law. This search is not so foreign if one considers that in reality it was the only available republican model. In the same way, nor are all the autonomous manifestations of PrIL regarding PIL absurd.

⁴⁴ Michaels (n 40) 128.

respect of PrIL. Whatever one's perspective, the supporting evidence does not change. Some of the most well-known and frequently discussed cases of recent years demonstrate this: (a) the *Chevron/Ecuador* saga (environmental law) shows us an originally private case that has generated different public elements and in which, returning to the principle, we could see that the effectiveness of the main Ecuadorean decision⁴⁵ of the matter depends on typical rules of PrIL, those relating to the recognition and execution of court decisions and to preventive measures adopted abroad;⁴⁶ (b) the New York decisions in multiple claims between the hedge fund NML and Argentina (finance law) not only caused the unfolding of the entire arsenal of arguments about States' immunity from jurisdiction and execution in various countries around the globe,⁴⁷ but they also provoked a real case of PIL with repercussions in the International Tribunal for the Law of the Sea and the Permanent Court of Arbitration in The Hague;⁴⁸ and (c) the already mentioned *Kiobel* case (human rights law) shows how the decision adopted by the U.S. Supreme Court not to open the jurisdiction of the United States in a case of tort responsibility between foreigners for events that took place abroad depended on the definition of the material and special reach of the notion of violation "of the law of nations or a Treaty of the United States" present in the Alien Tort Statute.⁴⁹

All that has been said so far becomes even clearer when the analysis is not encircled in a rather theoretical framework, but made in relation to the practice of international law. Those who are involved in an activity linked with the reality of international law as a lawmaker, judge, arbitrator, counsel or consultant know that it is hardly conceivable not to be somehow confronted with the other discipline. All international courts and tribunals, including the highest judicial

⁴⁵ *Aguinda v ChevronTexaco*, Superior Court of Nueva Loja, Lago Agrio (Ecuador), Case 2011-0106 (3 January 2012).

⁴⁶ See, among others, CSJN (Argentina), 4 June 2013, *Aguinda Salazar, María c/ Chevron Corporation s/ medidas precautorias*.

⁴⁷ Caroline Kleiner, 'L'affaire du siècle: NML Capital c. République d'Argentine ou la contribution des fonds vautours au droit international et au droit financier international' in *Mélanges en l'honneur du Professeur Pierre Mayer* (LGDJ Lextenso 2015) 391.

⁴⁸ It is very interesting to consult the decisions of the High Court of Justice, Accra Commercial Division of 11 October 2012 and of the Supreme Court of Ghana of 20 June 2013. Regarding the arbitration initiated (and concluded) before the Permanent Court of Arbitration, see http://www.pca-cpa.org/showpage.asp?pag_id=1528.

⁴⁹ Art 28 § 1350 US Code (n 32).

body on the planet, the International Court of Justice, often face cases populated by elements of both disciplines and they deal with them according to the nature of their particular function.⁵⁰ For instance, in the context of arbitral disputes, tribunals are beginning to develop truly transnational principles, rules and methodologies of PrIL that are almost completely devoid of connection with the State. Similarly, much of what is described as domestic PrIL has its origins outside the domestic sphere of States. Even investment arbitration, which deals with substantive PIL issues, operates under a scheme heavily influenced by commercial arbitration (i.e. PrIL). Moreover, the award by an arbitral tribunal constituted under a bilateral or multilateral investment treaty may be enforced through the channels created by PrIL.⁵¹ Before such a panorama, it seems obvious that today's international problems cannot be understood and effectively resolved by simply categorising them as either public or private; to the contrary, such labelling is harmful, as it dons blinders when what is needed is an expansive yet tempered perspective.⁵²

V. What is Next?

Due to all the changes experienced by PrIL throughout its existence, it now suffers from bipolar disorder, which, ultimately, does not appear to be so distant from schizophrenia. When it discovers its role as an instrument of global governance, when it realises that many private international matters are regulated by rules that have not been passed by any State legislature, when it discovers that it does not always need State courts to be enforced, or when it goes hand in hand with PIL, PrIL (and equally a number of its acolytes) feels euphoric. In these instances, PrIL experiences the satisfaction of being equally

⁵⁰ See Hans van Loon and Stéphanie De Dycker, 'The Role of the International Court of Justice in the Development of Private International Law' (2013) 140 *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht* 73; Burkhard Hess, 'The private-public divide in international dispute resolution' (2018) 388 *Recueil des Cours* 49; Diego P Fernández Arroyo and Makane Moïse Mbengue, 'Public and Private International Law in International Courts and Tribunals: Evidence of an Inescapable Interaction' (2018) 56 *Columbia Journal of Transnational Law* 797.

⁵¹ With the exception of awards rendered pursuant to the ICSID Convention (article 54).

⁵² Karamanian (n 6) 35-36. See also Veronica Ruiz Abou-Nigm, Kasey McCall-Smith and Duncan French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart 2018).

relevant to PIL. However, this does not mean that PrIL is free of any negative symptoms. Thus, when legislators, judges and authors insistently take PrIL back to its purported neutrality, as traditional as it is insipid, when they indicate that a poorly understood State sovereignty does not leave much room for transnational illusions, or when they remind it of the supposed virtues of its past as “special (domestic) private law,” it is understandable that PrIL would fall into depression. This paradox puts PrIL in a schizophrenic situation, as difficult to solve by insiders as to understand by outsiders.

