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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,

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

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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

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

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

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

(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

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

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

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

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.

UNMASKING THE SUBSTANCE BEHIND THE PROCESS: WHY THE DUTY TO COOPERATE IN INTERNATIONAL WATER LAW IS REALLY A SUBSTANTIVE PRINCIPLE

TAMAR MESHEL*

INTRODUCTION

The core principles of international water law[1]–equitable and reasonable utilization,[2] no significant harm,[3] and the duty to cooperate–are generally considered to have customary law status.[4] This body of law has played a meaningful role in in-

* Assistant Professor, University of Alberta Faculty of Law.1.'International water law' refers to the body of law governing non-navigational water uses, and should be distinguished from international law governing navigation, maritime issues, and the High Seas. *See generally ICWC Course: Int'l Water L.,* Stockholm International Water Institute, http://www.siwi.org/icwc-course-international-water-law/ (last visited March 5, 2019).

2. The equitable and reasonable utilization principle is rooted in the sovereign equality of states. It entitles each basin state to a reasonable and equitable share of an international watercourse and obligates it to use the watercourse in a manner that is equitable and reasonable vis-à-vis other states sharing it. *See* Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 337, 342-43 (2007); Muhammad Mizanur Rahaman, *Principles of International Water Law: Creating Effective Transboundary Water Resources Management*, 1 INT'L J. SUSTAINABLE SOC'Y 207, 210 (2009); Stephen McCaffrey, *The Law of International Watercourses: Present Problems, Future Trends, in* A LAW FOR THE ENVIRONMENT: ESSAYS IN HONOUR OF WOLFGANG E. BURHENNE 113 (Alexandre Kiss & Francoise Burhenne-Guilmin eds., 1994).

3. The no significant harm principle has its roots in the Latin maxim *sic utere tuo ut alienum non laeda* and is generally viewed as a customary norm of international environmental law, prohibiting states from using their territory in such a way as to cause harm to another state. *See generally* Catherine Redgewell, *Sources of International Environmental Law: Formality and Informality in the Dynamic Evolution of International Environmental Law Norms* & Jutta Brunnée, *The Sources of International Environmental Law: Interactional Law, in* THE OXFORD HANDBOOK ON THE SOURCES OF INT'L L. 939-986 (Samantha Besson & Jean d'Aspremont, eds., 2017).

4. *See, e.g.*, Stephen C. McCaffrey, *International Water Cooperation in the 21st Century: Recent Developments in the Law of International Watercourses*, 23 RECEIL 4, 5 (2014); Stephen C. McCaffrey, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls*, in INTERNATIONAL WATERCOURSES-ENHANCING COOPERATION AND MANAGING CONFLICT, 17, 26 (Salman M. A. Salman & Laurence Boisson de Chazournes eds., 1998); Gabriel Eckstein, *Water Scarcity, Conflict, and Security in a Climate Change World: Challenges and Opportunities for International Law and Policy*, 27 WIS. INT'L L. J. 409, 419, 434 (2009–2010).

terstate fresh water resource management and dispute prevention.[5] However, relatively little scholarly attention has been paid to the role of these legal principles in the *resolution* of interstate fresh water disputes, if and when they do arise.[6] In this article and others,[7] I offer a fresh perspective on the three core principles of international water law in order to reinforce their role in the resolution of such disputes.

Dispute settlement is one of the main functions of international law, and international law has played an increasingly important role in the resolution of inter-

5. See, *e.g.*, SALMAN M. A. SALMAN & DANIEL D. BRADLOW, REGULATORY FRAMEWORKS FOR WATER RESOURCES MANAGEMENT: A COMPARATIVE STUDY (Salman M. A. Salman et al. eds., 2006); Water Res. Lab., Helsinki Univ. of Tech, MANAGEMENT OF TRANSBOUNDARY RIVERS AND LAKES (Olli Varis et al. eds., 2008); SUSANNE SCHMEIER, GOVERNING INTERNATIONAL WATERCOURSES: RIVER BASIN ORGANIZATIONS AND THE SUSTAINABLE GOVERNANCE OF INTERNATIONALLY SHARED RIVERS AND LAKES (2013); Alexander Ovodenko, *Regional Water Cooperation: Creating Incentives for Integrated Management*, 60 J. CONFLICT RESOL. 1071 (2016); Marleen van Rijswick et al., *Ten Building Blocks for Sustainable Water Governance: An Integrated Method to Assess the Governance of Water*, 39 WATER INT'L 725 (2014).

6. On other efforts to prevent and resolve fresh water disputes see, *e.g.*, SHLOMI DINAR, INTERNATIONAL WATER TREATIES: NEGOTIATION AND COOPERATION ALONG TRANSBOUNDARY RIVERS (2008); Molly Espey & Basman Towfique, International Bilateral Water Treaty Formation, 40 WATER RESOURCES RES. W05S05 (2004); Shira Yoffe, Aaron T. Wolf & Mark Giordano, Conflict and Cooperation over International Freshwater Resources: Indicators of Basins at Risk, 39 J. AM. WATER RESOURCES ASS'N 1109 (2003); Sara M. McLaughlin & Paul R. Hensel, International Institutions and Compliance with Agreements, 51 AM. J. POL. SCI. 721 (2007); Paul R. Hensel, Sara McLaughlin Mitchell & Thomas E. Sowers II, Conflict Management of Riparian Disputes, 25 POL. GEOGRAPHY 383 (2006); Stephen E. Gent & Megan Shannon, Decision Control and the Pursuit of Binding Conflict Management: Choosing the Ties that Bind, 55 J. CONFLICT RESOL. 710 (2011); and Marit Brochmann & Paul R. Hensel, Peaceful Management of International River Claims, 14 INT'L NEGOT. 393 (2009).

On the limitations of international law in the resolution of fresh water disputes see, *e.g.,* Frederick W. Frey, *The Political Context of Conflict and Cooperation Over International River Basins* 18 WATER INT'L 54, 58 (1993); Aaron T. Wolf, *International Water Conflict Resolution: Lessons from Comparative Analysis*, 13 INT'L J. WATER RESOURCES DEV. 333, 336-37 (1997); Erik Mostert, *A Framework for Conflict Resolution*, 23 WATER INT'L 206, 207 (1998); Marty Rowland, *A Framework for Resolving the Transboundary Water Allocation Conflict Conundrum*, 43 GROUND WATER 700 (2005); Anna Spain, *Beyond Adjudication: Resolving International Resource Disputes In an Era Of Climate Change*, 30 STAN. ENV'T L. J. 334, 378 (2011); Salman M.A. Salman, *Good Offices and Mediation and International Water Disputes, in* THE INT'L BUREAU OF THE PERMANENT CT. OF ARB./PEACE PALACE PAPERS: RES. OF INT'L WATER DISP. 155 (Kluwer L. Int'l, 2002); Melvin Woodhouse & Mark Zeitoun, *Hydro-hegemony and International Water Law: Grappling with the Gaps of Power and Law*, 10 WATER POL'Y 103 (2008); Bjorn-Oliver Magsig, *Overcoming State-Centrism in International Water Law: Regional Common Concern as the Normative Foundation of Water Security*, 3 GOETTINGEN J. INT'L L. 317 (2011); Bruce Lankford, Does Article 6 (Factors Relevant to Equitable and Reasonable Utilization) in the UN Watercourses Convention Misdirect Riparian Countries?, 38 WATER INT'L 130 (2013).

7. The present article focuses on the duty to cooperate. I discuss the equitable and reasonable utilization and no significant harm principles in Tamar Meshel, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Transboundary Fresh Water Disputes,* 61(1) HILJ (forthcoming, 2020).

national disputes generally, as well as disputes concerning shared resources.[8] International law can provide well-defined rights and obligations to help overcome power imbalances, domestic constraints, and competing sovereign interests, all of which play a prominent role in interstate fresh water disputes.[9] Legal principles can also provide a measure of predictability, objectivity, and stability to interactions between states, and can therefore serve as critical "reference points" and useful guiding tools in the resolution of interstate fresh water disputes.[10] Indeed, once an interstate dispute has arisen out of conflicting water uses and each state has become convinced that its vital interests are at stake, the resolution of the dispute on the basis of scientific analysis and cooperative action alone can become extremely difficult.[11] In such circumstances, states should be able to rely on legal principles that limit their unilateral claims to shared water resources.[12] While international law in and of itself may not provide complete solutions to interstate fresh water disputes, it is unlikely there is a solution at all to such disputes without international law.[13]

The duty to cooperate is a well-established general principle of international law.[14] It has been viewed as the "linchpin for the peaceful relations between nation states" and has been invoked, *inter alia*, in relation to the environment, human rights, development, and dispute settlement.[15] The traditional purpose of the duty to cooperate in international water law is to regulate states' interactions in the ongoing management of shared fresh water resources, but it features far less prominently in the actual *resolution* of interstate fresh water disputes. In this article, I argue that this limited view of the duty to cooperate impedes the effective use of international water law in such resolution. Rather, the duty to cooperate should be

8. *See* Benedict Kingsbury, *The International Legal Order*, N.Y.U. - INST. FOR INT'L L. & JUSTICE, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=692626; Dominique Alheritiere, *Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments*, 25 NAT. RES. J. 701, 701 (1985).

9. *See* EYAL BENVENISTI, SHARING TRANS-BOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE (2002); Beth Simmons, *See You in "Court"? The Appeal to Quasi-Judicial Legal Processes in the Settlement of Territorial Disputes, in* A ROAD MAP TO WAR: TERRITORIAL DIMENSIONS OF INTERNATIONAL CONFLICT 205 (Paul F. Diehl ed., 1999).

10. NAHID ISLAM, THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: OPTIONS FOR REGIONAL REGIME BUILDING IN ASIA, 177 (2010). *See also* CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 30-31 (Cambridge Univ. Press ed., 2013); *Report of the International Law Commission on the work of its thirty-first session*, 1979 Y.B. Int'l L. Comm'n, 166, paras. 32, 34 U.N. Sales No. E.80.V.5 [hereinafter *1979 Report*].

11. *1979 Report, supra* note 10*,* at 164, para. 85.

12. William W. Van Alstyne, *The Justiciability of International River Disputes: A Study in the Case Method,* 13 DUKE L. J. 307, 309 (1964).

13. Edda Kristjansdottir, *Resolution of Water Disputes: Lessons from the Middle East, in* RESOLUTION OF INTERNATIONAL WATER DISPUTES 355 (Int'l BureauPerm. Ct. Arb, 2003).

14. *See* Christina Leb, *One step at a time: International law and the duty to cooperate in the management of shared water resources,* 40 WATER INT'L 21, 23 (2015).

15. Patricia Wouters, *Dynamic cooperation' in international law and the shadow of state sovereignty in the context of transboundary waters*, 3 ENV. LIABILITY 88, 89-92 (2013).

viewed in interstate fresh water dispute resolution as complementary to the no significant harm principle, and as imposing on states specific obligations in the dispute resolution process itself.[16]

After briefly describing the evolution of the duty to cooperate in international law generally, I turn to examine its development and traditional role in international water law. I argue that the function of the procedural obligations of the duty to cooperate in relation to the due diligence obligations of the no significant harm principle is currently unclear. I propose to approach the duty to cooperate as both informing the due diligence obligations of the no significant harm principle, and as an independent duty that can be violated in its own right. Viewed in this way, the duty to cooperate complements the no significant harm principle where the latter is not triggered since there is no "risk of significant harm".[17] I then propose an additional function for the duty to cooperate in the interstate fresh water context by imposing two specific obligations on state parties in the dispute resolution process itself: to make every effort to enter into provisional arrangements until a final resolution is achieved, and to not jeopardize or hamper the reaching of such final resolution.

II. THE DUTY TO COOPERATE IN INTERNATIONAL LAW

16. Some scholars view the duty to cooperate as a substantive principle in the management of international fresh water resources. *See, e.g.,* Patricia Wouters & Dan Tarlock, *The Third Wave of Normativity in Global Water Law - The duty to cooperate in the peaceful management of the world's water resources: An emerging obligation erga omnes?*, 23 WATER L. 51 (2013); Attila M. Tanzi, "Substantializing the Procedural Obligations of International Water Law Between Retributive and Distributive Justice" in Hélène Ruiz Fabri, *et al*, eds, *A Bridge Over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Leiden: Brill-Nijhoff, forthcoming 2019) (on file with author); Owen McIntyre, "The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay" (2011) 4:2 *Water Alternatives* 124 at 143. *See also,* Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), [2015] ICJ Rep 665, Separate Opinion of Judge Donoghue at para 9 ("I do not find it useful to draw distinctions between 'procedural' and 'substantive' obligations, as the Court has done"). Others distinguish between the 'substantive' equitable and reasonable utilization and no significant harm principles and the 'procedural' duty to cooperate. *See, e.g.,* STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 464 (Oxford Univ. Press, 2nd ed. 2007) (although McCaffrey notes that that "the line separating obligations that are substantive from those that are procedural is not always a clear one . . . the 'substantive' obligation of equitable and reasonable utilization may itself be thought of as a process; and the 'substantive' obligation not to cause significant harm also serves to trigger a process.")..

