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Across the Public/Private International Legal Divide in the Governance of Global Public Goods

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ACROSS THE PUBLIC/PRIVATE INTERNATIONAL LEGAL DIVIDE IN THE GOVERNANCE OF GLOBAL PUBLIC GOODS

LUCAS LIXINSKI*

I. INTRODUCTION

International law has long experienced a divide or "schism" between public and private international law.[1] This divide is not only heuristic, it has deeply constitutive effects on what is possible in the international landscape. The divide creates multiple shadow areas in which the private is rendered invisible and cannot be regulated, or at least not using traditional legal mechanisms.[2] An international legal pluralism framework, because of its ability to engage with forms of non-state law in international regulatory spaces, presents some promise to address those gaps, but it does not often engage with the private,[3] even if it shows the promise of articulating transnational governance.[4] In this sense, elements of private international ordering end up written off as part of a "non-legality" structuring device, as pre- or post-legal.[5]

The examination of these intersections is cause for some terminological variation; from international law, to global law, to transnational law,[6] to international legal pluralism, to private international law and global governance,[7]

* Associate Professor, Faculty of Law, University of New South Wales. A previous version of these ideas was discussed at International Law Weekend 2017, under the title "International Heritage Law and the Privatization of Public International Law." I am particularly grateful to the input of my co-panelists and the audience at the event, and also to my students at UNSW Law and University of Sherbrooke (where, as a visitor, I taught their Transnational Law Seminar on this very topic). Finally, Jonathan Bonnitcha, Claire Higgins and Marc de Leeuw provided insightful feedback to an earlier draft. All errors remain my own.

1. Horatia M. Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L LEGAL THEORY 347, 347 (2011).

2. *Id.* at 347, 355-56, 383.

3. Paul S. Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1174 (2007).

4. Ralf Michaels, *Economics of Law as Choice of Law*, 71 LAW & CONTEMP. PROBS. 73, 86 (2008) (citing Robert Wai, *The Interlegality of Transnational Private Law*, 71 LAW & CONTEMP. PROBS. 105 (2008)).

5. FLEUR JOHNS, NON-LEGALITY IN INTERNATIONAL LAW, UNRULY LAW 110 (2013).

6. PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

7. HORATIA M. WATT & DIEGO P. FERNÁNDEZ ARROYO, PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 4 (2014).

all of these are terms used to describe a shared project of moving beyond the state-centric nature of international or global ordering. To be sure, there is some variation in emphasis on the public and the private, as well as values, in each one of these projects. But, as Neil Walker's effort in mapping these different projects has shown,[8] these terms share a commitment to thinking of law's distributive effects on a global scale.[9] For present purposes, the terminological battles are set aside, and I refer to these projects simply for their common feature of engaging with the intersections between public and private international legal ordering. In doing so, I am able to analytically query the work that private international legal governance projects actually do in their different interactions with public international law standards without being constrained by classification efforts that miss one or more of those projects. That said, all of the projects above inform the scope of my analysis.

Therefore, regardless of labeling, the public/private divide in international law persists for multiple reasons, due to factors ranging from the effects of regulatory framing,[10] to the nature of (classic) private international law as state law,[11] to questions as to whether the nature of the legal field is public or private,[12] down to even the training of those engaging in the field. As international law specializes and fragments, the divide between public and private is rendered even stronger, and so are its distributive effects. Said distributive effects are felt particularly when speaking of global public goods, largely understood as non-excludable and non-rival goods the safeguarding of which is of concern to humanity writ large.[13] These goods, comprising things like the environment, human rights, and cultural heritage or property, by their very nature seem to sit more easily within public, and sometimes quasi-constitutional, frameworks, but their configuration as public values has two noteworthy consequences. First, often private international regulatory spaces, by focusing on values like individual liberty and party autonomy, disregard those public values. Second, even if they are engaged in the

8. NEIL WALKER, INTIMATIONS OF GLOBAL LAW (2015).

9. Richard Collins, *The Slipperiness of 'Global Law'*, 37 OXFORD J. LEGAL STUD. 714, 716-17 (2017) (referring to NEIL WALKER, INTIMATIONS OF GLOBAL LAW (2014)).

10. André Nollkaemper, *Aligning Frames for Elephant Extinction: Towards a New Role for the United Nations*, 108 AM. J. INT'L L. UNBOUND 158, 159 (2014).

11. ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW 18 (2009).

12. José E. Alvarez, *Is Investor-State Arbitration 'Public'?,* 7 J. INT'L DISP. SETTLEMENT 534, 551 (2016).

13. Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651, 651 (2012); Francesco Francioni, *Public and Private in the International Protection of Global Cultural Goods*, 23 EUR. J. INT'L L. 719, 719 (2012); *see generally* Anne van Aaken, *Behavioral Aspects of the International Law of Global Public Goods and Common Pool Resources*, 112 AM. J. INT'L L. 67 (2018). *But see* J. Samuel Barkin & Yuliya Rashchupkina, *Public Goods, Common Pool Resources, and International Law*, 111 AM. J. INT'L L. 376 (2017) (critiquing of the uses of this terminology by international lawyers).

private, the engagement happens in sporadic ways that affect the public in largely invisible ways, given the myopia of those working in this space.

Add to this maelstrom the issue of fragmentation, not only of regimes but of regulatory models altogether, and the mapping of governance becomes difficult, and more and more "shadow spaces" are created. But that is not to say regulatory models need to be streamlined or harmonized; they fulfill different functions, and speak to different stakeholders. In doing so, they speak to different values attributed to the global public good being engaged. Therefore, our role is not to undo diversity, but rather to learn how to navigate it and to be able to strategically tap into the myriad possibilities while aware of the different values and possibilities engaged in each.

This article seeks to contribute to the conversation about international legal governance of public goods by precisely mapping out the different forms of governance created at the juncture of public and private international law. A key objective of this article is to call out to public international lawyers, or international lawyers more generally invested in the safeguarding of global public goods, so that they can strategically and creatively tap into the possibilities of the private.

I do so with one specific global public good in mind: cultural heritage (also known as cultural property).[14] I choose cultural heritage because of its connection to identity, which grounds its stakes in human goals (contrary to the environment, for instance, where the "anthropocentric *versus* ecocentric" dimensions could add another layer of nuance that, while incredibly worthwhile, distracts from my immediate goal). Further, culture, and cultural heritage in particular, is often seen as a public concern because it defines a polity (so equated with national identity and largely a proxy for sovereignty).[15] But, like with most public goods, most of the law around heritage, at least as far as dispute resolution is concerned, is actually placed in the private. In the case of cultural heritage, property law in particular comes to mind, whether we are talking about intellectual property (IP) for intangibles,[16] chattels for cultural objects,[17] or "classic" property for

14. *See* Francesco Francioni, *A Dynamic Evolution of Concept and Scope: From Cultural Property to Cultural Heritage*, *in* STANDARD-SETTING IN UNESCO VOLUME 1: NORMATIVE ACTION IN EDUCATION, SCIENCE AND CULTURE 221, 228-31 (Abdulqawi A. Yusuf ed., 2007). There is a fair amount of discussion on the issue of terminology, suggesting that the term "cultural property," the term in older treaties, refers to culture in a way that is less morality-laden, whereas "cultural heritage" better encapsulates cosmopolitan values around heritage (while unintentionally excluding economics from heritage). However, even if "cultural heritage" is the current term of art in most non-US legal circles, I have come to advocate for a return of the term "cultural property," at least inasmuch as it better bridges the gap between domestic and international, and therefore provides clearer avenues for the exercise of community agency and control over heritage, as discussed below. *Id.* at 228-31 (discussing this shift from "property" to "heritage,"). *See generally* Lyndel V. Prott & Patrick J. O'Keefe, *'Cultural Heritage' or 'Cultural Property'?*, 1 INT'L J. CULTURAL PROP. 307 (1992).

15. *Id.* at 315.

16. *See generally* Convention for Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 3.

shipwrecks[18] and sites.[19] However, private law remains largely unaffected by and impervious to cultural considerations and is thus unresponsive to what makes cultural heritage a public good.