A. The Risk of Dying from Success

PrIL has gained great success at the global level because many legal situations formerly considered merely domestic have developed an extraordinary international dimension. Also, many activities traditionally kept under the direct control of public law have fallen within the “private commercial” scope, thus creating a massive “privatization.” Both internationalisation and privatisation of legal situations have dramatically enlarged the scope of action of PrIL. While this exponential success is positive, it may be hard to handle.

On the one hand, this success of PrIL contributes to the creation of a “global law.” On the other hand, if achieved, a global law may be amorphous, ubiquitous and so malleable that it would make useless any attempt of organisation of international legal relationships by means of principle and the mechanisms of PrIL. In other words, paradoxically, PrIL’s great outreach entails the risk of ultimately killing itself. But, apparently, those dangers would only be such that are assigned to a frivolous and superficial vision of global law. In the serious developments with respect to, as diverse as they can be, the mentioned risk would appear, if it is what it does, at a remote point, that in which it is possible to outline a general theory of global law, that which “will stand on neither an exhaustive inventory of its sources nor on the construction of a coherent and complete order, but rather on the description of a finite number of simple elements, whose combinations would permit the taking into account of the multiplicity of the apparently anarchical, incoherent, and arbitrary manifestations that reality places before our eyes.”⁵³

⁵³ Benoit Frydman, ‘Comment penser le droit global?’ in JY Chérot and B Frydman, *La science du droit dans la* (Bruylant 2013) 48, where he also says that “these norms and these

B. The Possible Avenues for the Future Development of PrIL

Despite its current achievements, there still remains considerable room for PrIL to mature⁵⁴ and this can be done through different avenues. PrIL has a clear ambition to show its potential to the world, but it should be cautious not to fall into an arrogance that would ultimately lead to a continuous depression. PrIL should not deny its evident private character, but should just try to nuance it. In other words, it should not pretend to be something else, but only accept its real nature and make the most of it. Private law situations are so relevant at a global level that they create the perfect opportunity for PrIL to show its potential. Namely, it must take conscience of its significance beyond its traditional role of neutral *pinpointer*.

PrIL should also accept that, as much as it has grown, a drastic emancipation from PIL is not only impossible but worthless. PrIL now finds that, considerably more than a century from the start of its independence battle, the two disciplines are more linked than ever. In fact, although each one maintains its own interests, they need each other and feed each other reciprocally. Today's international problems in the times of globalisation require a broad vision and complementary action. Therefore, PrIL has to overcome its old traumas and accept that it is left with no other option than to return to getting along with its father, who still "enjoys good health." PrIL and its followers should therefore seek to strengthen such a relationship. This effort shall be done on all fronts, including teaching, where the two disciplines are still presented separately. It is like the relationship between PrIL and comparative law: one cannot truly study the former without applying the method of the latter. We see prestigious institutions that deal with both disciplines, such as the *Institut de droit international*, the International Law Association and the Hague Academy of International Law.

mechanisms [of global law] are already very few and not well known and there remain no doubts that the works and studies that I have tried to summarize are already irrelevant."

⁵⁴ According to Horatia Muir Watt: "private international law remains in large measure, if not entirely, absent from the grand scene of global governance, or at least reluctant to offer a systematic vision, a feeling or a meaning, of the changes that affect law and authority in a global context" (Horatia Muir Watt, 'Private International Law Beyond the Schism' (2011) 2:3 Transnational Legal Theory 350).

But, in addition to working alongside PIL, PrIL should be ready to conquer new areas to govern because the world will not stand still and will continue changing, probably faster every day. A good example of novel areas that are still awaiting solutions relates to cyberspace, because the absence of a physical border renders territory less relevant in attempts to regulate activity.⁵⁵ This shows that we still need to think of creative and more efficient ways to address international problems.

VI. Concluding Remarks

After a long time living with the traditional assumption that considered it a domestic discipline, PrIL was able to initiate a true denationalisation. As a consequence, PrIL experienced several lines of evolution that make it ready to deal with the novel issues arising out of. Thus, PrIL was able to escape from its cage and show its real potential to the world. Due to the trauma of being always eclipsed by PIL, PrIL considered that its success would always depend on being able to emancipate from the former, and prove itself to be an independent discipline. However, as much as PrIL has tried to leave PIL behind, it inevitably sees that PIL is everywhere and so it has had to learn to coexist with it.

In this context, and despite its undeniable success, PrIL still experiences bouts of depression, when reminded about its origins as a quasi-international discipline and its potential is questioned, especially in comparison to PIL. But, PrIL must convince itself that trying to cut its links with PIL will not help its future development. To the contrary, PrIL can only function at its best when interacting smoothly with PIL (and vice versa). Therefore, PrIL's strategy can only be to enhance its relationship with PIL on all fronts. The story of PrIL shows that the world changes so fast, that the only way for international law to rise to the challenges caused by novel situations is to abandon old dogmas and constantly reinvent itself. In this, educational institutions play a crucial role, since only they can encourage young generations to think beyond the established doctrines and be brave enough to create the international law of the future.

⁵⁵ Karamanian (n 6) 37.