17. In the context of international watercourses, the no significant harm principle is triggered where a state can show a "risk of significant harm", *i.e.* that it has sustained or is likely to sustain "significant harm". "Significant harm" requires something more than "trivial" but need not be at the level of "substantial". If the complaining state meets this threshold, the acting state would have to show that it has acted diligently in order to comply with the no significant harm principle. McCaffrey, *supra* note 16, at 409, 432. A "risk of significant harm" refers to "the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact" and requires "high probability of causing significant harm." Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, at 152 (2001) [hereinafter Draft Articles on Prevention].

Interstate cooperation has been defined as "the process by which states take coordination to a level where they work together to achieve a common purpose that produces mutual benefits that would not be available to them with unilateral action alone."[18] International law has evolved, and continues to evolve, around this flexible concept of cooperation. In the past century, a "paradigm shift" has taken place from a "law of co-existence" to a "law of co-operation," evidenced, in part, by an increasing imposition of obligations to cooperate on states.[19]

The law of co-existence, composed of rules of abstention aimed at identifying limits to state sovereignty, was linked to the obligation to refrain from interfering in the sovereignty sphere of others. The law of cooperation, by contrast, is composed of positive obligations of assistance reflected, *inter alia*, in the establishment of the League of Nations and its successor the United Nations.[20] Indeed, one objective of the UN Charter is "to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character."[21] Many post-Charter instruments similarly reflect states' general obligation to cooperate, further contributing to its solidification as one of the most significant norms of contemporary international law.[22]

This general duty to cooperate has given rise to a large body of norms of cooperation in the international environmental law context as a result of states' common interest in the protection of the natural environment.[23] This body of norms is reflected in many international instruments and has been reinforced by international judicial and arbitral decisions.[24] Moreover, in the specific context of cooperation

18. Christina Leb, *One Step at a Time: International Law and the Duty to Cooperate in the Management of Shared Water Resources*, 40 Water International 21, 22 (2015).

19. Erik Franckx & Marco Benatar, *The "Duty" to Co-Operate for States Bordering Enclosed or Semi-Enclosed Seas*, 31 Chinese (Taiwan) Y.B. Int'l L. & AFF. 67 (Ying-jeou Ma ed., 2013).

20. Leb, *supra* note 10, at 33.

21. U.N. Charter art. 1, ¶3.

22. *See generally* Charter of the Org. of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3; Charter of the Org. of African Unity, May 25, 963, 479 U.N.T.S. 39; G.A. Dec. 25/85, U.N. Doc A/RES/25/2625 (Oct. 14, 1970); G.A. Dec. 60/7, U.N. Doc A/RES/S-6/3201 (May 1, 1974). There is ongoing debate on whether the general obligation to cooperate constitutes an "autonomous legal obligation" or a principle of international law that gives rise to more specific obligations but is not in itself an independent obligation. For present purposes, I treat it as a general obligation with a legal nature of its own. *See* Leb, *supra* note 10, at 80-81.

23. Leb, *supra* note 10, at 34.

24. Examples of international instruments include: U.N. Conference on the Human Environment, *Stockholm Declaration*, U.N. Doc A/CONF.48/14/Rev.1 (Ch. I), princ. 24 (June 5-16, 1972); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), princ. 27 (Aug. 12, 1992); U.N. Convention on the Law of the Sea arts. 123, 197, Nov. 16, 1994, 1833 U.N.T.S. 397; U.N. Convention on Biological Diversity, art. 5, Jun. 5, 1992, 1760 U.N.T.S. 143; UNEP, *Report of the Governing Council*, U.N. Doc. A/32/25, ch. VII (Sept. 2, 1977). Examples of international judicial and arbitral decisions include: Trial Smelter Case (U.S. v. Can.), Vol. III R.A.I.I. 1905 (1938 & 1941); North Sea Continental Shelf (Ger./Den., Ger./Neth.), Judgment, 1969 I.C.J. 327, 3 (Feb. 20); Fisheries Jurisdiction (U.K. & N.Ir. v. Ice.), Judgment, 1974 I.C.J. 395, 3 (Jul. 25); MOX Plant (Ir. v. U.K.), Case No. 10, Order of Nov. 13, 2001, 10 ITLOS 2001,

over shared or common natural resources, the *Charter of Economic Rights and Duties of States* provides in Article 3 that "[i]n the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve the optimum use of such resources without causing damage to the legitimate interest of others."[25]

III. THE DUTY TO COOPERATE IN INTERNATIONAL WATER LAW

In the context of *managing* interstate fresh water resources, cooperation among states has become increasingly formalized, culminating in a universal recognition that the duty to cooperate is crucial to international water law.[26] First mentions of cooperation appeared in the Institute of International Law's (IIL) 1911 *Madrid Declaration*, which recommended the establishment of permanent joint commissions for the purpose of interstate cooperation on water issues.[27] The IIL's 1961 *Salzburg Resolution* and the International Law Association's (ILA) 1966 *Helsinki Rules* introduced additional norms of cooperation among basin states, including rules for notification, consultation, and negotiation for states wishing to utilize shared waters in a manner that seriously affects other states.[28]

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89. *See also* ISLAM, *supra* note 10, at 125; PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 204-205, (3rd ed., 2012).

25. G.A. Res. 3281 (XXIX), art. 3, Charter of Economic Rights and Duties of States (Dec. 12, 1974).

26. Christina Leb, *The UN Watercourses Convention: the éminence grise behind cooperation on transboundary water resources*, 38 WATER INT'L 2, 146, 147 (2013).

27. INST. OF INT'L L., *International Regulation regarding the Use of International Watercourses for Purposes other than Navigation - Declaration of Madrid*, Vol. 24 Madrid Ses. 1911 365 (Apr. 20, 1911), http://www.fao.org/docrep/005/W9549E/w9549e08.htm#bm08.1.2.

28. INST. OF INT'L L, *Resolution on the Use of International Non-Maritime Waters*, Res. Salzburg (Sept. 11, 1961), http://www.fao.org/docrep/005/w9549e/w9549e08.htm; INT'L L. ASS'N, *The Helsinki Rules on the Uses of the Waters of International Rivers*, 57 Conf. Rep. 1967 (Aug. 1966), http://www.unece.org/fileadmin/DAM/env/water/meetings/legal_board/2010/annexes_groundwater_paper/Annex_II_Helsinki_Rules_ILA.pdf; Leb, *supra* note 10, at 148-149; INT'L L. ASS'N. The IIL adopts resolutions of a normative character pursuant to work undertaken by its scientific commissions. These Resolutions are then brought to the attention of governmental authorities, international organizations, and the scientific community. Their aim is to highlight the characteristics of the *lex lata* in order to promote its respect and to make determinations de *lege ferenda* in order to contribute to the development of international law. *See History of Institut De Droit International*. http://www.idi-iil.org/en/histoire/. The objectives of the ILA are "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law," which it carries out by way of consultation to UN agencies, work undertaken by international committees, and biennial conferences. *See International Law Association "ILA" Mission Statement*, http://www.ila-hq.org/en/about_us/index.cfm. The ILA embarked in 1954 on a study of the legal aspects of the use of the waters of international drainage basins. Three committees have been engaged in this work. The first committee produced the 1966 *Helsinki Rules*; the second formulated a number of articles amplifying particular aspects of the *Helsinki Rules*; and the third committee continued this work of amplification. Charles B. Bourne, *The International Law Association's Contribution to International Water Resources Law*, 36 NAT. RESOURCES J. 155, 155 (1996).

was first set out in the ILA's 1972 *Supplementary Rules Applicable to Flood Control*, stipulating that "basin States shall co-operate in measures of flood control in a spirit of good neighborliness, having due regard to their interests and well-being as co-basin States."[29] This general duty was also recognized in the 1977 Report of the United Nations Water Conference, which required and defined both regional and international cooperation on shared water sources.[30] The general duty to cooperate was further recognized with respect to pollution of rivers and lakes in the IIL's 1979 *Athens Resolution*.[31] This resolution identified specific measures for implementing cooperation, including regular exchange of data, coordination of research and monitoring programs, and provision of technical and financial aid to developing countries.[32] The ILA's 1982 *Montreal Rules on Water Pollution in an International Drainage Basin* similarly confirmed a general duty to cooperate with regard to pollution of international fresh water resources. Article 4 of the *Montreal Rules* provides that "[i]n order to give effect to the provisions of these Articles, States shall cooperate with the other States concerned." In the commentary to this Article, the ILA justified the inclusion of a general duty to cooperate by stating it was considered "generally accepted as a fundamental principle."[33]

The evolution of the International Law Commission's (ILC)[34] work on the *Draft Articles on the Law of the Non-navigational Uses of International Watercourses* (*Draft Articles*), which formed the basis for the main international instrument codifying the core principles of international water law–the *United Nations Convention on the Law of the Non-navigational Uses of International Watercourses* (*UNWC*)[35]–similarly illustrates the progressive recognition of cooperation as a core component of international water law.[36] In 1981, the second Special Rapporteur working on this topic, Stephen Schwebel, proposed the concept of "equitable participation" to reflect the shift in the international community to a position of affirmative promotion of cooperation with respect to shared water resources.[37] Ac-

29. INT'L L. ASS'N, *Supplementary Rules Applicable to Flood Control*, art. 2 (1972).

30. Rep. of the U.N. Water Conf. [UNWC], at 51-57, U.N. Doc. E/CONF.70/29 (1977).

31. Stephen M. Schwebel (Special Rapporteur), *Third report on the law of the non-navigational uses of international watercourses*, ¶ 259, U.N. Doc. A/CN.4/348 (Dec. 11, 1981).

32. *The pollution of rivers and lakes and international law*, 58 ANNUAIRE DE INSTITUT DE DROIT INTERNATIONAL (1979), https://www.internationalwaterlaw.org/documents/intldocs/IIL/IIL-Resolution_of_Athens.pdf (reproduced in *Id.* at art. VII).

33. INT'L L. ASS'N, *Report of the Sixtieth Conference held at Montreal,* 535-48 (1982).

34. The ILC was established by the UN General Assembly to undertake the mandate of the Assembly to "initiate studies and make recommendations for the purpose of. . .encouraging the progressive development of international law and its codification." The task of the Commission in relation to a given topic is completed when it presents to the General Assembly a final product on that topic, which is usually accompanied by the Commission's recommendation on further action with respect to it. G.A. Res. 174 (II), at 105 (Nov. 21, 1947).

35. G.A. Res. 51/229, (Jul. 8, 1997) [hereinafter UNWC].

36. *Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater*, 2 Y.B. Int'l L. 89; G.A. Res. 174 (II).

37. Schwebel, *supra* note 31, at ¶ 85.

cordingly, Schwebel introduced a duty to participate as a procedural component to operationalize the duty of cooperation.

In 1982, Jens Evensen, the subsequent Special Rapporteur, was the first to include an article explicitly defining the principle of cooperation in this context.[38] He introduced a new chapter on "Cooperation and Management in Regard to International Watercourse Systems," which stipulated specific cooperation obligations and rights, including consultation, negotiation, and prior notification of planned measures. This chapter was required, Evensen submitted, since the "indivisible unity" of watercourses meant that cooperation among states was essential for effective management and optimal utilization, as well as for reasonable and equitable sharing in this utilization.[39] In the ILC 1983 session, member states further stressed the need "to formulate a positive rule calling for co-operation among the States concerned; States had a legal duty to co-operate in the solution of problems resulting from uses of the waters of international watercourses."[40]

Such a duty was indeed included in the *UNWC*, requiring watercourse states to "cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse."[41] The evolution of the ILC's *Draft Articles* and the *UNWC* therefore reflects the acceptance of cooperation as a core principle of international water law.[42] This acceptance is further evidenced by other conventions and instruments, such as the 1992 *UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (*UNECE Convention*),[43] the 2004 *Berlin Rules* of the ILA,[44] and the 2008 ILC *Draft Articles on the Law of Transboundary Aquifers*,[45] as well as basin-specific water agreements such as the *Nile Cooperative Framework Agreement*.[46]

The general duty to cooperate on shared fresh water gives rise to two categories of procedural obligations. The first category includes obligations relating to the ongoing management of interstate fresh water resources, such as the duty to

38. Jens Evensen (Special Rapporteur), *First report on the law of non-navigational uses of international watercourses*, ¶ 107, U.N. Doc. A/CN.4/367 (Apr. 19, 1983).