I argue that international cultural heritage law and global public goods governance more generally cannot function properly unless it delves into the private, as opposed to its current approach of largely skirting it. International family law is one way in which the public and the private have somewhat blended[20] through the use of blanket clauses that refer to human rights law.[21] In addressing the challenge posed by cultural heritage, I want to resist falling back on the right to cultural life as a means to articulate the private because of the relationships between human rights and private law.[22] Doing so, in my view, defers the debate rather than tackling it. Instead, it is important to demonstrate that there is more to property than the protection of personal autonomy, while at the same time being able to draw on the power of property categories to convey non-economic priorities.[23]

My intervention lies therefore primarily in reorganizing the field to expose its blind sides and unintended consequences. I rely on the theoretical work of scholars from critical heritage studies and critical legal studies, particularly Duncan Kennedy's work around the power effects of the public onto the private, and vice-versa,[24] and of authors like Laurajane Smith on the complicated and multiple uses of heritage.[25] Relying on this mode of intervention, I can advance the ways in which private international legal governance can be built around public objectives, bridging the schism between public and private international law.

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17. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 1, Nov. 14, 1970, 823 U.N.T.S. 231.

18. Convention on the Protection of the Underwater Cultural Heritage art. 9, Nov. 2, 2001, 2562 U.N.T.S. 3 [hereinafter UCHC].

19. Convention concerning the Protection of the World Cultural and Natural Heritage art. 1, Dec. 17, 1975, 1037 U.N.T.S. 151 [hereinafter WHC].

20. *See generally* Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter Child Abduction Convention]; Michael Kirby, *Children Caught in Conflict – The Child Abduction Convention and Australia*, 24 INT'L J. L. POL'Y & FAM. 95, 96 (2009); *see generally* Victoria Stephens and Nigel Lowe, *Children's welfare and human rights under the 1980 Hague Abduction Convention – the ruling in Re E*, 34 *J. SOC. WELFARE & FAM. L.* 125; *see generally* Linda Silberman & Martin Lipton, *A Brief Comment on Neulinger and Shuruk v. Switzerland (2010), European Court of Human Rights*, 18 JUDGES' NEWSL. INT'L CHILD PROTECTION 18, 18 (2012); *see generally* Paul Beaumont et al., *Child Abduction: Recent Jurisprudence of the European Court of Human Rights,* 64 INT'L & COMP. L.Q. 39 (2015).

21. *See* HUMAN RIGHTS IN PRIVATE LAW (Daniel Friedmann & Daphne Barak-Erez eds., 2001) (providing a collection of essays).

22. *Id.*; *see also* Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 EUR. J. INT'L L. 9, 13 (2011).

23. *See generally* HANOCH DAGAN, PROPERTY, VALUES AND INSTITUTIONS (2011).

24. DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).

25. *See generally* LAURAJANE SMITH, USES OF HERITAGE (2006).

There are three modalities of engagement between public and private in this article, all of which bleed into one another: public international law and private international law; public values and private values; and public domestic law and private domestic law. While the international duality is the central focus of this article, it is also a proxy for the expression of certain values, which are only expressed in domestic law. Hence, the three configurations of the public/private distinction bleeding into one another.

In order to advance my thesis, the article is divided in four additional parts. The next section, which represents the bulk of this article, maps out different strategies of private international legal governance in relation to public values, and particularly shows the uses of language and institutional mechanisms typical of public international law to pursue private international legal governance. Following that, I re-engage the stakes of my intervention, discussing in particular the reasons and consequences of the public/private divide in relation to the safeguarding of public values. Subsequently, I discuss strategies for reengaging the private in the governance of global public goods. Concluding remarks follow, outlining pathways for future research.

II. STRATEGIES OF PRIVATE INTERNATIONAL LEGAL GOVERNANCE AND PUBLIC VALUES

If delving into the private is key to the effectiveness of global public goods governance, understood as the ability of legal regimes to protect or safeguard the public good and the objectives that are tied to said safeguarding, then a first key step is to map out the different strategies through which private international legal governance occurs. Private international legal governance, or transnational private law, can articulate a social vision of global public order, and it performs a public function of embedding private behavior into broader social ordering.[26] Related to that effort is the identification of the place and role of public values in these strategies.[27] There are five key strategies, which will be addressed in turn: classic domestic conflict rules; international harmonization of conflict rules; international harmonization of substantive rules; international cooperation in civil or criminal legal affairs; and industry self-regulation.[28] Each of them favors certain values with respect to heritage, and, in doing so, showcases different objectives, which the public good safeguarding or protection pursues.

A. Domestic conflict rules: public values as sovereignty

Private international law is traditionally centered on this mechanism.[29] That is why, in a sense, private international law is often discussed as being neither

26. Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471, 471 (2005).

27. *Id.* at 473.

28. *See infra* Sections 2)a)-e).

29. Peter Hay et al., *Conflict of Laws*, *in* ENCYCLOPEDIA BRITANNICA (1998).

international nor private, since conflict rules are domestic and of public law.[30] One effect of piercing the terminology and scrutinizing the nature of conflict rules as public is that some level of public values are contained in these rules, not only in their drafting, but also, first and foremost, in their interaction with other rules of the forum. A key aspect of this interaction is the idea of public policy (*ordre public*), which prevents the application of the law the conflicts rule directs you to if in doing so fundamental values of the forum would be negatively impacted, but I will address more on that later. More broadly, as Alex Mills has suggested, private international law can be read through an international, rather than domestic, prism, giving it the ability to engage with the "public principles of global ordering it embodies."[31]

The normal flow of a dispute in private international law, once proceedings are started in the appropriate forum, and assuming there are no challenges to commencement of proceedings there, is for the judge of the forum to classify the dispute according to the legal category it falls predominantly under (property; tort; family; etc.). A judge will next refer to the conflict rule of the forum with respect to the type of dispute and see what law the rule directs them to (law of the place of residence of one of the parties; *lex loci delicti commissi*;[32] *lex contractus*;[33] *lex rei sitae*;[34] etc.) and then apply that law in the forum. In some jurisdictions, the judge is prevented from considering conflict rules in the application of the law stage, so as to avoid the situation where a foreign legal system's conflict rule directs the case to yet another body of law.[35] That is called the prohibition of *renvoi* and is useful in imbuing public values in that it constrains the application of conflict rules to a pre-merits stage of the case.[36]

In the application of the law determined by the conflicts rule on the merits, the judge is generally bound by those rules, whether foreign or domestic. However, particularly in applying foreign law, there are two exceptions which protect (domestic) public values, and are thus worth mentioning in our present context. The first exception is public policy, mentioned above, a mechanism through which the judge sets aside the foreign law on the basis of its offense to public policy of the forum (which can also be informed by international public policy, that is,

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30. AN CHEN, THE VOICE FROM CHINA: AN CHEN ON INTERNATIONAL ECONOMIC LAW – ON THE MISUNDERSTANDINGS RELATING TO CHINA'S CURRENT DEVELOPMENTS ON INTERNATIONAL ECONOMIC LAW DISCIPLINE 31, 35 n. 6 (2013).

31. MILLS, *supra* note 11, at 3.

32. Thomas K. Graziano, *Torts*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1709, 1710 (Jürgen Basedow et al., 2017) (applying the law of the place where the tort was committed).

33. Michael Wilderspin, *Contractual Obligations*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 472, 478 (Jürgen Basedow, et al., 2017) (applying the validity of the clause).

34. Louis d'Avout, *Property and Proprietary Rights*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1428, 1428 (Jürgen Basedow et al., 2017) (applying that a territorial regime applies to tangible property-related issues).

35. Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1822-23.

36. *Id.* at 1823.

values contained in international legal instruments to which the forum is a party).[37] The protection of public values is fairly evident in this context, as is the defense of sovereignty. Their application to global public goods happens through the value attributed to public goods; their defense, if one is to invoke public policy, is fundamental to the way the polity defines itself, and its own values. Therefore, the public operates as a trump card to the private.

A similar trump mechanism exists in the second exception: the judge can in theory preserve the sovereignty of the forum and of the foreign law by saying it is not within the court's mandate to enforce or pass judgment on the public law of another country.[38] Here, the defense of values is less evident, since foreign public law communicates values, and often the domestic law affecting global public goods is itself public law. What this mechanism does, if applied, is to set aside one set of values in defense of global public goods (the foreign law) in favor of another (the state's). One public value thus trumps another.[39] In the specific domain of cultural heritage, or other public global goods, it means that for private international law to apply as a mode of governance, it needs to be stripped of its values, and turned into "neutral" private law, which is in many respects an impossibility.