39. *Id*. at ¶¶ 103-06; *see also* Leb, *supra* note 10, at 28.

40. *Report of the International Law Commission to the General* Assembly, 2 Y.B. Int'l L. Comm'n 72, ¶ 247, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (1983).

41. UNWC, *supra* note 35, art. 8, ¶1.

42. Leb, *supra* note 10, at 78-79.

43. Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 9, Mar. 17, 1992, 1936 U.N.T.S. 269 [hereinafter UNECE Convention].

44. INT'L L. ASS'N, *Berlin Rules on Water Resources*, art. 11 (2004).

45. Shared nat. resources: comments & observations by Gov'ts on the draft articles on the laws of transboundary aquifers, Int'l L. Comm'n, Rep. on the Work of Its Sixtieth Session, U.N. Doc. A/CN.4/595, art. 7 (Mar. 26, 2008).

46. NILE BASIN INITIATIVE, *Agreement on the Nile River Basin Cooperative Framework,* art. 3 (2001). *See* Stephen McCaffrey (Special Rapporteur), *Third report on the non-navigational uses of international watercourses,* U.N. Doc. A/CN.4/406, annex 1 (Apr. 8, 1987) for a list of international agreements containing provisions concerning cooperation on watercourses.

negotiate water agreements and to regularly exchange data and information.[47] These obligations apply to such resources, regardless of the existence of a dispute, and are therefore not the focus of the present analysis. The second category includes procedural obligations that relate more directly to potential interstate fresh water disputes and generally arise where there are new uses or modification of existing uses, such as the obligation to notify, consult, and conduct an environmental impact assessment.[48]

These latter obligations are frequently implicated in interstate fresh water disputes and inform the due diligence requirement of the no significant harm principle.[49] Under the *UNWC*, these procedural obligations also exist independently from the due diligence obligations of the no significant harm principle, and may therefore be invoked in the absence of harm.[50] The duty to negotiate, for instance, comes into play with regard to "the *possible effects* of planned measures."[51] The requirement to notify the results of "any environmental impact assessment" is similarly triggered "[b]efore a watercourse State implements or permits the implementation of planned measures which may have a significant *adverse effect*."[52] Therefore, violation of these obligations, which may occur regardless of any risk of significant harm, would in and of itself give rise to an internationally wrongful act under the *UNWC*.

This approach finds support in the International Court of Justice's (ICJ) decision in the *Pulp Mills* case, where the Court recognized that states' "procedural" obligations have an independent existence and can be violated regardless of any violation of their "substantive" obligations.[53] The Court further recognized that these procedural obligations are linked to states' due diligence obligations to prevent significant harm, but did not find that a failure to meet procedural duties nec-

47. *E.g.*, UNECE Convention, *supra* note 43, arts. 2, 12 (other obligations arising under the duty to cooperate in the management of international fresh water resources include the duty to conduct research on shared fresh water resources), and arts. 9, 11 (the duty to establish joint programmes for monitoring the conditions of such waters).; UNWC, *supra* note 35, art. 25 (the duty to cooperate on the regulation of the flow of transboundary waters).

48. UNWC, *supra* note 35, arts. 11-19; UNECE Convention, *supra* note 43, arts. 9-10; McCaffrey, *supra* note 16, at 465. While these obligations are not explicitly set out under the general duty to cooperate in the *UNWC*, they are best understood "as a specific application of the general principle of cooperation", McCaffrey, *supra* note 16, 470. It may be useful to group them under this duty since, first, it is well established both in international law generally and in international water law, and second, treating these procedural obligations as arising under the duty to cooperate would clearly distinguish them from the due diligence requirements of the no significant harm principle and clarify that they come into play regardless of such harm and that a failure to comply with them would constitute an internationally wrongful act. *Id*.

49. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 204 (Apr. 20).

50. McCaffrey, *supra* note 16, at 473-75.

51. UNWC, *supra* note 35, art. 11 (emphasis added).

52. UNWC, *supra* note 35, art 12 (emphasis added).

53. *See Pulp Mills*, 2010 I.C.J. at ¶¶ 78-79.

essarily implies a violation of the no significant harm principle.[54] Moreover, in accordance with the agreement between Argentina and Uruguay, the ICJ noted that Uruguay's obligation to inform the parties' joint institution was triggered as soon as it had a sufficiently developed plan of the activity, in order to allow for a proper assessment of its impact. At this stage, the Court added, "the information provided will not necessarily consist of a full assessment of the environmental impact of the project."[55] Similarly, the Court noted that the parties' obligations to notify and consult each other were designed to "assess the risks of the plan," and therefore were triggered before the risk of significant harm was actually established.[56] With respect to the requirement to conduct an environmental impact assessment, the Court found it applies where the planned activity is liable to "cause harm to a shared resource and transboundary harm" or "may have a significant adverse impact in a transboundary context," setting out a lower threshold than the "risk of significant harm" required to invoke states' due diligence duties under the no significant harm principle.[57] The ICJ's decision in *Pulp Mills* is therefore in line with the approach adopted in the *UNWC* of treating states' "procedural" and "substantive" principles as related yet distinct, and setting out a lower threshold for triggering the former.

Yet the latest international fresh water decision of the ICJ in the *San Juan River* cases seems to blur this approach, as the Court employed somewhat contradictory language when describing the parties' obligations.[58] With respect to the obligation to conduct an environmental impact assessment, the Court noted that, "a State must, before embarking on an activity having the potential *adversely to affect* the environment of another State, ascertain if there is a risk of significant transboundary harm" in order to "fulfil its obligation to exercise due diligence in preventing" such harm.[59] This pronouncement suggests that the Court, similarly to its decision in *Pulp Mills*, viewed the obligation to conduct an environmental impact assessment as requiring a lower threshold – that of an "adverse effect" – while the due diligence obligations under the no significant harm principle arise only where such assessment indicates a "risk of significant transboundary harm."

However, the Court ultimately found, regarding Nicaragua's dredging program, that "[i]n light of the absence of risk of *significant transboundary harm*, Nicaragua was not required to carry out an environmental impact assessment," while Costa Rica's construction of the road "carried a risk of significant trans-

54. *Id.* at ¶¶ 72-74, 78-79. *See generally* Jutta Brunnée, *Procedure and Substance in International Environmental Law: Confused at a Higher Level?*, ESIL REFLECTION, Jun. 2016, http://www.esil-sedi.eu/node/1344.

55. *See Pulp Mills*, 2010 I.C.J at ¶ 105.

56. *Id.* at ¶¶ 94, 104-05, 115.

57. *Id.* at ¶¶ 72-74, 78-79, 203-04.

58. Brunnée, *supra* note 54.

59. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) *and* Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, ¶¶ 104, 153, (Dec. 16) (emphasis added).

boundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met."[60] Furthermore, despite this finding that there was a risk of significant harm from Costa Rica's road construction that triggered its obligation to undertake an environmental impact assessment, the Court concluded that absent evidence of "actual" significant transboundary harm, Costa Rica did not violate the no significant harm principle.[61] These conclusions suggest, rather confusingly, that the Court viewed the threshold for triggering the environmental impact assessment obligation to be a "risk of significant transboundary harm" rather than the lower "adverse effect," and the requirement for violating the no significant harm principle to be "actual" harm rather than breach of due diligence obligations.

Whereas the Court's language with respect to the obligation to conduct an environmental impact assessment was unclear, the same cannot be said of its position regarding the obligations to notify and consult. The Court found in this regard that "[i]f the environmental impact assessment confirms that there is a risk of *significant transboundary harm*, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk."[62] The Court therefore clearly applied a higher threshold to these obligations, conditioning their triggering on there being a risk of significant transboundary harm.

Even though the *San Juan River* decision was rendered later in time, the approach of the ICJ in *Pulp Mills* seems preferable. First, by setting out a lower threshold for the application of the duties to notify, consult, and conduct an environmental impact assessment, the *Pulp Mills* decision is more in line with the *UNWC*. It also reflects the general significance of the duty to cooperate in international law, and is more conducive to achieving cooperation in the resolution of disputes.[63] This decision is also more practical and realistic, since it is difficult to imagine how a state could conclude there is, or is not, a risk of significant transboundary harm without first undertaking an environmental impact assessment and consulting other potentially affected states.[64] The Court in *San Juan River* noted that "to conduct a preliminary assessment of the risk posed by an activity is one of the ways in which a State can ascertain whether the proposed activity carries a risk of significant transboundary harm,"[65] but this reasoning seems vague and circular. In addition, it is unclear when states would ever have the occasion to notify and consult if these obligations are conditioned on an environmental impact assessment that the acting state can unilaterally decide not to undertake since there is

60. *Id.* at ¶¶ 105, 156.
61. *Id.* at ¶¶ 216-17.
62. *Id.* at ¶¶ 104, 108, 168 (emphasis added).
63. *See Nicar. v. Costa Rica*, 2015 I.C.J. at ¶ 21 (separate opinion by Donoghue, J.).
64. *See id.* at ¶ 22.
65. *Nicar. v. Costa Rica*, 2015 I.C.J. at ¶ 154.

no "risk of significant harm."

I therefore propose to resolve the confusion arising from the *San Juan River* decision along the lines of the *UNWC* and the ICJ's position in the *Pulp Mills* case. Accordingly, the procedural obligations arising under the duty to cooperate, including the obligations to notify, consult, and conduct an environmental impact assessment, should apply separate and apart from the due diligence requirements of the no significant harm principle, and come into play regardless of any risk of significant harm. These procedural obligations would therefore have a dual role. They would not only inform the due diligence standard that states are required to comply with once there is a "risk of significant harm," but they would also require states to cooperate when a new measure is planned even if no such risk arises, so long as the planned measure might have an "adverse effect."[66] In this way, the duty to cooperate would complement the no significant harm principle in interstate fresh water disputes where a state is able to show a potential "adverse effect" not rising to the level of a "risk of significant harm" that would trigger the latter principle.[67] A failure to comply with these obligations would be considered as a violation of the duty to cooperate, giving rise to state responsibility for an internationally wrongful act.[68]

Accordingly, where a state plans a new measure that might have an "adverse effect" on other states, the environment, or the fresh water resource, which is a low standard to meet, the duty to cooperate would require it to notify, consult, and undertake an environmental impact assessment. If the assessment then indicates a "risk of significant harm" resulting from the new measure, the no significant harm principle would be triggered, requiring the planning state to exercise due diligence to prevent such harm. This would entail not only consultation and negotiation, but also "the adoption of appropriate rules and measures. . .[and] a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party."[69]

This approach accomplishes several objectives. First, it detaches obligations arising under the duty to cooperate from the notion of harm, thereby preventing a violating state from evading responsibility for breach of such obligations merely because there is no actual or potential harm. As noted by Judge Dugard in his Separate Opinion in the *San Juan River* cases, treating the environmental impact assessment obligation as independent would prevent a state from arguing, in hindsight, that in the absence of proven harm at the time of the proceedings "no duty of

66. In addition to the *UNWC* and the ICJ decisions mentioned above, the threshold of "adverse effect" has been incorporated in various forms in many international agreements. *See* Draft Articles on Prevention, *supra* note 17, at 158 n.900 (for a list of agreements).

67. McCaffrey, *supra* note 46, at 24, ¶ 42.

68. McCaffrey, *supra* note 16, at 470.

69. *Arg. v. Uru.,* 2010 I.C.J. at ¶ 197.

due diligence arose at the time the project was planned."[70] I propose extending this rationale also to the other obligations arising under the duty to cooperate with respect to planned measures, namely the duties to notify and consult. Second, this approach is also helpful where states, judges, or arbitrators are reluctant, or find it difficult, to establish that significant harm has been, is being, or is likely to be caused by another state.[71] Violations of procedural obligations can be more easily established, and holding states responsible for such obligations may prompt them to cooperate, correct harmful conduct, or take more effective preventive measures in the future.[72] Finally, this approach shifts the emphasis from a 'negative' duty to avoid harm to a 'positive' duty to cooperate, requiring states to take concrete steps to protect a shared fresh water resource even if no significant harm is caused or is likely to be caused.[73]

IV. THE DUTY TO COOPERATE IN THE DISPUTE RESOLUTION PROCESS

In addition to complementing the no significant harm principle, the duty to cooperate can also play a more meaningful role in the actual dispute resolution process. Cooperation is especially difficult to achieve once a dispute has arisen, particularly where there is no agreement that governs the fresh water resource at issue.[74] Less than half of interstate surface water resources are governed by an agreement, and only about one-fourth of such agreements include all relevant states.[75] Only a handful of international aquifers and groundwater basins in the world are subject to a legal arrangement, and some of these arrangements are not binding.[76] Even where an agreement is in place and refers to the duty to cooperate, such reference may be limited to the general management of the shared resource and not address cooperation in the dispute resolution process itself.