But I focus on the effects of the actual application of this mode of private international legal governance, rather than its exceptions, and I will therefore set the public policy and enforcement of foreign public law rules aside for the purposes of this article. Among existing conflict rules, the one that applies to the majority of situations involving cultural heritage is the rule applying to property: *lex rei sitae*, or the law of the place where the thing is. In other words, domestic conflict rules would more often than not suggest the application of the law of the place where the heritage is located, as long as the case is classified by the forum judge as one about property. In some instances, limited recognition has been given to the idea of *lex originis*, or the application of the law of the place of origin of the property, in the case of illicitly removed or looted cultural objects. However, that rule is complicated by the following three factors: the difficulty of identifying precisely the country of origin of an object found to be looted; that the *lex originis* does not necessarily guarantee stronger protection to heritage; and that the law of other states may provide better safeguarding.[40] This rule can therefore lead to a certain degree of arbitrariness.[41]

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37. MILLS, *supra* note 11, at 9. On the 1970 Convention on cultural objects as international public policy, *see* PATRICK J O'KEEFE, COMMENTAIRE RELATIVE À LA CONVENTION DE L'UNESCO DE 1970 SUR LE TRAFIC ILLICITE DES BIENS CULTURELS 349-53 (2d ed. 2014) (discussing the 1970 Convention on Cultural Objects as international public policy).

38. Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 448 (1995).

39. *Id.*

40. ALESSANDRO CHECHI, THE SETTLEMENT OF INTERNATIONAL CULTURAL HERITAGE DISPUTES 65, 97-98 (2014).

41. Alessandro Chechi, *When Private International Law Meets Cultural Heritage Law: Problems and Prospects*, 19 YEARBOOK OF PRIVATE INTERNATIONAL LAW 269, 276 (2017-2018).

The *lex rei sitae* rule, and the conflicts strategy more generally, align with public values inasmuch as they are about sovereignty. Conflicts rules are chosen by the forum state (even if in practice there are many shared commonalities across states), and the public policy exception also protects the forum state from applying rules it disagrees with on the basis of its public values. Therefore, in the protection of sovereignty on the basis of territoriality (*lex rei sitae*), as well as the public policy exception, this strategy aligns with public values in somewhat unexpected ways.

In the application of the public policy exception, thus, there is more scope for a veto of foreign law and values, which in the case of global public goods, can turn into a conversation about each country's political preferences. This conversation aligns with the idea that private international law is at its core about "policy choices with regulatory impact."[42] With respect to *lex rei sitae*, conversely, values associated with public goods, and heritage in particular, have no clear place, as the issue is largely about a mechanical application of a conflict rule. This is true even if the state does have a certain degree of choice, which in itself is a choice about public values and sovereignty in attempting to predict the direction cases will take, and exercising preferences on the basis of said predictions. However, another private international legal governance strategy seeks to remove this discretion, by harmonizing different conflict rules. To this strategy, and its effects on global public goods, I move next.

B. Harmonization of conflict rules: public values as limited certainty

The harmonization of conflict rules is a process through which public international law starts to blur the public/private divide in private international legal governance. Specifically, this strategy consists of states agreeing to adopting the same conflict rule for the same classification of cases. So, for instance, in a case about torts, it may be that states agree through a treaty that all of them will apply the *lex loci delictii* rule and not another possibility, like the law of nationality of the victim, regardless of where the tort occurred.[43]

The greatest draw of this strategy is to create a certain degree of certainty in the international space. States give up some sovereignty (particularly the sovereign interest of always defending the interests of their nationals, regardless of the situation they are involved in, since nationality is often the alternative and a trump to other conflict rules) in favor of international cooperation in this space. But the mechanism's application is limited to conflict, rather than substantive, rules, so it still makes relatively little room for public values to enter directly into its application (save for the exceptions discussed above). States give up their ability to change their conflict rule, too, even though in practice these treaties are only ratified by states that already have the basic conflict rule contained in the treaty

42. Wai, *supra* note 26, at 474.

43. Heinz-Peter Mansel, *Nationality*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1289, 1293 (Jürgen Basedow et al., 2017).

with relatively few states changing their domestic law to reflect a new treaty commitment.

The use of the language and forms of public international law aids a shift in values. Public international law comes in the following two forms: instruments and institutional venues.[44] Harmonized rules are usually set as international treaties, and they happen within the framework of international or regional organizations that may or may not dedicate themselves exclusively to private international law matters, like the Hague Conference of Private International Law[45] or the Organization of American States.[46] With respect to organizations like the latter in particular, their broader mandate means there is a greater change of spillover and communication of public values into this technical legal domain.

One example of this type of strategy is the Hague Convention on Succession (1989).[47] This treaty is a typical example of a harmonization of conflict rules treaty, in that it has little to no preamble (a part of the treaty where values are usually noted)[48] and only speaks to the application of the harmonized conflicts rule, with no provisions on other matters.

This Hague Convention on Succession is also useful in the present context of cultural heritage and other global public goods because it speaks to conflict rules affecting property (of deceased persons).[49] However, unlike typical property issues that are resolved under the *lex rei sitae* rule discussed in the previous section, in this case one applies the law of the state of habitual residence of the deceased at the time of death.[50] Once the law of the state of residence applies, though, one moves to an application of succession law in that state, which triggers property law.[51] It is important to note that, typically, the engagement is with the category of property (as classified by the judge of the forum), making no allowance to thinking of different types of property differently.[52] Extrapolating to other global public goods, this type of mechanism speaks to public values only inasmuch as certainty

44. *See generally* Armin von Bogdany et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. INT'L L. 115 (2017).

45. *See generally* Marta Pertegás, *Hague Conference on Private International Law*, in ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 870 (Jürgen Basedow et al., 2017).

46. *See* ORGANIZATION OF AMERICAN STATES' DEPARTMENT OF INTERNATIONAL LAW, PRIVATE INTERNATIONAL LAW, http://www.oas.org/en/sla/dil/private_international_law.asp (last visited Mar. 3, 2019).

47. Hague Conference on Private International Law, Convention on the Law Applicable to Succession to the Estates of Deceased Persons and Final Act of the Sixteenth Session, October 20, 1988, 28 I.L.M. 146 [hereinafter Hague Succession Convention].

48. Vienna Convention on the Law of Treaties art. 31, ¶ 2, May 23, 1969, 1155 U.N.T.S. 331 (suggesting that the preamble is a means of interpreting the treaty, as it indicates the treaty's object and purpose).

49. Hague Succession Convention*, supra* note 46.

50. *Id*. art. 3.

51. *Id*. art. 3, ¶ 2.

52. *Id*. art. 1, ¶ 2 (a).

over the application of a conflict rule is a worthwhile public good. Nevertheless, private international law of conflicts serves an important communicative function in that it creates a pathway for pluralistic engagement with the laws of foreign countries.[53]

Most importantly for present purposes, though, the use of these mechanisms serves as testing the waters for deepening of private international legal governance through public and openly value-laden mechanisms. The next section discusses a strategy that largely builds on the idea of harmonization, but takes them further, looking at substantive rules.

C. Harmonization of substantive rules: public values as internationalization

Harmonization of substantive rules is in some respects the next step from the harmonization of conflict rules. Instead of making uniform the rule that the judge applies to decide which law is applicable, the harmonization of substantive rules makes the applicable law itself uniform. The harmonization of substantive rules does not necessarily follow from the harmonization of conflict rules in the same area, and different fora can be used for one or another strategy. Nevertheless, it does represent, at least on the surface, a more sophisticated strategy, and one in which the forms and content of public international law have more of a bearing, meaning less room left for state sovereignty, which is essential to the conflicts rules strategies outlined above.

Importantly, the harmonization of substantive rules internationalizes the values underlying substantive rules, which are more apparent and have greater influence than those underlying conflict rules.[54] As public policy, for instance, is drawn from substantive rules (rather than conflict rules), it underscores the importance of substantive law in enforcing public values, which are key when speaking of global public goods. Harmonizing substantive rules can also be a means for showcasing pluralism and respond to it (the flip side being that pluralism can also be about normative contestation).[55] But the state process of harmonization "can publicize contestable behavior in the broader society", helping articulate goals of regulation, redistribution, and efficiency.[56]

The harmonization of substantive law also gives an opportunity to skirt the effects of classification, a necessary step in applying conflicts rules that, as indicated above, can and often does have the effect of stripping away public values from public goods safeguarding, rendering them simply yet another property law

53. Wai, *supra* note 4, at 123.

54. *Id*. at 109.

55. *Id.*; *But cf.* MILLS, *supra* note 11, at 21 (suggesting harmonization means the loss of pluralism and may be too great a cost against the potential risk of regulatory conflict in conflict-based private international law).

56. Wai, *supra* note 4, at 109.

issue, for instance, or another tort.[57] And, as harmonization of substantive rules happens more often than not in a rather piecemeal fashion, rather than large codifications of private international law,[58] it also allows for the specialization of the substantive rule, to reflect values specific to the global public good. In the area of cultural heritage, it can even lead to the emergence of what Chechi describes as *lex culturalis*, or a body of law that puts the values of heritage front and center, sidestepping obstacles created by the piecemeal application of other private international law rules.[59]

One instance of this latter effect, which I will call the harmonization of substantive rules with direct effect on global public goods, is the International Institute for the Unification of Private Law (UNIDROIT) 1995 Convention.[60] This treaty fits squarely within the mandate of UNIDROIT, an institution created in 1940, which, as spelled in its Statute, is to harmonize and coordinate private law, and lead to the adoption of "uniform rules of private law."[61]

The 1995 Convention provides for the jurisdiction of the courts where the object is located, or other states having possible jurisdiction over the object on the basis of their national rules.[62] Further, the courts of state where the object is located can issue provisional or protective measures that take precedence over the jurisdictional claims of any other state.[63] This provision, however, is not to be confused with *lex rei sitae* discussed in the previous section,[64] which is about applicable law. In disputes where the UNIDROIT Convention is applicable, the treaty itself is the applicable law.[65]

In terms of the substantive rules being harmonized or unified in this treaty, they have to do with ownership,[66] limitation periods,[67] compensation,[68] and the rights of good faith possessors.[69] Certain public values can be seen in these substantive and procedural private law rules, such as the idea of enlarging limitation periods with respect to cultural objects "forming an integral part of an

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57. *Id.* at 117-18.

58. *Id.* at 121.

59. Chechi, *supra* note 41, 270.

60. International Institute for the Unification of Private Law, Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 2421 U.N.T.S. 457 [hereinafter UNIDROIT Convention]. *See* LYNDEL V. PROTT, BIENS CULTURELS VOLÉS OU ILLICITEMENT EXPORTÉS: COMMENTAIRE RELATIF À LA CONVENTION D'UNIDROIT (2000).

61. Statute of the International Institute for the Unification of Private Law art. 1, Mar. 15, 1940, 15 U.S.T. 2504, A.T.S. 1973/10.

62. UNIDROIT Convention, *supra* note 60, art. 8.

63. *Id*.

64. *See* discussion *supra* Section II(B).

65. *See generally* UNIDROIT Convention, *supra* note 60.

66. UNIDROIT Convention, *supra* note 58, art. 6, ¶ 3(a).

67. *Id*. art 3, ¶ 4.

68. *Id*. art. 4.

69. *Id*. art 4, ¶ 4.

identified monument or archaeological site, or belonging to a public collection".[70] Likewise is the requirement for the exercise of due diligence in the acquisition of cultural objects, which speaks to the need for considering interests of other parties, and the public at large, prior to acquisition of property title.[71] The exercise of due diligence, to be discussed further in another subsection below,[72] speaks to a public interest, but it fundamentally creates a shield around private rights when exercised. This exercise of harmonizing private law, thus, is centrally concerned with the protection of a global public good, even if it imbues public values somewhat obliquely in their framing of private interests, which is the central part of their mandate.

But there are also other ways of harmonizing substantive rules with only indirect effects on global public goods. One example with respect to cultural heritage is the possibility of invoking instruments on civil liability for damage resulting from environmental activities to protect underwater cultural heritage. The Council of Europe Convention of March 1993 includes cultural heritage in its definition of the environment,[73] and includes provisions determining the liability of public or private actors for damage resulting from dangerous activities. Harm to underwater heritage resulting from oil spills, for instance, would fall squarely within the scope of this regime.[74] A regime thus established to address primarily one global public good (the environment) refers to another (cultural heritage), while regulating primarily civil liability matters. Therefore, instead of a regime that focuses entirely on cultural heritage, we have heritage made part of a treaty to harmonize law on certain types of liability more generally and in particular the environment as a global public good. In this respect, the near "mainstreaming" of cultural heritage would in theory make the regime more palatable for ratification.

Underwater cultural heritage's safeguarding in international law also reminds us of the limits of the public's relationship with the private in international legal governance, and the potential rejection of the private by the public. During the drafting of the Underwater Heritage Convention, for instance, drafters within the International Law Association (whose project served as the basis for the UNESCO process) considered the relationship between their project and existing international legal instruments that regulated salvage as a private international law matter.[75] The drafters excluded salvage from the scope of application of the goal of

70. *Id*. art. 3, ¶ 4.

71. *Id*. art. 4, ¶ 1.

72. *See* discussion *infra* Section II(E).

73. Council of Europe, Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment art 2, ¶ 10, June 23, 1993, E.T.S. No.150.

74. *See* Vincent Negri, *Conventions and Laws Related to Submarine Archaeological Sites in the Mediterranean*, *in* UNDERWATER ARCHAEOLOGY AND COASTAL MANAGEMENT: FOCUS ON ALEXANDRIA 122, 126-127 (Mostafa Hassan Mostafa et al. eds., 2000) (providing a brief commentary in the context of underwater cultural heritage).

75. The Int'l Law Ass'n, *International Committee on Cultural Heritage Law*, 65 INT'L L. REP. CONF. 338, 362 (1992).

safeguarding underwater cultural heritage,[76] thus creating an artificial barrier between the public and private that has been perpetuated in the UNESCO treaty, and negatively impacts the possibilities of safeguarding this global public good.[77]

In terms of thinking about direct (UNIDROIIT) and indirect (Environmental Liability Convention) to harmonize private law rules concerning cultural heritage as a public good, it would seem that the Environmental Liability treaty would be more easily replicated and more desirable, since it can address a number of global public goods at once. It can direct harmonization towards a problem that on the surface is rather technical and value-free (liability for pollution), while tying itself to important background political choices around the safeguarding of the global public good. But not being clear about those political choices can also lead to lack of clarity as to legal frameworks available for safeguarding the global public good and these tools getting lost in the cacophony of fragmented legal strategies.

Regardless of whether one relies on direct or indirect harmonization of substantive rules, though, it is important to note that this strategy also relies on the language and mechanisms of public international law to change private law. Underlying this strategy is thus the notion that "private law assists in the circulation of ideas and norms among social systems, be they different functional areas, different identity groups, or different jurisdictions", and is thus an important component of global ordering projects.[78]

However, in attempting to change private law, harmonization is not a given, as much of the nuance, including certain values, can be lost in translation domestically, since the fallback set of rules is domestic background norms, as opposed to the way the treaty is implemented in other countries. One example of harmonization of substantive rules where this happens involves the Vienna Convention on Contracts for the International Sale of Goods (CISG).[79] In its implementation in Australia, for instance, judges have insisted that the set of fallback rules they apply is the law of contracts of the state in Australia where the dispute is taking place, rather than the way the CISG has been implemented in other countries.[80] In other words, even in the harmonization of substantive rules, there is in practice enough room for sovereignty's echoes, and international values can be set aside, in case of lack of clarity, in favor of domestic ones. It is thus a falsehood to think of the harmonization of substantive rules strategy as a perfect blend of public and private international law, even if it may be as close as we may

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76. *Id*. at 345.

77. Liza J. Bowman, *Oceans Apart over Sunken Ships: Is the Underwater Cultural Heritage Convention Really Wrecking Admiralty Law?*, 42 OSGOODE HALL L.J. 1 (2004) (arguing that the effective safeguarding of underwater heritage requires both public and private participation).

78. Wai, *supra* note 4, at 481.

79. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (1980).

80. Franco Ferrari*, PIL and CISG: Friends or Foes?* 31 J.L. & COM. 45 (2012-2013); Lisa Spagnolo, *The Last Outpost: Automatic CISG Outs, Misapplications and the Costs of Ignoring the Vienna Sales Convention for Australian Lawyers*, 10 MELB. J. INT'L L. 141 (2009).

have gotten to so far.