I therefore propose a new function for the duty to cooperate, which imposes specific obligations on state parties in this process. Such obligations are recognized, to a limited extent, in previous interstate fresh water disputes. For instance, in the *Lake Lanoux* arbitration,[77] the tribunal pointed out the parties' failure to cooperate in the resolution of the dispute, noting unjustified delays, systematic refus-

70. *Nicar. v. Costa Rica*, 2015 I.C.J. at ¶¶ 9-10, 19 (separate opinion by Dugard, J.).

71. Brunnée, *supra* note 54.

72. *Id*.

73. *Id*.

74. Salman M.A. Salman, *Mediation of International Water Disputes – the Indus, the Jordan, and the Nile Basins Interventions*, *in* INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES 360, 360-61 (Laurence Boisson de Chazournes, Christina Leb & Mara Tignino, eds., 2013).

75. Ken Conca, 5 Focal Points for U.S. Global Water Strategy, NEW SECURITY BEAT (Nov. 3, 2016), https://www.newsecuritybeat.org/2016/11/5-focal-points-u-s-global-water-strategy-and-submit-too/).

76. For a representative list of such arrangements, *see* Francesco Sindico & Stephanie Hawkins, *The Guarani Aquifer Agreement and Transboundary Aquifer Law in the SADC: Comparing Apples and Oranges?*, 24 RECIEL 318, 319 (2015).

77. *Lake Lanoux* (Fr. v. Spain), 12 R.I.A.A. 281, 306 (1957).

als to take into consideration proposals or interests of the other party, and a general lack of good faith, as examples of uncooperative conduct.[78] However, such cooperative obligations in the dispute resolution process have risen more frequently in the maritime boundary delimitation context.[79] Drawing on practices in this field could therefore prove useful in the resolution of interstate fresh water disputes.

As with international water law, the body of international law governing maritime boundary delimitation disputes initially developed on the basis of unilateral, exclusive, and sovereign rights.[80] Therefore, much like interstate fresh water disputes, many disputes concerning maritime boundary delimitation involve competing rights and claims to the use of waters, unilateral state action, and politically sensitive and highly complex issues.[81] Indeed, in its early work on the *Draft Articles*, the ILC had already recognized the potential benefits of drawing parallels with the field of maritime boundary delimitation. In his 1979 Report to the Commission, Special Rapporteur Stephen M. Schwebel noted the obvious similarities between the two fields:

The basic subject—water—is the same, although there are real differences between sea water and sweet water. The basic objective is identical: to lay down rules that govern uses of water by States. And, in both cases there must be a certain similarity of approach, that is to say, in the law of the sea there has been, and in the law of international watercourses there must be, conceptualization and formulation of legal principles that respond to the nature of water and to physical facts respecting it.[82]

Moreover, the body of law governing maritime boundary delimitation is better developed than international water law in terms of the clarity and rigor of its governing principles in general, and cooperative principles and procedures in particular.[83] Useful lessons may therefore be drawn from the dispute resolution regime set out in the 1982 *United Nations Convention on the Law of the Sea* (*UNCLOS*), considered one of the most advanced and complex global dispute resolution systems, and its use of the duty to cooperate.[84] Particularly instructive in this regard

78. McCaffrey, *supra* note 16, at 470.

79. "Maritime delimitation" has been defined as "the process of establishing lines separating the spatial ambit of coastal State jurisdiction over maritime space where the legal title overlaps with that of another State." YOSHIFUMI TANAKA, PREDICTABILITY AND FLEXIBILITY IN THE LAW OF MARITIME DELIMITATION 197 (1st ed, 2006).

80. Ian Townsend-Gault, *Rationales for Zones of Co-operation*, *in* BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES 114, 118 (Robert Beckman et al, eds., 2013).

81. Robert Beckman, *International Law, UNCLOS and the South China Sea*, *in* BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES 47 (Robert Beckman et al, eds., 2013).

82. Stephen Schwebel (Special Rapporteur), *First report on the law of the non-navigational uses of international watercourses*, 145-46, U.N. Doc. A/CN.4/320 (May 21, 1979).

83. *Id.* at 146.

84. *See* United Nations Convention on the Law of the Sea sec. 5, Nov. 16, 1994, 1833 U.N.T.S. 397; Beckman, *supra* note 81, at 79.

are the *UNCLOS* provisions dealing with the delimitation of exclusive economic zones and continental shelves (Articles 74(3) and 83(3), respectively), which require that, "the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during the transitional period, not to jeopardize or hamper the reaching of final agreement. Such arrangements shall be without prejudice to the final delimitation."[85]

These provisions thus impose two interrelated obligations on states involved in a boundary delimitation dispute, derived from their duty to cooperate: the obligation to make every effort to enter into provisional arrangements until a final delimitation is agreed upon, and the obligation not to jeopardize or hamper the reaching of such final delimitation agreement. Both of these obligations could also be applied in the resolution of interstate fresh water disputes.

A. The duty to make every effort to enter into provisional arrangements

In the *UNCLOS* context, this duty is designed to promote interim regimes and practical measures for the provisional utilization of disputed areas pending delimitation, and at the same time to restrict certain activities in these areas in order to remove obstacles to delimitation.[86] Such provisional arrangements, moreover, are without prejudice to the final delimitation. This means that the disputing parties cannot be assumed to have accepted them as being final, that such arrangements do not have to be taken into account in the final resolution of the dispute, and that the parties are not estopped from taking a position on the final agreement that contradicts them.[87] The rationale for this duty is rooted in the recognition that arriving at an agreed delimitation can be a time-consuming process and that some form of interim solution pending the final delimitation is often required in order to avoid the suspension of economic development in a disputed maritime area, while also ensuring that such activities do not affect the reaching of a final agreement.[88]

The same rationale applies to the resolution of interstate fresh water disputes. Whatever process is employed in such resolution, it may extend over a long period of time, leaving the parties vulnerable to a deterioration in the hydrological condition of the disputed fresh water resource that may adversely affect their ability to

85. *Id.* at art. 74(3). The duty to cooperate is also relevant to other aspects of the UNCLOS, such as the prevention of maritime pollution. *Id.* at arts. 43, 199, 200, 201. It is also relevant to cooperation of states bordering enclosed or semi-enclosed seas. *Id.* at art. 123. *See also Mox Plant* (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, ITLOS Rep. 95, 110; *Land Reclamation by Singapore in and around the Straits of Johor* (Malay. v. Sing.), Case No. 12, Order of Oct. 8, 2003, ITLOS Rep. 9, 25.

86. *See Guy. v. Surin*., 30 R.I.A.A. ¶ 460 (Perm. Ct. Arb. 2007); Rainer Lagoni, *Interim Measures Pending Maritime Delimitation Agreements*, 78 AM. J. INT'L L. 345, 354 (1984).

87. *See* Lagoni, *supra* note 86, at 359.

88. *See* Tara Davenport, *The Exploration and Exploitation of Hydrocarbon Resources in Areas of Overlapping Claims*, *in* BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES 93, 100 (Robert Beckman et al, eds., 2013); *Guy. v Surin.*, 30 R.I.A.A. at ¶ 460.

use it, or to a *fait accompli* scenario in which a planned measure has been completed before the dispute is resolved. Therefore, the duty to cooperate should extend to the interstate fresh water dispute resolution process and impose on the state parties a duty to "make every effort" to enter into "provisional arrangements" to prevent such outcomes.

The term "every effort" in Articles 74(3) and 83(3) of the *UNCLOS* leaves room for interpretation by the disputing states, but also imposes on them a duty to negotiate in good faith and in a conciliatory manner.[89] Therefore, while states are not required to undertake specific actions to satisfy this obligation, it is not a mere recommendation but rather a mandatory rule whose breach would constitute a violation of international law.[90] Whether or not provisional arrangements are in fact necessary to protect the rights of the states concerned, and if so which, depends on the particular circumstances of each case. Nonetheless, the requirement that negotiation efforts be conducted "in a spirit of understanding and cooperation" reflects the traditional legal concept of "good faith."[91] The balance under this requirement between the obligation to negotiate in good faith and the absence of an obligation to reach a specific agreement was most recently articulated by the International Tribunal for the Law of the Sea as follows:

> [T]he obligation to negotiate in good faith occupies a prominent place in the [UNCLOS] Convention, as well as in general international law. . .The Special Chamber notes, however, that the obligation to negotiate in good faith is an obligation of conduct and not one of result. Therefore, a violation of this obligation cannot be based only upon the result expected by one side not being achieved.[92]

This general obligation to negotiate in good faith has also been recognized in the international water law context, and many instruments in this field provide for such negotiation as a possible mechanism for the resolution of disputes.[93] However, this general obligation has not given rise to the corollary duty to negotiate in good faith provisional arrangements pending the resolution of an interstate fresh water dispute. Such a specific duty is warranted since provisional arrangements and the process of their negotiation could facilitate the cooperative resolution of interstate fresh water disputes and ease tensions between the parties. Moreover, a duty to negotiate provisional arrangements in good faith could protect the state parties' mutual interests in the shared resource by preventing unilateral action without preju-

89. *Id.* at ¶ 461.

90. Lagoni, *supra* note 86, at 354.

91. *Id.* at 355. As evidenced, for instance, in the ICJ decisions in *U.K. v. Ice.*, 1974 I.C.J. at ¶¶ 73-75, 78-79(3), and in the *Ger. v. Den., Ger. v. Neth.*, 1969 I.C.J. ¶ 85.

92. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana & Côte D'Ivoire in the Atlantic Ocean* (Ghana v. Côte D'Ivoire), Case No. 23, Order of Sept. 23, 2017, ITLOS Rep. ¶ 604.

93. Stephen M. Schwebel (Special Rapporteur), *Second report on the law of the non-navigational uses of international watercourses*, ¶¶ 170, 172, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (May 22, 1980); *Fr. v. Spain*, 12 R.I.A.A. at 285.

dicing the final resolution of their disputes. Provisional arrangements in this context could include, for instance, an interim joint plan for the shared use of the disputed water resource or for the sharing of benefits, or a temporary moratorium on further unilateral use of the resource.[94] Where state parties fail to agree on provisional arrangements and submit their dispute to binding third-party resolution, they could also request the court or arbitral tribunal to decide on the terms of such arrangements as an interim measure.[95]

B. The duty not to jeopardize or hamper the reaching of a final agreement

In the *UNCLOS* context, this duty, also known as the "obligation of mutual restraint," applies during the transitional period until final delimitation is agreed upon, particularly in the absence of a provisional arrangement.[96] This duty aims to prevent unilateral activities that might affect other parties' rights in a permanent manner, without stifling the ability to pursue economic development in a disputed area.[97] Therefore, the duty not to jeopardize or hamper the reaching of a final agreement would not preclude all unilateral activities in such an area, but only those activities that represent an irreparable prejudice to the final delimitation agreement, *i.e.* that lead to permanent physical impact on, or change in, the marine environment, or military activities directly related to the subject matter of the dispute.[98]

This non-aggravation duty also forms part of general international law.[99] For instance, the 1928 *General Act for the Pacific Settlement of International Disputes* requires parties to "undertake to abstain from all measures likely to react prejudicially upon the execution of the judicial or arbitral decision or upon the arrangements proposed by the Conciliation Commission and, in general, to abstain from any sort of action whatsoever which may aggravate or extend the dispute."[100] Similarly, the 1970 *Declaration on Friendly Relations* and the 1982 *Manila Declaration on the Peaceful Settlement of International Disputes* require state parties to an international dispute, as well as other states, to refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security or impede the peaceful settlement of the dispute.[101] The purpose of these provisions is to ensure that while means of peaceful settlement are being

94. Davenport, *supra* note 88, at 100, 102.

95. IGOR V. KARAMAN, DISPUTE RESOLUTION IN THE LAW OF THE SEA 198 (Vaughan Lowe & Robin Churchill eds., 2012).

96. *Guy. v Surin.*, 30 R.I.A.A. at ¶ 469.