The safeguarding of global public goods comes to the fore more clearly because of the influence of substantive international law, but harmonized private law needs to give more guidance as to how the public and the private mix, as opposed to only replicating the language of domestic private law (even though understandably that is the primary challenge, and a difficult one at that). Another factor to consider is whether the harmonization of substantive rules creates enough of an institutional framework through which these values are defended and that may be part of the problem of background norm influence outlined above. Another strategy for private international legal governance, thus, would put institutional frameworks at the forefront and would focus on cooperation in the joint pursuance of ever-changing values, rather than setting those values firmly but without the institutional means to uphold them. To this idea of international cooperation as private international legal governance, we move next.

D. International cooperation in civil (and criminal) affairs: public values as beyond scrutiny

Cooperation in civil and criminal affairs means the use of international treaty frameworks to equalize procedures for obtaining access to information or people. These frameworks work on the assumption that substantive decisions about the law and its values are to be made elsewhere, and, for the sake of expediency and promoting comity, it is up to the parties to mechanically promote certain outcomes without prejudging the merits in any given case. In this sense, this is a type of private international law committed primarily to "an allocation of regulatory authority, not a final judgment."[81] It is a type of framework that blends private legal governance with administrative legal mechanisms,[82] but, because it eludes the forms of traditional public international law, and still has more purchase in private international law than public international law, it is dealt with here as a strategy for private international legal governance.

For instance, the framework on the enforcement of foreign judgments or arbitral awards predetermines that the authority of the state where the judgment was first rendered was correct, baring formal defects or offense to public policy (*ordre public*).[83] Effectively, it means that the state where the judgment is being enforced is not able to question the judgment of the judge in the state of origin, and simply needs to guarantee its enforcement, for the sake of comity and expediency. (International) Public policy can apply here as a means of injecting substantive values, but it is the exception, rather than the rule.[84]

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81. MILLS, *supra* note 11, at 18.

82. With respect to cultural heritage, on the administrative aspects, see Lorenzo Casini, *Italian Hours: The Globalization of Cultural Property Law*, 9 INT'L J. CONST. L. 369 (2011).

83. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 330 U.N.T.S. 38; 21 U.S.T. 2517; 7 I.L.M. 1046.

84. MILLS, *supra* note 11, at 283.

There is some limited room for the discussion of the substantive values, reverting back to the idea of public policy in the application of conflicts rules. However, in many instances the idea of public policy is abused to promote sovereigntist outcomes by domestic authorities.[85] One example is the uses of the Hague Convention on Child Abduction, mentioned above.[86] This international scheme which to achieve common results though the national application of harmonized rules across jurisdictions which may have different legal and cultural assumptions and divergent laws,[87] and in this context may necessitate looking at substantive law more closely. It is also a reminder of how values cannot be encapsulated out of private international legal governance. In its implementation in Australia, for instance, Australian courts have not responded well to the internationalist elements of the Convention, and they have instead largely exercised their own jurisdiction, especially in cases involving the welfare and best interests of children.[88]

In spite of these instances of application of public policy, as a rule the strategy of international cooperation in civil or criminal affairs skirts the values discussion. It brings to bear a fairly sophisticated institutional machinery, but only so it can give a domestic forum the opportunity to consider the merits of a case. However, this machinery would not have been developed, seemingly, without its detachment from substantive values.

In the context of cultural heritage, the international framework on heritage crime and illicit trafficking is particularly useful. It engages a series of international institutions cooperating on issues like law enforcement, taking of evidence, customs and taxation, among others.[89] This multifaceted framework prioritizes returning the object to the last jurisdiction where title could be lawfully established.[90] However, in doing so it overrides discussions, for instance, of repatriation of objects that had once been looted and taken unlawfully to their countries of cultural origin, and therefore prevents a re-discussion of the values associated with specific cultural heritage items, and what they mean for contested identities. So, for instance, were one to return to India the Koh-i-Noor diamond that currently adorns the British Crown, but taken from India during British

85. *Id.* at 258.

86. Child Abduction Convention, *supra* note 20.

87. *See generally* ELISA PÉREZ-VERA, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION, III ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION (1982); United States Dept. of State, Hague Intl. Child Abduction Convention, Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,510 (Mar. 26, 1986); Nigel Lowe and Victoria Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention*, 46 FAM. L.Q. 41 (2012); RHONA SCHUZ, THE HAGUE CHILD ABDUCTION CONVENTION: A CRITICAL ANALYSIS (2013).

88. Michael Kirby, *Children Caught in Conflict - The Child Abduction Convention and Australia*, 24 INT'L J.L. POL'Y & FAM. 95 (2010).

89. *See* U.N. Office of Drug and Crime, Protection Against Trafficking in Cultural Property, U.N. ODC, U.N. Doc. CCPCJ/EG.1/2009/CRP.1 (Oct. 28, 2009) (providing a useful summary of the cooperation of international institutions).

90. *See id.*

colonization, the cooperation framework would require that the object be sent back to the United Kingdom immediately, regardless of the colonial history and possibly legitimate claims that could be made on behalf of the Indian state.

With respect to public goods, more generally, this strategy means the safeguarding of public goods is not scrutinized for meaning, which is a given. This strategy suspends and defers a consideration of values, while giving way to the domestic institution's assessment of values. It thus resembles the conflicts strategies discussed above, with the key difference being that this strategy is focused on promoting the resolution of the dispute regardless of the law; instead of worrying about what the law and its values represented, international cooperation focuses on creating the material preconditions for the law to meaningfully bear on a situation to begin with. After all, without access to the cultural object, to refer back to the looted cultural items example, there is little to no point in pursuing a full legal case.

But, by divorcing the merits of a dispute from its preconditions, this strategy can be seen as assuming that values do not have a bearing on institutional design or the operation of international cooperation. The strategy also presupposes that states have a shared interest in a neutral resolution of the dispute, rather than individual interests that could have been mediated through the harmonization of substantive rules. And, because exceptions on the basis of public policy are still present, it gives certain states the ability to manipulate the system in favor of their own individual values, which may or may not coincide with other values connected to the safeguarding of global public goods. This strategy, thus, however functional, starts escaping the influence of public values by purporting to be about procedural mechanics, while it effectively perpetuates or allows the perpetuation of certain values.

Value-neutrality as a strategy to avoid public interference in private international legal governance is, of course, not unique. Many other avenues exist, such as the operation of conflict rules which, at the moment of classification of the dispute for the purposes of determining the applicable conflict rule, ostensibly takes away the public values attached to the subject matter. Both these instances, however, require state mediation. What if the state could be done away with altogether? The next section explores one final strategy for private international legal governance, and queries the use of industry self-regulation to safeguard global public goods.

E. Industry self-regulation: public values as beyond the state

The use of industry standards[91] to influence governance and law-making is not unique to international law, nor does it go without official institutional endorsement by traditional public international law mechanisms.[92] Industry

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91. I am grateful to Julian Arato for reminding me of this category.

92. See JOSÉ E ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS (2005)

standards have the advantage of being more malleable and changeable to adjust to latest developments, as well as to rely more directly on expertise that has an immediate and relevant bearing on the regulatory objective.[93] They can also better make use of the possibilities within an industry without the burden of government-led regulation.[94] Industry standards often have their values replicated in public legal instruments in the area, either because industry has led standardization and law-making in a certain area, or because their credibility depends on (at least ostensibly) abiding by certain public values, particularly when their activity relates to global public goods.[95]

In cultural heritage, a useful example of industry self-regulation is the International Council of Museums (ICOM) Code of Ethics.[96] This Code of Ethics, voluntarily adopted by the museum profession, is the result of increasingly public pressure in the aftermath of a series of high-profile cases involving museums and dealers in looted cultural objects.[97] The Code's language suggests that, prior to acquiring a cultural object, the collector or museum must perform due diligence to "ensure that any object or specimen offered for purchase, gift, loan, bequest or exchange has not been illegally obtained in, or exported from its country of origin or any intermediate country in which it might have been owned legally."[98] It is a particularly important commitment. It is also an issue that concerns other private international legal governance strategies, since the UNIDROIT 1995 Convention also contains its own language on due diligence.[99] This standard allows for the public values of cultural heritage safeguarding to be directly considered in otherwise private transactions involving dealers, collectors, and cultural institutions. At the same time, though, it is unclear what exactly due diligence requires in practice, and the standard's oversight is performed by ICOM themselves.[100] As the International Council of Museums, their constituency is not

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(commenting on the role of the International Standardization Organization (ISO) as an international organization created by states to facilitate industry self-regulation).

93. *See Id*.

94. *See Id*.

95. *See Id*.

96. INTERNATIONAL COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS (2017) [hereinafter *ICOM*].

97. *See, e.g.,* JASON FELCH AND RALPH FRAMMOLINO, CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUM (2011). *But see* James Cuno, *View from the Universal Museum*, *in* JOHN HENRY MERRYMAN, IMPERIALISM, ART AND RESTITUTION 15-36 (2006)(describing a more positive take on the issue); James Cuno, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE (2008).

98. ICOM, *supra* note 96, at 9.

99. UNIDROIT Convention*, supra* note 58, art. 4, ¶ 4 (stating "[i]n determining whether the possessor exercised due diligence, regard shall be had to all the circumstances of the acquisition, including the character of the parties, the price paid, whether the possessor consulted any reasonably accessible register of stolen cultural objects, and any other relevant information and documentation which it could reasonably have obtained, and whether the possessor consulted accessible agencies or took any other step that a reasonable person would have taken in the circumstances.").

100. ICOM, *supra* note 96, at Preamble.

necessarily concerned with the safeguarding of the global public good, or at least not directly; rather, the central interest is in ensuring museums can acquire objects they deem relevant for their collection. As museums themselves thus oversee compliance with their standard, self-regulation can be fraught, particularly amidst calls for judges to defer to the expertise of museum and other cultural heritage experts.[101]

As one can see, even if we are speaking of an industry association that is devoted to the safeguarding of a global public good, there is still a wide leeway for abuse and disregard of the public values the industry body purports to defend. The industry association avoids the public because it means unwanted scrutiny; instead, it relies on the invisibility of the private to conduct its business in a way that can fly in the face of public values associated with global public goods. Industry standards create blind spots within the private, and rely on the public for a feel-good veneer of legitimacy. These industry standards also lack the gravitas of public international law, as their normativity is always ephemeral, and these organizations benefit from this state of affairs.

Industry self-regulation is the strategy of private global legal governance where most of the cultural consideration takes place, except that this consideration sits outside the purview of all parties, and only serves one specific industry at a time, whether it is museums or archaeologists (in the case of heritage). The values of non-experts, because they do not organize in the same way, cannot form a competing form of discourse.

Admittedly, my mistrust of industry self-regulation is tainted by my political views and for negative experiences with respect to cultural heritage. But there is an argument to be made as well in relation to other public goods that, when industry is heavily involved without much public scrutiny, values get translated into a business case framework, and only those values that align with a good business case get to be promoted.[102] Therefore, out of the five possible strategies for private international legal governance, industry self-regulation is the one that seems least adept at promoting values associated with global public goods, even if it can in effect safeguard aspects of these global public goods that speak directly to the industry's interests.

F. *International Private Legal Governance Strategies and Public Values*

The five strategies outlined above respond to the idea of safeguarding global public goods in very different ways. As it became apparent, none of them are directly designed to protect global public goods. But, as public international law forms and mechanisms creep in,[103] these strategies become more open to directly

101. *E.g.*, Marett Leiboff, *Clashing Things*, 10 GRIFFITH L. REV. 294 (2001).

102. *See generally* PETER DAUVERGNE & JANE LISTER, ECO-BUSINESS: A BIG-BRAND TAKEOVER OF SUSTAINABILITY (2013).

103. MILLS, *supra* note 11 (noting an additional trend).

engaging with the notion that they do pursue values, rather than just mechanically apply conflict rules for the benefit of safeguarding state sovereignty while facilitating international comity.

In line with the idea of relying increasingly on public international law forms, harmonization processes become more and more used.[104] These allow for the discussion of values to be promoted by legal instruments more openly, and for identifying these values as goals, rather than limits (which is what happens when the public policy or foreign public law exceptions apply with respect to conflict rules). And, if public values are put front and center, these strategies can more effectively bridge the public/private divide. However, even in those instances, the private frame of state sovereignty and the private frame of technical or apolitical dispute resolution still creeps in, either as the fallback norms when harmonized substantive law falls short, or through rendering institutional cooperation mechanisms ostensibly value-free.

There is something to be said about making values less apparent and strategically using purported "neutrality" to advance more sophisticated legal and institutional responses, as seen in the discussion of indirect harmonization of substantive rules with indirect effects on global public goods or in international cooperation mechanisms. But the lack of normative commitment to safeguarding global public goods in these instances means that lawyers, advocates, and decision-makers need to be more aware of the possibilities that can be deployed. If fragmentation is one of the problems plaguing the public/private divide in this space, it may be that this strategy is less desirable and it only compounds one of the field's key problems.

For the most part, when it comes to cultural heritage, the strategies discussed above focus primarily on cultural objects, which is what the vast majority of US legal literature and disputes in the area focus on as well. To that, two caveats must be added to put this discussion into perspective. First, is the evident fact that this focus misses large swathes of culture where the private is also present, such as the application of construction law to areas near World Heritage Sites[105] or the uses of intellectual property law in relation to intangible cultural heritage.[106] These other interactions between public and private deserve in-depth consideration themselves, particularly in that they can affect the range of possibilities under the five strategies outlined above.[107]

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104. *See supra*, Section II(B).

105. *See* Nathasha Affolder, *Mining and the World Heritage Convention: Democratic Legitimacy and Treaty Compliance*, 24 PACE ENVTL. L. REV. 35 (2007).

106. *See* LUCAS LIXINSKI, INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW 7-9, 29-65, 175-204 (2013).
Intangible cultural heritage is defined as living cultural practices, and is popularly known as folklore, even if this term is now rejected in the field for it being charged with negative connotations. *Id.* at 7-9, 29-65, 175-204 (discussing this definition, alongside the international legal regime and the relationship between intangible cultural heritage and intellectual property).

107. *See supra* Sections II(A)-(E).

Secondly, and most importantly, the response of all these five strategies is to ignore public value dimensions, and largely translate these concerns as being plain property disputes or customs enforcement action. Therefore, another effect of the public/private divide when it comes to cultural heritage is that, taken in the private, cultural heritage law becomes "art law," where cultural aspects are only important for economic valuation. "Heritage law," where cultural aspects affect the very fabric of the thing, and the thing is both economic and political, falls to the background. It is noteworthy in this connection that none of these five strategies, for instance, focus much on the 1970 Convention, which, in spite it being a very problematic international instrument, at least attempts to bring the public to bear on how we think of these artifacts.[108]

One example outside cultural objects is in the area of intangible heritage, and claims of authenticity over food heritage.[109] The recognition of culinary traditions as cultural heritage is a relatively recent phenomenon in international heritage law, thus allowing us to examine them with fresher eyes. Private law can help structure not only proprietary interests around food, but also the interests of organizations of cooks and other practitioners of the heritage. Existing private international rules would refer only to the heritage as a thing, except that here it is a practice that still deserves regulations. There are therefore limits to what the current strategies can do in terms of bringing public values into a conversation about safeguarding global public goods as part of private international legal governance efforts. What those limits mean for thinking about global public goods more generally, and the public/private divide, is the object of the next section.

III. WHAT IS MISSED BY TALKING PAST ONE ANOTHER?

To think of private international legal governance of public goods, as discussed above,[110] involves a wide range of possible strategies. Yet, the plurality of strategies may in some respects contribute to the problem, rather than address it. This section explores in further detail why public and private work in parallel but seldom intersecting spheres, particularly from the perspective of global public goods and with the example of cultural heritage in mind.

As discussed above, public international lawyers in cultural heritage miss the private because it is deemed unworthy of the global public good.[111] The private's focus on economics in particular devalues the public good. And, if the answer is to engage the private to bring public values to bear on it, then private law aspects are still the *domaine reservé*, off limits, too difficult. Not to mention there may be a

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108. *See* O'KEEFE, *supra* note 37 (providing a commentary).

109. *See* Lucas Lixinski, *Food as heritage and multi-level international legal governance*, INT'L J. CULTURAL PROP. (forthcoming 2018) (providing a further discussion of the legal safeguarding of culinary traditions as cultural heritage, and the effects of framing across other regimes concerned with food or food products).

110. *See supra* Sections II(A)-(E).