97. *Id.* at ¶ 470.

98. *Id.* at ¶¶ 467, 470; Lagoni, *supra* note 86, at 365-66.

99. For a list of conventions and treaties referencing this duty, *See South China Sea* (Phil. v. China), Case No. 2013-19, Award, at n.1468-69 (Perm. Ct. Arb. 2016).

100. General Act for Pacific Settlement of International Disputes art. 33(3), Sept. 26, 1928, 93 L.N.T.S. 343.

101. G.A. Res. 25/2625, at 5 (Oct. 24,1970); G.A. Res. 37/10, at 3-5 (Nov. 15, 1982).

used, the parties do not take action that might aggravate their dispute.[102] This duty in turn gives rise to two specific obligations: first, to refrain from changing the *de facto* situation that had given rise to the dispute, and second, to take preventive measures to avoid or lessen tensions.[103] The non-aggravation duty has also been applied in the judicial resolution of interstate disputes. For instance, the Permanent Court of International Justice stated in its decision on provisional measures in the *Electricity Company of Sofia and Bulgaria* case that "the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute."[104] The ICJ also referred to this duty in the *Case Concerning United States Diplomat and Consular Staff in Tehran*, where it held that "no action was to be taken by either party which might aggravate the tension between the two countries."[105] A similar duty was also included in the Arbitration Agreement between Croatia and Slovenia, which formed the basis for their recent arbitration concerning certain land and maritime boundary issues.[106] Article 10 of the Agreement, which Croatia later claimed to have been breached by Slovenia during the arbitration proceedings, provided that: (1) Both Parties refrain from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal. (2) The Arbitral Tribunal has the power to order, if it considers that circumstances so requite, any provisional measures it deems necessary to preserve the stand-still.[107]More recently, the non-aggravation duty was applied in the *South China Sea* arbitration. In this case, the Philippines claimed that China had breached Paragraph 5 of the 2002 *ASEAN-China Declaration on the Conduct of Parties in the South China Sea*, which required the parties

> to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.[108]

On this basis, the Philippines argued that China violated its right to have the dispute settled peacefully by aggravating and extending the dispute through its dredg-

102. Rep. of the 1966 Special Comm. on Principles of Int'l Law Concerning Friendly Relations & Cooperation Among States on its Twenty-First Session, U.N. Doc. A/6230, at ¶ 237 (1966).

103. *Id*.

104. *Electricity Company of Sofia and Bulgaria* (Belg. v. Bulg.), Order, 1939 P.C.I.J. (ser. A/B) No. 79, at 199 (Dec. 5). *See also LaGrand* (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466, ¶¶ 102-03 (June 27), and other ICJ decisions cited in the *Phil. v. China*, Case No. 2013-19 at n.1464.

105. *United States Diplomat & Consular Staff in Tehran* (U.S. v. Iran), Judgment, 1980 1.C.J. Rep. 3, ¶ 93 (May 24).

106. Croat. v. Slovn., Arb. Mat'l (European Comm. 2009) https://pcacases.com/web/sendAttach/2165.

107. *Id.*

108. *Phil. v. China*, Case No. 2013-19 at ¶ 1124.

ing, artificial island-building, and construction activities.[109] The arbitral tribunal noted in this regard that

> there exists a duty on parties engaged in a dispute settlement procedure to refrain from aggravating or extending the dispute or disputes at issue during the pendency of the settlement process. This duty exists independently of any order from a court or tribunal to refrain from aggravating or extending the dispute and stems from the purpose of dispute settlement and the status of the States in question as parties in such a proceeding.[110]

Moreover, the tribunal noted that this principle of international law "is inherent in the central role of good faith in the international legal relations between States" and applies also to the provisions of the treaty relating to dispute settlement, which require "the cooperation of the parties with the applicable procedure."[111] The tribunal also found that the final and binding nature of the arbitral award had "an impact on the permissible conduct of the parties in the course of proceedings. . .actions by either Party to aggravate or extend the dispute would be incompatible with the recognition and performance in good faith of these obligations."[112] Finally, the tribunal found that

> [i]n the course of dispute resolution proceedings, the conduct of either party may aggravate a dispute where that party continues during the pendency of the proceedings with actions that are alleged to violate the rights of the other, in such a way as to render the alleged violation more serious. A party may also aggravate a dispute by taking actions that would frustrate the effectiveness of a potential decision, or render its implementation by the parties significantly more difficult. Finally, a party may aggravate a dispute by undermining the integrity of the dispute resolution proceedings themselves, including by rendering the work of a court or tribunal significantly more onerous or taking other actions that decrease the likelihood of the proceedings in fact leading to the resolution of the parties' dispute.[113]

In the international fresh water context, the non-aggravation duty is reflected in Article 17(3) of the *UNWC*, which provides that during the course of consultations and negotiations "the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months unless otherwise agreed."[114] This duty is limited, however, by the requirement that the notified state demonstrate its willingness to reach a "prompt and just" solution

109. *Id.* at ¶¶ 1134, 1166.

110. *Id.* at ¶ 1169.

111. *Id.* at ¶ 1171.

112. *Id.* at ¶ 1172.

113. *Id.* at ¶ 1176.

114. *Notification Process for Planned Measures: User's Guide Fact Sheet Series: Number 6*, UN WATERCOURSES CONVENTION, https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-6-Notification-Process-for-Planned-Measures.pdf.

by pacific means, a determination left to the sole discretion of the notifying state in the absence of an impartial third-party decision-maker.[115]

I propose to strengthen the non-aggravation duty as set out in the *UNWC*, whether in the negotiation of future treaties or in state practice, along the lines of its use in the *UNCLOS*. First, it should be detached from a determination of the notified state's "willingness" to reach a "prompt and just" peaceful resolution.[116] Once the disputing states have commenced some form of dispute resolution process, this should be viewed as an indication of the notified state's good faith intentions and the notifying state should be required to take all steps necessary to prevent "irreparable prejudice to the final agreement,"[117] including the suspension of the disputed project or use if need be. Second, the duty should not be limited to a six-month period, which is in any event extremely short, but rather apply so long as the dispute resolution process is underway. At the same time, however, possible measures other than complete suspension, such as compensation or sharing of benefits, should also be considered where relevant, and in any event unilateral activities that do not represent "irreparable prejudice to the final agreement" should be allowed.

This broader non-aggravation duty in interstate fresh water dispute resolution would serve to reduce tensions and facilitate settlement.[118] It would also prevent states from exacerbating a dispute that they are in the process of resolving by taking unilateral action that would cause irreversible harm, such as polluting a shared water resource or exhausting it, or that would render moot the final resolution of the dispute, such as completing a dam or diversion project. The value of a non-aggravation duty in this context is evident, for instance, in the mediation of the *Indus River* dispute by the World Bank in the 1950s, which led to the signing of the 1960 *Indus Waters Treaty*. Although India and Pakistan were not subject to a duty of mutual restraint under international water law at the time, the success of the World Bank in facilitating the resolution of this dispute was partially credited to the fact that it managed to get both sides to agree not to take any action to reduce the flow of the waters to the other until a final agreement was reached, a commitment that is part and parcel of the non-aggravation duty.[119]

A caveat should be noted with respect to the parallels I have drawn between international water law and the *UNCLOS* system. Recall that the substantive and procedural rules governing the *UNCLOS* are practically universal and are more robust and developed than those of international water law. Disputes relating to maritime delimitation, moreover, are subject to an elaborate, compulsory, and binding

115. William L. Griffin, *The Use of Waters of International Drainage Basins under Customary International Law*, 53 AM. J. INT'L L. 50, 79-80 (1959).

116. W.L. Griffin, *The Use of Waters of International Drainage Basins Under Customary International Law*, 53 Am. J. Int'l L. 50, 79 (1959).

117. *Guy. v Surin.*, 30 R.I.A.A. at ¶467, 470; Lagoni, *supra* note 86, at 365-66.

118. Davenport, *supra* note 88, at 104.

119. Salman, *supra* note 74, at 373.

dispute resolution system that includes a specialized tribunal, and benefit from established case law.[120] Therefore, the two cooperative obligations I propose above might be more easily applied in the maritime boundary delimitation context than in the context of interstate fresh water dispute resolution. Nonetheless, international water law can and should draw lessons from the *UNCLOS* experience in order to develop its own cooperative dispute resolution rules and practices, and the principles I discuss here could serve as a useful starting point.

V. CONCLUSION

The importance of the general duty to cooperate in international water law is rooted in the "indivisible unity" of watercourses, which requires cooperation for their ongoing use and management, as well as for the resolution of disputes.[121] In order to facilitate such resolution, however, the procedural obligations arising under the duty to cooperate, including the obligation to notify, consult, and conduct an environmental impact assessment, should be viewed as independent from, and complementary to, the no significant harm principle. They do not only inform the due diligence obligations of states once there is "risk of significant harm"[122] triggering this principle, but also come into play where there is transboundary "adverse effect."[123] In light of this lower threshold and their independent nature, violating these obligations should give rise to international state responsibility.

In addition, the duty to cooperate can serve a useful purpose in the interstate fresh water dispute resolution process itself by imposing specific cooperative obligations. These obligations would require states to make every effort to enter into provisional arrangements until a final resolution of the dispute is reached, and to not jeopardize or hamper such final resolution. This approach to the duty to cooperate extends it beyond the *management* of shared fresh water resources and the *prevention* of interstate fresh water disputes to their *resolution*, thereby reinforcing the role of international water law in this context.

120. Karaman, *supra* note 95, at 1.
121. Evensen, *supra* note 38, at ¶ 107.
122. See *supra* note 17.
123. UNWC, *supra* note 35, art. 12.

THE ROLE OF LAW AND THE RULE OF LAW IN THE ECONOMIC DEVELOPMENT PROCESS: QUEST FOR NEW DIRECTIONS AND APPROACHES IN INTERNATIONAL DEVELOPMENT LAW REGIME

BRIAN-VINCENT IKEJIAKU*

INTRODUCTION

"Trends of events in the international system appear to have clearly established that developing countries have been placed in a weaker structural position in the global-economy[1] but also tend to be placed in a less dominant position on other variable indicators"[2] of power within the international system, including political, military, and legal.[3] Evidence also suggests that the international development "le-

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1. Millenium Development Indicators: World and Regional Groupings, UNSTATS, https://unstats.un.org/unsd/mi/worldmillennium.htm (stating "there is no established convention for the designation of "developed" and "developing" countries or areas in the UN system."). In this article, the term *developing country* will be used interchangeably with *Third World* or *Global South and, the term developed country used interchangeably with Global North or Western World. Id.*

2. *See* Brian Ikejiaku*; International Law, the International Development Legal Regime and Developing* Countries, 7 L. & Dev. R. 1, 131 (2014).

3. *Id.*; *See* R.P. ANAND, CONFRONTATION OR COOPERATION?: INTERNATIONAL LAW AND DEVELOPING COUNTRIES, (1987). Stating,

> For example, in legal trends, the [U.S.] and Britain still strongly influence undertakings in the international legal regime. In economic trends, significant [developments] since the 1980s show the virtual collapse of the market value of the natural resources extracted from the territories of developing countries and the continued triumph of Western owned multinational corporations (["MNCs",] which control processing) and under political trends, Western countries' occupation of most of the strategic positions in global organizations such as the United Nations (including wielding "veto power") as well as in other international [organizations] or agencies.

See Anthony Carty, *The Concept of International Development Law*, 1 INT'L SUSTAINABLE DEV. L.

gal regime shows a clear, wide-gap between the more developed and prosperous global north as compared to the miserable realities of violent conflict and chronic poverty experienced by a significant proportion of the" global south's population, particularly in developing poor countries.[4] "These gaps and inequalities reflect not only failures of understanding, conflicts of interest, resource constraints, and poor implementation,[5] but also a kind of concerted practice involving the leaders of rich western countries" and international organizations do not show practical and convincing development commitments, particularly strategic and functional legal reforms in developing countries.[6] For example, 1 billion dollars of the financing mapped out for development "were diverted from the war on poverty, going instead towards the war on terrorism,"[7] thereby making ~~things~~ economic situation more difficult globally, especially in the developing countries., One key negative spill-over effect or implication is the rise on terrorist activities within the international system.[8]

The paper identifies that the specific issue borders on the "Role of Law" and the formal legal system in development process and the effects within the countries of the global south. The paper examines approaches to the "Role of Law" and importance of the "Rule of Law" in economic development process.[9] It is submitted

(2008); *see also* Kevin Narizny, *Anglo-American Primacy and the Global Spread of Democracy: An International Genealogy*, 64 WORLD POL. 341, 342 (2012). Westerners, particularly the U.S. and Britain, have been able "to influence the political . . . development of states around the world. In many of their colonies, conquests, and clients, they have propagated ideals and institutions conducive to democratization." *Id.* at 341.

4. ROY CULPEPER ET AL., HUMAN SECURITY, SUSTAINABLE AND EQUITABLE DEVELOPMENT: FOUNDATIONS FOR CANADA'S INTERNATIONAL POLICY 23 (2005).

5. *See* K. Donovan, Bono and Geldof: World Leaders Failing to Keep Promises (May 16, 2020) https://www.christiantoday.com/article/bono.and.geldof.world.leaders.failing.to.keep.financial.pledges/10795.htm; Brian-Vincent Ikejiaku, *International Law Is Western Made Global Law: The Perception of Third World Category*, 6 AFR. J. OF LEGAL STUD. 337, 353 (2014).

6. Ikejiaku, *supra* note 2; Andreas L. Paulus, *International Law After Postmodernism: Towards Renewal or Decline of International Law?*, 14 LEIDEN J. OF INT'L L. 727, 732-33 (2001).

7. Ikejiaku, *supra* note 2; *See* Shahrbanu Tadjbakhsh, Human Security Center presentation at the University of British Columbia Human Security Report: War and Peace in the 21st Century, (Sept. 09, 2005) (transcript available at https://web.archive.org/web/20070320123627/http://www.peacecenter.sciences-po.fr/conflicts-ip-st.htm).

8. *See* Robert I. Rotberg, *Failed States in a World of Terror*, 81 FOREIGN AFF. 127, 139 (2002).

9. James A. Grant, *The Ideals of the Rule of Law*, 37 OXFORD J. OF LEGAL STUD. 383, 383 (2017). In this paper, the Law is seen as a precursor to the Rule of Law, in the sense that Rule of Law cannot exist or thrive where there is no Law in place. The level of success of the Rule of Law depends on how active the Law plays its roles in the society. *Id.* at 383. Jurists and Philosophers have attempted to bring a sharp distinction between the Rule of Law and the Law, but the problem is lack of simplicity; some differentiate them as two kinds of Rule of Law ('rule of authority and procedural rule of law' and, 'rule of reason and substantive rule of law.') *Id.* The Law or Role of Law is simply rule by any law that is created by the highest law-making body of any nation; what the law is and its purpose is not usually the concern. It is merely the spirit of the law, the procedure and value neutral. There might be letters of the law stipulating how a country should be governed (particularly in dictatorial society) without the Rule of Law present or in practice in the same society. The Rule of Law connotes rule is founded on certain principles of law; it is a value laden concept which includes democratic values of liberty, equali-

that "Law" as a tool for development may serve well in the developed world because the relevant structures and features are available for Law to act as a tool for development; however, in the developing poor countries, there are no such features or structures. Thus, in developing countries Law cannot work as a tool for development, but as a facilitator in order to take into consideration the local needs. Law cannot serve as a tool for development in developing countries because it has already been packaged based on the legal system and climate of the developed world before it was transplanted, and the packaged Law was not meant to be altered (this was the failure of Law and Development Movement). However, as a facilitator, Law could be used with appropriate attention to the local culture, social, and economic needs of developing countries.

The paper critiques the current approach which sees Law as a tool or mechanism for development itself. It argues that Law and/or the Rule of Law should be more functional in the roles they play in the international development process, in order to improve the development stance of the third world countries, and in turn serve as one of the key ways to achieve peace and security in the global plane. In "order to make international development law agenda 'functional', the strategy would be to approach Law" from a new direction, that is, "as a 'facilitator of development reform', rather than as 'a tool for development itself.'"[10] This approach "will help take into consideration indigenous needs and thereby remove disagreements over reform priorities and improve efficiency and accountability."[11] This is a new direction that highlights the importance and necessity of "focusing the international system's approach to Law as a 'means to facilitate' local empowerment, social cohesion, and justice – or as an approach to development consistent with the life choices and development goals of indigenous populations, rather than as it has generally appeared as an 'end in itself'."[12] Thus, it appears impractical and a mere academic exercise to suggest a general theory of law and development as presented in Lee's work.[13] This is because empirical scholarly research suggests that no single theory is fit for analyzing the entire law and development issues and no unilateral approach is capable of achieving development reforms or more embracing 'development goals' in different societies with distinct and diverse social, cultural, and economic exigencies.[14]

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ty, justice, supremacy of the law, separation of powers, transparency and others. *See e.g.* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823 (1972). This paper while, recognizing such distinction, will employ the concepts with the understanding and consideration that Rule of Law cannot thrive in a society where there is no Law in place. *Id.*

10. Ikejiaku, *supra* note 2.

11. *Id.*

12. *Id.*

13. *See* Yong-Shik Lee, *General Theory of Law and Development*, 50 CORNELL INT'L L. J. 415, 417-18 (2017).

14. Von Christain Boulanger, *Law and Development as Practice and as Theory–From Self-Estrangement to Alienation?*, DAS BLOG DES BERLINER ARBEITSKREISES RECHTSWIRKLICHKEIT 1, 7-8 (2015). As a final note in his presentation, Boulanger clarifies that, it seems that it is necessary to revisit the vocabulary:

The paper is of the view that (international) law and development regime has a crucial role to play in order to achieve global well-being and facilitate the effort towards achieving global-peace and security. This is by focusing attention on the Role of Law and the formal legal system (that is the importance of the Rule of Law) in development process in the developing countries. In terms of methods and theoretical perspective, this paper uses the well-being and functionalist legal theoretical approaches, "interdisciplinary and critical-analytical approach within the framework of (international) law and development."[15] It employs comparative and qualitative empirical evidence from developing and developed countries for its analysis. While the well-being and functionalist legal theoretical approaches will be used to analyze the proposed importance and functions of Law, which is centerd on considering and improving indigenous needs; the interdisciplinary and critical-analytical perspective involve employing literature in the Legal, International Relations, Economics, and International Development fields. This will be critically analyzed within the framework of (international) law and development. The qualitative empirical evidence is employed by gathering relevant material from both developing and developed countries for an in-depth comparative analysis.

The structure of this paper is presented in five sections. Section 1 is the general introduction. Sections 2 looks at the complex issue of the relationship between the Rule of Law and economic development. Section 3 briefly introduces the Structural Functional and Well-Being legal theories used for analysis in section 4. Section 4 examines the approaches and directions of the Role of Law in economic development process. The summary and conclusion are in Section 5.

II. THE RELATIONSHIP BETWEEN THE RULE OF LAW AND ECONOMIC DEVELOPMENT

The subject of Rule of Law is an age-long discourse,[16] but more recently the discussion on Rule of Law and economic development has prominently been fea-

> "Concepts like 'import', 'export', 'transplant' or 'transfer' are misleading, since they do not describe what is actually happening. What [they] are dealing with are transformations of normative orders, or 'travelling models.' Law is about stability of expectations, and this is a function that legal system must provide, regardless of their external appearance. The key is to check [not just] whether global models fit the local context, and meet the actual local needs." *Id.*

However, this is where the problem lies; (different) global models must be approached to suit with local distinctiveness – this is the only way law could facilitate development process in the global south. *Id.*

15. Ikejiaku, *supra* note 2.

16. *See* M. THOMAS, RULE OF LAW IN WESTERN THOUGHT (World Bank Group, 2001). "Plato wrote one of the earliest surviving discussions. While convinced that the best form of government is rule by a benevolent dictator, Plato concedes that, as a practical matter, persons with the necessary leadership qualities are rare. Accordingly, he imagines a utopia that is governed not by a benevolent dictator, but by Nomos, the god of Law. In "The Politics," Aristotle also considers whether it is better for a king to rule by discretion or according to law, and comes down firmly on the side of law; individuals are too often swayed by private passions. Christian philosophers, seeing the power to rule as a delegation from God, the Lawgiver, saw any kingly act contrary to "natural" law as an express violation of this delegation for which a monarch would surely be punished after death." *Id.*

tured in the academic literature and professional practice.[17] There appears to be a close association between efficient Rule of Law and high growth, as well as between respect for the Rule of Law, justice, political stability, and sustainable development.[18] In his work, Faundez argues that constitutionalism seeks to reduce the stakes of politics by protecting liberty and human dignity.[19] In this respect, constitutionalism sets limits to the powers of the state and protects individual freedom, considering that the concept of constitutionalism is not far from the notion of the Rule of Law, as it provides the institutional foundation for the Rule of Law in the contemporary society to thrive.[20] While the similarities between constitutionalism and the Rule of Law may still raise some issues, there is clear suggestion that the protection of basic rights and liberties is an essential component of any democratic process and an essential feature of the Rule of Law.[21] It has been argued that distortion of the Rule of Law weakens the institutional foundation of economic growth, and results in legal and institutional frameworks of the State being crippled. This creates the single greatest obstacle to good governance and economic and social development.[22] The harmful effects of a weak legal system "are especially severe on the poor, who are hardest hit by economic decline" and "are the most reliant on the provision of basic needs and public services."[23]

While there is available evidence to suggest how Law or the Rule of Law[24] interacts with development,[25] the greater debate centers on the approach and direc-

17. *See e.g.* Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT'L L. J. 483 (2007); *see also* Matthew Stephenson, *Rule of Law as a Goal of Development Policy*, WORLD BANK RESEARCH (Mar. 6, 2019, 11:48 AM), https://www.eldis.org/document/A37080; *see e.g.* Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998).

18. *See* G. Yash, *The Rule of Law, Legitimacy, and Governance*, 14 INT'L. J. OF THE SOC. OF L. 179 (1986); *see generally* Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L. J. 67 (2007).

19. Julio Faundez, *Law and Development Lives On* 22 (Warwick Law School, Legal Studies Research Paper No 2011-12, 2011).

20. *Id.*

21. *See id.*

22. See Brian Ikejiaku, *The Relationship between Poverty, Conflict and Development*, 2 J. SUSTAINABLE DEV. 15, 15 (2009) [hereinafter Poverty, Conflict and Development].

23. *Id.*; *See also World Bank Finds Corruption is Costing Billions in Lost Development Power*, PROBE INT'L (Sept. 29, 2004), https://journal.probeinternational.org/2004/09/29/world-bank-finds-corruption-is-costing-billions-in-lost-development-power/.

24. *What is the Rule of Law*?, UNITED NATIONS, https://www.un.org/ruleoflaw/what-is-the-rule-of-law/. For the purpose of this paper, the Rule of Law incorporates the simple and direct U.N. definition and Lon Fuller's eight (8) principles of legality which capture the essence of the Rule of Law. The U.N. defines it as

> a principle of governance in which all persons, institutions and entities, public and private, including the [s]tate itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

Id. And Lon Fuller, in his much authoritative work, *The Morality of Law*, promulgates eight principles

tion of the Law, that is "how to go about it, rather than whether it has the potential to promote development."[26] There is a wide assumption suggesting the Rule of Law is necessary for the growth of the economy– a very essential attribute of economic development, but the Rule of Law is a multidimensional concept that connotes various ranges of different components.[27] Contemporary legal and economic theory exposes the link between the Rule of Law with the economic growth and development.[28] It is fairly established in the "legal theory, there is a general view that the Rule of Law is essential to any modern legal system, but there is no single viewpoint in terms of determining its scope and content."[29] Series of empirical research conducted show there have been considerable efforts to formulate suitable empirical assessment of the Rule of Law, covering the subjective indices and objective indicators; this suggests that there are two empirical assessments of the Rule of Law – the theoretical subjective and those using practical institutional & legal environment.[30] However, "the relative benefit of either type of indicator has

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of legality that capture the basic essence of the Rule of Law:

> (i) laws must be of general application; (ii) laws must be widely promulgated or publicly accessible to ensure that citizens know what the law requires; (iii) laws should be prospective in application; (iv) laws must be clear and understandable; (v) laws must be non-contradictory; (vi) laws must not make demands that are beyond the powers of the parties affected; (vii) laws must be constant and not subject to frequent changes; and (viii) laws must reflect congruence between rules as announced and their actual administration and enforcement.

See LON L. FULLER, THE MORALITY OF LAW, 21 (New Haven: Yale Univ. Press rev. ed. 1969). Furthermore, the

> World Justice Project has proposed a working definition of the rule of law that comprises four principles: (a) a system of self-government in which all persons, including the government, are accountable under the law (b) a system based on fair, publicized, broadly understood and stable laws (c). a fair, robust, and accessible legal process in which rights and responsibilities based in law are evenly enforced (d) diverse, competent, and independent lawyers and judges.