111. *See supra* Section I.

problem of lack of expertise in the field. As we specialize in specific subfields, speaking across subfields of public international law, let alone the domains of public and private international, becomes challenging, even if there is emerging scholarship attempting to address that gap.[112] Lastly, the public framework itself resists interference from the private, as it defers to states (usually with the crucial intervention of experts)[113] to make decisions about what heritage is worth valuing. Culture is thus tightly wrapped around sovereignty and nationalism; culture is political, and as such it is best it is not used by private citizens who may contest the authorized meanings that serve the national project.[114]

From the perspective of private (international) law, there is relatively little crossover with public international law as well. International law instruments for public goods do not register in the activity of a private (international) lawyer unless it has been duly transposed into domestic law. And, in the transposition, traceability is often lost, as the domestic judge will enforce the international instrument on the basis, making that experience less useful (in that it is harder to identify) for a judge in another jurisdiction. This transposition issue compounds with the translation issue identified above[115] with respect to the background norms operating to interpret international law in domestic courts, and together they create further isolation and a *domaine reservé* not dissimilar to the one identified with respect to public international law. A crucial difference here is that there is a further layer of separation between the legal-technical and the political that is integral to the governance of global public goods. With respect to heritage, thus, what bodies like UNESCO have to say on the matter is irrelevant, as the legal framework is about the two individuals involved in the specific dispute; there is (or should be) no spillover into the public, or at least that is not a concern for this situation. Culture stops being politics and becomes economics.

The same can be said of other global public goods, read through the lenses of either public or private international law. Public international law's politics give the global public good value legitimacy, but political processes also compromise effectiveness and normativity. Private international law's economics may lead to enforceable results, but these happen in a different register from that of public international law, often dissociated from any values other than those brought by the private parties, a process of translation through which public values often get lost or distorted, in the absence of an overarching frame of reference.

The biggest loser in these missed opportunities are the global public good itself, and, perhaps most importantly, the communities that live in, with, or around

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112. *See, e.g.*, LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW (Veronica Ruiz Abou-Nigm et al. eds., 2018).

113. *See generally* Lucas Lixinski, *International Cultural Heritage Regimes, International Law and the Politics of Expertise*, 20 INT'L J. CULTURAL PROP. 407, 413-14 (2013).

114. *See* NATIONALISM, POLITICS, AND THE PRACTICE OF ARCHAEOLOGY (Philip L. Kohl & Clare Fawcett eds.,1995) (providing a collection of essays on the topic).

115. *See supra* Section II(C).

the global public good and whose way of life or cultural or economic survival may depend on the global public good's safeguarding and their (the community's) agency in the process. These goods and actors fall through the cracks, as their existence is not fully apprehended by either framework, and, amidst fragmentation, they do not get a proper voice in governance processes. For communities, it turns out that private title is an encumberment to advancing the public values, and the public does not help them get anything out of their global public good on the basis of its economic value, which is relegated to the private.[116] But, as Christa Roodt has argued, private international law's ability to control supply-and-demand can be a useful means of engaging private international legal governance for the safeguarding of cultural heritage.[117]

One example, in the area of cultural heritage, concerns World Heritage. Under the World Heritage Convention,[118] one of the world's most successful treaties with well over 190 States Parties, states get to nominate heritage in their territories for inscription on the World Heritage List, which at the time of writing already espouses over 1,000 sites all over the world.[119] By adding something to the World Heritage List, the state renders the site public and an object of public international law, but it skirts the question of private law. The response is usually to just make the site public property, even if it means evicting people,[120] or making their interests subordinated to that of the heritage (in spite of the fact that they are the ones who bear the actual costs, not to mention the ones who keep the heritage site relevant).[121]

By finding better ways to connect strategies of private international legal governance with public international law values and mechanisms, a hybrid that ties effectiveness with the big picture objective of safeguarding the global public good may be within reach. The next section discusses these possibilities.

IV. CULTURAL HERITAGE AND OTHER GLOBAL PUBLIC GOODS AS PUBLIC CONCERNS THAT NEED PRIVATE ARTICULATION

If we are serious about a commitment to not undo diversity, but be able to strategically tap into it to safeguard global public goods, it is important to be able to think more broadly about the ways in which the international private legal

116. *See* example *infra* text accompanying notes 119-121.

117. CHRISTA ROODT, PRIVATE INTERNATIONAL LAW, ART AND CULTURAL HERITAGE 345 (2015).

118. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972 27 U.S.T. 37.

119. UNESCO World Heritage Centre, *World Heritage List*, https://whc.unesco.org/en/list/ (last visited Mar. 7, 2019).

120. *See generally* LYNN MESKELL, THE NATURE OF HERITAGE: THE NEW SOUTH AFRICA (2011) (discussing forced evictions in Kruger National Park).

121. Astrid Wallner & Urs Martin Wiesmann, *Critical Issues in Managing Protected Areas by Multi-Stakeholder Participation - Analysis of a Process in the Swiss Alps*, 1 ECOMONT - J. ON PROTECTED MOUNTAIN AREAS RES. 45, 48-49 (2009).

articulation of public concerns can gain traction and defend public values.[122] The private, as discussed above, brings novel techniques and strategies for addressing legal governance issues.[123] While each of these strategies carries its own normative preferences and limitations, they also have the potential to serve different values associated with global public goods, and thereby advance a worthwhile diversity of mechanisms. Values can function to unify orientations, but not to change the mechanics of the strategies themselves.

If the point of this discussion is to think more broadly and creatively about the possibilities of private international legal governance, then it is worthwhile recalling what the private brings to the table with respect to global public goods and how to go about engaging the private.

In terms of advantages of the private, the following have already been mentioned: diversity of strategies; the ability to bring about a discussion of the economics of global public goods; and greater effectiveness or enforcement potential. Among these draws, the economics argument deserves some more discussion. It is fairly common, as stated above, to think of global public goods as transcending economics.[124] If they are beyond the market, the reasoning goes, they can be protected in absolute terms, hermetically enclosed for the benefit of present and future generations. That is certainly a worthwhile ideal, but in effect the strategy is self-defeating. As I have argued elsewhere with respect to cultural heritage,[125] the fact that heritage is seen as beyond the reach of economics does not mean the market goes away; it just moves elsewhere. To turn a blind eye to the market is to enable it to act in the shadows; to think of the market as belonging more with the private than the public is to legitimize the move into the shadows. Therefore, international law for public goods would do well to engage with the market, so as to be able to regulate it with the values associated with the global public good front and center, rather than as afterthoughts which may or may not fit a market rationality.

In addition to these advantages, there are other things to be gained from a greater engagement with private international legal governance for global public

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122. *See* 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* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 293 (Horatia Muir Watt & Diego P Fernández Arroyo eds. 2014) (providing essays engaging with the boundaries of public and private in the defense of public good such as finance, migration and gender equality); Sabine Corneloup, *Can Private International Law Contribute to Global Migration Governance?*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 301 (Horatia Muir Watt & Diego P Fernández Arroyo eds. 2014); Ivana Isailović, *Political Recognition and Transnational Law, Gender Equality and Cultural Diversification in French Courts*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 318 (Horatia Muir Watt & Diego P Fernández Arroyo eds. 2014).

123. *See supra* Section II.

124. *See supra* Section II(F).

125. Lucas Lixinski, *A Third Way of Thinking about Cultural Property*, 44 BROOK. INT'L L.J. 563 (2019).

goods. The involvement of more stakeholders is an important factor to be considered, as the investment of communities living in, with, or around global public goods is often an important element in success stories of safeguarding. In other words, the involvement of non-state actors, which can be enabled via the language and strategies of private (international) law, can be important means for these actors to have a stake in the global public good and contribute to its safeguarding, as long as private (international) legal mechanisms are set in reference to public values that necessitate the safeguarding of the global public good. In this way, the private can promote better outcomes for the global public good itself, and the possible uses and values of the public good are more clearly advanced or articulated throughout the entire legal system, as opposed to only relegated to the private.