American Bar Association Division for Education, *What is the Rule of Law*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf.

25. AMARTYA SEN, DEVELOPMENT AS FREEDOM 1 (Oxford Univ. Press 1999) (stating "development is about creating freedom for people and removing obstacles to greater freedom. Greater freedom enables people to choose their own destiny. Obstacles to freedom, and hence to development, include poverty, lack of economic opportunities, corruption, poor governance, lack of education and lack of health.").

26. DR. NANDINI RAMANUJAM, THE RULE OF LAW AND ECONOMIC DEVELOPMENT: A COMPARATIVE ANALYSIS OF APPROACHES TO ECONOMIC DEVELOPMENT ACROSS THE BRIC COUNTRIES 3 (McGill University).

27. *Id.* This ranges from the same law applicable to everybody, human rights including security of the person, and property rights, to separation of powers, checks and balances on the arms of government, combating of corruption, and accountability. *See* Stephen Haggard & Lydia Tiede, *The Rule of Law and Economic Growth: Where are We?*, 39 WORLD DEV. 673, 673 (2011).

28. Katerina Kocevska, *Rule of Law – Condition for Economic Development (Republic of Macedonia*), 11 SEEU REV. 183, 185 (2015).

29. *Id.* at 183.

30. While the subjective indices involve the theoretical evaluations of experts or citizens or those

been an ongoing point of controversy";[31] while the subjective measure is prone to risk of bias, there is the tendency that the objective assessment may be irrelevant on how the institution works.[32] As subjects seeking assurance of protection from the Law, the Rule of Law "still implies the creation of [a] legal system that establishes public order."[33] In this respect, "it suggests that the exercise of freedom of market and entrepreneurship, and the protection of ownership rights" are possible only if the natural and artificial persons acting on the market or property owners feel confident and safe in an entity.[34]

During the 1990s and 2000s, the notion that favorable economic development impacts on formal legal institutions was virtually accepted by many.[35] This is essentially as a result of the growing use of standard of measurement professing to determine the quality of the Rule of Law. The World Bank's Rule of Law Index, compiled from many sources and stand-points on the operation of legal institutions, was employed to demonstrate that the nature of a country's adherence to the tenets of the Rule of Law significantly correlates to the effects of its level of economic development.[36] For example, it was argued robustly that an "improvement in the Rule of Law score by one standard deviation (from levels prevailing in Ukraine in early 2000s) would," as it was claimed, "lead to a fourfold increase in per [capita] income over the long term."[37] However, this World Bank and other similar "initiatives came to be questioned as the expected relationship between" Rule of Law (or legal reform) and economic growth failed to yield positive result in a number of contexts.[38] A good illustration is China under Deng Xiaoping[39] – how should one reconcile China's (economic) growth rate with its Rule of Law credentials? China has been ear-marked as the fastest growing economy and one of the most important in the world.[40] There is prediction by commentators that "China will surpass the size of the U.S. economy at some point in the second decade of this century" (in particular on purchasing power parity 'PPP', but not in per capita income level).[41] For example, China's profile in manufacturing, particularly in labor intensive industries is an accepted "challenge to the manufacturing sectors of

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that make up aggregate measures; objective indicators are mapped out to capture features of the institutional and legal environment.

31. DR. NANDINI RAMANUJAM, *supra* note 26.

32. *See* Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. OF POL. SCI., 205, 208 (2008).

33. Kocevska, *supra* note 28, at 185.

34. *Id*.

35. Ding Chen & Simon Deakin, *On Heaven's Lathe: State, Rule of Law, and Economic Development* 2 (Ctr. for Business Research, Working Paper, No. 464, 2014).

36. *Id.*

37. *Id.*

38. *Id.* at 3.

39. *Id.*

40. Kenneth W. Dam. *China As a Test Case: Is the Rule of Law Essential for Economic Growth?* 1 (John M. Olin Program in L. and Econ., Working Paper No. 275, 2006).

41. *Id.*

the most advanced economies."[42] China is also growing beyond low wage manufacturing and has entered the high technology platform based on high-level research, and highly educated scientists and engineers that have performed in the area of "research and development activities from some of the world's most accomplished high technology firms."[43] This suggests "the coexistence of the two [may] mean that, contrary to the prevailing [academic] view, institutions are not important [elements], after all to economic growth."[44] In fact, one group of scholars has gone far about reaching that conclusion; thus, "China is an important counter example to the findings in the law, institutions, finance, and growth literature: Neither its legal nor financial system is well developed by existing standards, yet it has one of the fastest growing economies."[45] A tentative conclusion could be, at "least that legal institutions and the Rule of Law are not [particularly] important" to the extent as previously claimed.[46] The Chinese case provides a clearer picture and plausible support, just as Faundez suggests that the Rule of Law does not necessarily promotes economic development.[47]

However, while emphasizing the importance of Rule of Law to development process, Sen argues that development has to include a notion of Rule of Law or freedom, since "development is not only about economic growth, as measured by standard [of] indices such as GDP per capita."[48] Rather, he views development as a broader process, which its aim is to enhance people's capabilities.[49] Thus, according to Sen, scholars and development practitioners should take into account all the domains of social life, including economic, social, political and legal, since they all have a part on the development process.[50] In this context, various spheres of social life cannot be independently considered – "economic growth without social equity or economic re-distribution without effective political participation could hardly be

42. *Id.*

43. *Id.* at 1-2.

44. *Id.* An important alternative route (from the Rule of Law) to achieving economic development is what is generally referred to as 'phenomenon of economically benevolent dictatorships' demonstrating that countries under dictators such as Chile under Augusto Pinochet (1973-1990) and South Korea under Park Chung Hee (1961-1979). In these countries "rapid economic development was based not on the basis of adherence to the Rule of Law but on the ability of non-democratic governments to create 'non-excludable' public goods for the benefit of the masses." Chen, *supra* note 35; *see also* Joseph Y. S. Cheng, *China's approach to BRICS*, 24 J. OF CONTEMP. CHINA 357 (2015).

45. Franklin Alan, Jun Qian, & Meijun Qian, *Law, Finance, and Economic Growth in China*, 77 J. OF FIN. ECON. 57, 57 (2005).

46. *See* Dam, *supra* note 40, at 2 (providing that one group of scholars, Allen, Qian and Qian ('AQQ'), has gone far to reaching that conclusion.).

47. *See generally* GOOD GOVERNANCE AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES, (Julio Faundez, St. Martin's Press) (1997).

48. SEN, *supra* note 25, at 1; *see also* Julio Faundez, *Rule of Law or Washington Consensus: The Evolution of the World Bank's Approach to Legal and Judicial Reform*, *in* LAW IN THE PURSUIT OF DEVELOPMENT (A. Perry-Kesaris, Routledge, 2010).

49. SEN, *supra* note 25, at 4.

50. Amartya Sen, Address at World Bank Legal Conference: Role of Legal and Judicial Reform in Development (June 5, 2000).

regarded as making meaningful contribution to development."[51] In Sen's perspective, these different sectors are part of a single process, since each plays a relatively equal role in enhancing people's capabilities.[52] Within Sen's conceptualization, "even if it were established that Law did not contribute" one iota "to economic growth, Law's central role in the process of development would not be questioned."[53] Sen believes, however, that Law does make an important contribution both to economic growth and to other domains of social life.[54] Yet, he cautions that while Law's contribution to economic growth is crucial, its role is not self-evident.[55] Because social life is complex, in order to understand the role of the Rule of Law in development, it is necessary to carefully investigate the causal interconnections between the economic, social, political and legal domains.[56]

The implication is that societies can still experience economic development with or without the Rule of Law depending on the culture, political leadership, and attitudinal belief of the indigenous population.

III. LEGAL THEORETICAL APPROACH(ES)

It is helpful at this point to consider the applicable legal theoretical approach(es) that will assist in the examination and analysis. This paper uses the well-being and functionalist legal theories. While the functionalist legal theoretical approach helps to analyze the importance of making Law functional by considering the distinctiveness of any society the Law is meant to serve or regulate; the well-being theory helps us to understand the necessity of making the Law serve the needs of the indigenous people.

A. The well-being theory

The well-being theory[57] appears to have dominated the economic-analysis of Law movement in legal scholarship.[58] Well-being theory generally stipulates "that the enhancement of people's well-being is a worthy goal for the State to pursue."[59]

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51. Federico Ortino, *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*, 30 LEIDEN J. OF INT'L. L. 71, (2017).

52. Sen, *supra* note 50.

53. *Id.*

54. *Id.*

55. SEN, *supra* note 25, at 1.

56. Amartya Sen, *What is the Role of Judicial Reforms in the Development Process?*, 2 WORLD BANK LEGAL REV. 33, 33-51 (2006).

57. *See* THOMAS M. SCANLON, WHAT WE OWE TO EACH OTHER (1998). This paper is not interested in discussing the divergent theories of well-being including 'mental state/experimental theories' which state that well-being is wholly determined by individuals' experiences, consciousness, or feelings. Daphna Lewinsohn-Zamir, *The Objectivity of Well Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003) (stating "desire or preference theory' which holds "that a person's well-being is determined by the extent to which her preferences are fulfilled."); *see* JAMES GRIFFIN, WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE (1989).

58. *E.g.,* EYAL ZAMIR & DORON TEICHMAN, THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW (Oxford University Press, 2014).

59. Lewinsohn-Zamir, *supra* note 57.

In order to achieve the enhancement of people's lives in any given society, the well-being theory needs not be rigid or elitist, but needs to "be sufficiently flexible to respect people's autonomy and allow many paths to achieving a good life."[60] It shows that "objectivity cannot be avoided even in [consideration of] seemingly subjective preferences" of well-being in any given society.[61]

The well-being theory further holds that "our desires are always directed toward some future state of affairs."[62] Humanity "may wish our preferences to be fulfilled because we anticipate that their fulfillment will improve our lives," but the problem is that most people are not allowed to make preferences. Even when they show or make preferences, their expected autonomy for preferences are not respected by those claiming to promote or enhancing people's lives.

Well-being as a legal theory is crucial both in theoretical analysis and practical implementation of the rights to development (including in modern legal reforms). This is because it uses legal requirements that are relevant and manifest for development reforms in the society such as the rule of law, substantive freedom of the people, social justice, equality, human rights, and empowerment. For example, "Amartya Sen's call for understanding development not only in terms of gross national product but also 'in terms of the substantive freedoms of people' that marked an important reframing of the legal and policy discourse around economic development" has as its 'ends' centered largely on well-being of the people.[63] The well-being theory helps us to understand that if legal reforms are fashioned in line to the uniqueness of the lives, values, and cultures of the indigenous people, they will be well-received and effective in the society.

B. Structural functional legal theory

Using a legal standpoint, a functional "explanation in legal theory is an im-

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60. *Id.*

61. *Id.* at 1673.

62. *Id.* at 1678.

63. Call for Papers, *2014 Biennial Research Conference: Reassessing International Economic Law and Development: New Challenges for Law and Policy*, American Society for International Law International Economic Law Interest Group (Nov. 13-15), https://www.asil.org/sites/default/files/ILPOST/pdfs/20140424_EC_LAW.pdf. *Development as Freedom* weaves the most important strands of recent thinking on economic development, social justice, and human rights into a coherent vision of a better world. According to Sen, expansion of freedom is viewed, in this approach, both as the primary end and as the principal means of development. Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. *See* SEN, *supra* note 25, at 5.

> The resulting Millennium Development Goals (MDGs) focused much academic research in this area towards a more comprehensive understanding of development, one that would recognize economic growth as intrinsically tied to such areas as: environmental sustainability; food security; the reduction of extreme poverty, hunger, and child mortality; access to health; and the promotion of education and gender equality.