How can this bridge between the public and the private be articulate, though? As indicated in the introduction, often a response from the perspective of public international law is to think of human rights.[126] The appeal is obvious and evident; it is a powerful discourse, tailored to address the needs of human beings in international law, with a ready-made and largely successful international institutional machinery and jurisprudence. Examples abound of the relationship between international human rights law and private international law, such as international family law, where the intersection between the United Nations Convention on the Rights of the Child[127] and the Hague Convention on Intercountry Adoption[128] is a frequent and needed topic of discussion. The interests of the child, framed in the language of international human rights law, inform and shape the possibilities of private international legal governance of family law, and international human rights respond by reading the Hague Convention in terms of how it advances the public interest of safeguarding the best interests of the child.[129]

In theory, the same logic could be extended to other interests, such as quintessential global public goods using rights like the right to minority protection or cultural rights or the right to a healthy environment, among others. As international human rights law increasingly forms part of public policy, it enmeshes with private international law.[130] Nevertheless, they still fail to penetrate private law to an extent comparable to substantive private law, to the extent they inform more conflicts than substantive law, and because human rights focus still primarily on vertical relationships, rather than horizontal dealings among private parties.[131]

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126. *See* Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights* 51 CORNELL INT'L L.J. 361 (2018) (providing some recent scholarship in this respect).

127. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

128. Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167.

129. *See generally* Silberman & Lipton, *supra* note 20, at 18.

130. Dagan & Dorfman, *supra* note 126, at 369-70.

131. *Id*. at 370-72.

But there is a fundamental limitation internal to the human rights approach, since it requires the translation of collective interests into individual rights, thus replicating some of the limitations of pure private international legal governance strategies. There are very few successful attempts at articulating group interests in international human rights legal fora,[132] and they remind us of the difficulties of translating collective agency (an important part of global public goods and their safeguarding) into an international human rights framework. Further, translating global public goods safeguarding into exclusively the interests that fit into a human rights framework can essentialize those global public goods in unproductive ways and ways that pay too much deference to state sovereignty and subsidiarity through doctrines like margin of appreciation,[133] which applies more widely in areas of "new development" of international human rights law, which includes global public goods.[134]

An example that helps also highlight the limits of international human rights law in the safeguarding of global public goods has to do with underwater cultural heritage. The language of human rights does not communicate well with the idea of underwater heritage, which is often seen as divorced from immediate and everyday human interests. Nevertheless, people connect to underwater heritage in myriad ways, not the least of which through diving for recreation, or subsistence fishing in those areas. Or, when the international regime for underwater cultural heritage does connect to human rights, it is through the protection of human corpses contained in the Underwater Heritage Convention.[135] This provision gives a near absolute protection to human corpses found underwater on the basis of their inherent dignity,[136] which is a move comparable to some of the discourses that identify the foundation of international human rights law on human dignity.[137] But in this respect corpses have "too much weight" of human rights on them, to the point where the human rights protection stops helping the private and actually

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132. *See, e.g.,* Case of the Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015). *See also* Lucas Lixinski, *Case of the and Lokono Peoples v. Suriname,* 111 Am. J. Int'l L. 147 (2017) (providing a brief commentary on the case).

133. *See* HOWARD CHARLES YOUROW, THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE (1996) (discussing the margin of appreciation doctrine in general).

134. *See* Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 14 Cambridge Y.B. Eur. Legal Stud. 381, 387-90 (2011-2012).

135. UCHC, *supra* note 18, art. 1, ¶ 1(a)(i) (stating "[u]nderwater cultural heritage' means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context.").

136. *See* Jie Huang, Protecting *Non-indigenous Human Remains under Cultural Heritage Law*, 14 Chinese J. Int'l L. 709, 717-18, 721 (2015).

137. Bas de Gaay Fortman, *Equal Dignity in international human rights*, *in* THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY 355-56 (Marcus Düwell et al. eds., 2014).

paralyzes governance possibilities entirely. This example thus reminds us that international human rights law can also be a burden on the governance of global public goods, as it creates a bridge that can take away one of the greatest advantages of private international legal governance strategies: their agility.

An alternative avenue, that does not depend on the language and institutions of international human rights law, is to resolve agency and standing issues with respect to global public goods, perhaps through harmonization of those rules in contexts that do not necessarily speak directly to those goods (therefore, the strategy of harmonization of substantive rules with indirect effects on global public goods, discussed above). In this way, the global public good's articulation outside of public international legal frameworks can be more easily collectivized.

Further, public international legal governance fora and institutions where global public goods are discussed should be made open to private (non-expert) parties. NGO and expert group participation already happens in a number of these institutions, but these instances of participation fall short of connecting the global public good with the groups that live in, with, or around it. Current models of participation fail to engage these groups in venues where the public values are put front and center, as opposed to the private international legal governance strategies that, as discussed above, only engage with these values indirectly.

If this strategy is to be pursued, a significant threshold question is why states would agree to give up so much power. As it stands, the public international legal governance of global public goods is done with significant deference to sovereignty, meaning effectively a monopoly of state (and sometimes expert[138]) rule. However, if the commitment to safeguarding the global public good is to be put front and center, as opposed to being a pawn in a broader political game, then power-sharing should be possible. Experts could be a productive starting point for this shift, since they are already sympathetic to the idea of non-state actors in public international legal governance areas, and are committed to the safeguarding of the global public good in more central ways.[139] Once experts agree to power-sharing with communities, they can then put pressure on states as well in invisible ways. One example in the domain of cultural heritage is the practice by International Union for Conservation of Nature (IUCN), whose approval is necessary for natural or mixed sites to be added to the World Heritage List,[140] of increasingly consulting local communities ahead of their evaluation of the site for inscription, a practice that is not required of them, but engages communities in ways that are beneficial for the safeguarding of these sites (global public goods for both cultural heritage and environmental reasons).

It is apparent that these strategies, even if the examples used are with respect to cultural heritage, can be extended to other global public goods. Attempts have

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138. Lixinski, *supra* note 113, at 423.

139. *See id*. at 410.

140. WHC, *supra* note 19, art. 8, 11, 13-14.

already been made in the environmental domain,[141] but the oceans and Antarctica, for instance, could also benefit from clearer engagement between the public and the private in their governance. After all, companies responsible for overfishing, marine pollution and mineral exploitation in the oceans are for the most part private; and public and private operators increasingly put pressure on the Antarctica regime's veto of economic exploitation,[142] and private presence in the area is growing.[143] The big question to be answered is whether it is feasible to expect states to give up their power (near-) monopoly in favor of better safeguarding of global public goods. It is a tall ask indeed, but we must keep chipping away at the edifice of sovereignty that still encloses the possibilities of governance of global public goods.

V. CONCLUDING REMARKS

This article illustrates the difficulties of blurring the public/private divide, particularly with respect to global public goods, which necessitate public values and the tools and engagement of private international legal governance strategies. Each side of this divide, and each strategy within private international legal governance, evokes different possibilities and priorities, creating an often hard to navigate and highly fragmented landscape. Rather than eliminating this diversity, though, it is key to embrace it strategically, for the benefit of those public global goods and the communities living in, with, or around them, which are the first to lose when things go wrong with these public goods, and the ones upon whom the bear of safeguarding these goods weighs more heavily.

Further, this article shows that attainment of objectives directed by the values attributed to global public goods is only possible through blurring the public/ private divide, which justifies the excursion into these strategies and possibilities. Exploring these strategies, and their consequences for global public goods governance more broadly, reminds us that public international law needs to be more aware of the private's potential to actually make the lofty promises of treaties on public goods reality, while at the same time private international legal governance strategies need to stop hiding in their own shadow. Further work is needed in mapping out the possibilities of private international legal governance for other global public goods, and, centrally, in articulating the possibilities for the

141. *See*, *e.g.*, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447; *see also* U.N. ECON. COMM'N FOR EUR., COMM. ON THE CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (2016).

142. *See*, *e.g.*, Michael Atkin, *China's Interest in Mining Antarctica Revealed as Evidence Points to Country's Desire to Become 'Polar Great Power,'* ABC NEWS (Jan. 21, 2015, 6:59 AM), http://www.abc.net.au/news/2015-01-20/chinas-desire-for-antarctic-mining-despite-international-ban/6029414.

143. *See* Alok Jha, *As Antarctica Opens Up, Will Privateer Explorers Be Frozen Out?,* THE GUARDIAN (Feb. 28, 2014, 4:00 AM), https://www.theguardian.com/world/2014/feb/28/-sp-antarctica-privateer-explorers-scientific-research-territory-polar-code.

intersecting of public values into these private strategies. In that way, coordinated yet pluralistic action to safeguard global public goods may be possible, and these goods may be better safeguarded.