See Address at College of Law Sutton Biennial Research Conference: Reassessing International Economic Law & Development - New Challenges for Law and Policy (2014).

portant and familiar legal concept in positive legal theory."[64] This "emphasizes the idea of a functional explanation of a phenomenon or society."[65] For example, when posed the key question of: "Why do legal rules have the form and content that they do, in fact, have?" a functionalist would answer with "the function of a rule can be part of a causal explanation of the content of the rule."[66] When posed, "[w]hy does corporations law limit the liability of stockholders?" A functionalist answer might be that the rules are the way they are because they serve "the interest of the capitalist class, or that this is the rule because it is the efficient rule, and common Law selects for efficient rules."[67]

Similar questions applicable to this analysis are: why have the problems bordering on the Role of Law and/or the role of the Rule of Law in development process continues to re-occur in developing countries of the global south? A simple answer from a functionalist perspective might be that legal reforms in developing countries do not take into consideration the distinctiveness of those countries. Several other researches "have applied a similar approach in the realm of Law and economic development; [r]eference is often made to Max Weber's nineteenth-century work 'Sociology of Law', which 'inquired into the casual relationship between particular features of Western Law and the development of capitalism'".[68] In particular, Sen's work also provides a helpful answer to the question that is relevant to functional aspect of law.[69] In line with the views of this paper, and the functionalist theory, that Law or the Rule of Law has been dysfunctional in the developing countries, as this paper intends to demonstrate.

IV. APPROACHES AND DIRECTIONS OF ROLE OF LAW IN ECONOMIC DEVELOPMENT PROCESS

It has generally appeared in the international development legal regime that Law has been approached as a tool for development itself.[70] In this sense, experts sometimes "assume that international development law is both distinctively placed and uniquely suited" as a mechanism for development "programmes and projects

64. Ikejiaku, *supra* note 2 (stating "[p]ositive legal theory attempts to explain and predict legal behaviour, especially the content of legal rules.") *E.g.*, H.L.A. Hart, *Concept of Law*, 1963 DUKE L. J. 629, 629-70 (1963); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593-629 (1958); Lon. L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630, 630-72 (1958).

65. Ikejiaku, *supra* note 2.

66. John A. E. Pottow, Keynote Address at Commercial Law League of America Luncheon: Bankruptcy Supreme Court Round-Up: Is Functionalism Back? (Oct. 28-13, 2018); Lawrence Solum, *Lexicon: Functionalist Explanations in Legal Theory,* LEGAL THEORY BLOG (Jun 10, 2007, 3:04 PM), https://lsolum.typepad.com/legaltheory/2007/06/legal_theory_le_1.html.

67. *Id.;* Ikejiaku, *supra* note 2.

68. Ikejiaku, *supra* note 2; *See* Kalidou Gadio, Keynote Address at 2010 Harvard African Law and Development Conference: Role of Law in the Development for the African Continent from a Development Agency Perspective (2010).

69. SEN, *supra* note 25, at 3.

70. *See* Shirley V. Scott, *International Law and Developing Countries*, *in* THE INT'L STUD. ENCYCLOPEDIA (Robert Denemark, Blackwell Publishing, 2010).

because a key function of Law may be to engineer, attain, or enhance the social and economic changes necessary to achieve the goals of development."[71] Furthermore, "it is expected that Law will provide the infrastructural mechanism required for development, and that Law has the capacity to bring about the social, economic, and political changes needed,[72] including the necessary cultural attitudinal tenets conducive to development."[73] When

Faundez[74]doubted whether the shift in attention from legal institutions to economic analysis would help avoid the problems of the earlier attempts at reforms [in developing countries]; his concern is that all the unanswered questions that lurked behind the "law and development movement."[75]

One of his concerns about unanswered questions relates specifically to the Role of Law and the importance of Rule of Law in development process.[76] Faundez presented his argument by analyzing the different approaches of the law and development movement and that of the World Bank.[77] Even though, they appear similar, he argued that the context in which the Bank's programs were being carried out was to a large extent different.[78] While the law and development movement premised that "the State 'would initiate and promote the process of economic development'", in contrast, the Bank perceived Law as "facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining Law and order."[79] Since the State is no longer the champion of social change, there is a smaller margin for error. However, Faundez, in his analysis, appeared to be uncertain that the faults of the development and law movement would not be repeated.[80] There was doubt whether the "shift in attention from legal institutions to economic analysis would thereby avoid the problems of the earlier attempts at reform."[81] Faundez apprehension was "that all the unanswered questions that lurked behind the law and development movement – the Role of Law and the

71. Ikejiaku, *supra* note 2; Tom Ginsburg, *Does Law Matter for Economic Development?* 34 L. AND SOC'Y REV. 829, 837 (2000); Robert Allen Sedler, *Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System*, 13 St. Louis U. L.J. 195, 199 (1968).

72. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1067-68 (1974).

73. Ikejiaku, *supra* note 2; Jane Murungi, *The New Law and Economic Development by David M. Trubek & Alvaro Santos*, 46 OSGOODE HALL L.J. 685, 686 (2008).

74. Mashrood Badarin, *Law and Development in Africa: Towards a New Approach*, 1 NIALS J. OF L. & DEVELOPMENT 1-48 (2011).

75. *Id.* at 2.; Ikejiaku, *supra* note 2.

76. Badarin, *supra* note 74, at 39-40.

77. *See generally* Julio Faundez, *Legal technical assistance*, *in* GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES 1, 12-14 (Julio Faundez, ed., 1997).

78. *Id.* at 12-13.

79. *Id.* at 13; *See also* WORLD BANK GROUP, *Law and Development Movement,* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LawandDevelopmentMovement.pdf .

80. WORLD BANK GROUP, *supra* note 79, at 12, 14.

81. WORLD BANK GROUP, *supra* note 79.

formal legal system in development, the relationship between Law and politics, and the relationships among democracy, authoritarianism, and development" – will continue to exist.[82] But, McAuslan and Thome had no doubts that the mistakes of the past, particularly those bordering on the "Role of Law and the formal legal system in development process," would reoccur and no doubt this has continued to reoccur.[83] It is relevant to examine a few prominent approaches to the Role of Law in development process.

A. Natural inherent approach

One approach is that the international development community is promoting the Law that is legal and judicial reforms by relying on the belief that, besides their inherent efficacy, such reforms will help improve economic performance.[84]As argued, this belief in the efficacy of legal and judicial reforms to stimulate economic development is supported by a "growing body of research showing that economic development is strongly affected by the quality of institutions – including the quality of a nation's legal institutions."[85] However, while there is "the case for reforming legal institutions on economic grounds, it tells little about what institutions to reform" and how to engage in such institutional reform.[86] It is a very difficult task to measure the quality of legal institutions, but it is even more difficult to practically reconcile "the strength of the causal relationships between their quality and economic development, and virtually impossible" from the trends of events within the international system, "to sort out the complex and contingent relationship between the different components of real-world institutions," particularly in the developing countries.[87] This is similar to what Haggard terms 'the Rule of Law complex,' – suggesting that the relationship between the efficient Law and economic development goes beyond 'getting the Law right', but rather how distinct entities may emerge from complex casual chains that include reciprocal institutions and political arrangements.[88]

B. Internationalization / transplanting approach

Another approach is the internationalization or transplanting approach of the

82. *See Id.*

83. *Id.* (discussing Patrick McAuslan & Joseph R. Thome, *Law, Governance, and the Development of the Market: Practical Problems and Possible Solutions*, *in* GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES 1, 25-51 (Julio Faundez, ed., 1997)).

84. Aymo Brunettei & Beatrice Weder, *Political Credibility and Economic Growth in Less Developed Countrie*s, 5 CONST. POL. ECON. 23, 27 (1994).

85. YASH, *supra* note 18; WORLD BANK GROUP, *supra* note 79.

86. WORLD BANK GROUP, *supra* note 79.

87. *See generally* James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 REV. OF INTL. POL. ECON. 542, 542-73 (2004); WORLD BANK GROUP, *supra* note 79.

88. Stephen Haggard & Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?*, 39 WORLD DEV. 673, 677 (2011).

Law and legal reform.[89] It can be put forward that virtually all Law reforms which have taken place in the developing countries appear as internationalized and/or transplanted rules.[90] This approach to Law or legal reform is built on three premises: one, that development demands a modern legal framework similar to that of the United States; two, that this should possess clear and predictable rules; and three, that it ought to be capable of being easily transplanted.[91] However, it appears that while this approach reflected on the lessons of the past, and had improved on a few mistakes of the law and development movement, the empirical research and trends of events in the developing world, in most cases, have proved the three assumptions weak.[92] For example, "[w]hile the massive importation of legal code allows countries to quickly overhaul their statutory Law in comparison to the time it took for these Laws to evolve in the exporting countries, available evidence from formerly socialist countries suggests that the enforcement of transplanted Law is often problematic."[93]

Academic literature suggests that recent World Bank initiatives (about a shift to economic analysis of the law and development)[94] "have involved local lawyers from the beginning in studying the legal system and developing proposals for

89. John Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 637, 640 (2013).

90. The legal reforms in most African and Asian countries were not based or rooted on local uniqueness and indigenous needs, but rather patterned on those of the Western countries. For example, the rule or principles that everybody is equal before the law could hardly function in developing countries due to their level of development. This is where more than half of the populations live below the $ 1.90 a day international poverty line. Development successes recorded in places like China and Singapore did not follow the Western tradition. This is also the case on reforms in the legal practice, where the dressing codes are complete transplant of the Western model. The wig and gown used in many countries like India, South Africa, Nigeria and other countries does not even suit their respective climate and practitioners' comfort. Also, is there any possibility in deciding on whether there is an acceptance of an offer (through post) in a contract and therefore a party binding, to apply the (postal) rule in *Adams v Lindsell* in developing countries, where most countries do not even have functional postal service system. Adams v Lindsell *[1818] 106 Eng. Rep. 250.*

91. David Trubek, *The 'Rule of Law' in Development Assistance, Past, Present, and Future, in* THE ROLE OF LAW IN DEVELOPMENT, PAST, PRESENT, AND FUTURE 1 (Yoshiharu Matsuura ed., 2005).

92. *See generally* PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING (2007) (outlining the issues with the current law and development model). "Contemporary economic and political development experts tend to concur on the Herculean task facing International Development Law and acknowledge the enormous gravity of the hurdles. Similarly, the total collapse of the (much popular and once confident) "Washington Consensus" and the global financial crisis which began in the Western economies in 2007–2008 out of the subprime crisis in the USA has weaken the confidence of economic theorists. International Development Law pundits and development economists equally admit that they have no reliable knowledge about how to generate economic development." Ikejiaku, *supra* note 2; *See also* Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT'L L. J. 209, 217 (2011).

93. Bernard Black, Reinier Kraakman & Anna Tarassove, *A Russian Privatization and Corporate Governance*, 52 STAN. L. REV. 1, 29 (1999).

94. *See also* Tom Ginsburg, *Does Law Matter for Economic Development?*, 34 LAW AND SOC'Y REV. 829, 837 (2000); *World Bank Group, supra* note 79.

change, or have trained local lawyers in the skills necessary for market reform."[95] But there is criticism that, even if some of the past lessons on the weakness of law and development programs have been learned and improved on, "pressures to produce results quickly will work against the gradual and incremental approach to law reform warranted by our current state of knowledge about the relationship between law and development."[96] This paper is of the position that in spite of the acclaimed lessons learned from the past weakness of the law and development movement, and addressing of such weakness; for example, through the involvement of local lawyers and training of the local lawyers. The weakness of the past on the Role of Law in the economic development process continues in the developing countries. This is because the local lawyers involved were trained on studying western legal system and skills on market reform patterned towards, and more beneficial to the western countries.

The new approach this paper proffers is to make international development law agenda more functional in the developing countries. From the functionalist theoretical viewpoint, the local lawyers and practitioners should be trained to learn international development legal reform from the context of indigenous exigencies and distinctiveness (that is the needs, stage of development, cultures, and value systems of the local people). According to the well-being theory, the Role of Law in this direction will be to facilitate local empowerment, social cohesion, and justice.

C. Law as a facilitator of development process (the functional approach)

Against this backdrop, it is the contention of this paper that there is a 'vacuum or gap' that Law supposes to fill in the global efforts towards actualization of good governance and socio-economic development in developing countries.[97] This no doubt has led to more legal scholarly works on the very importance of Law in this direction. Perry and Hatchard, arguing in this perspective, observe that "the ideas about development which fuel contemporary interest in the Law also seem to encourage the hope that Law could simplify development policy making, toning down its engagement with political and economic controversy."[98] In response to

95. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95-106 (1998); *see also* WORLD BANK GROUP, *supra* note 79.

96. THE FORD FOUND., MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 58 (2000); *see also* WORLD BANK GROUP, *supra* note 79.

97. *See* Sachiko Morita & Durwood Zaelke, *Rule of Law, Good Governance, and Sustainable Development*, 3 J. ENVTL. PLAN. L. 378 (2007). The authors submit that while many factors play an important role in development and good governance that many donors are recognizing the importance of rule of law, by "actively supporting legal and judicial reforms, including judicial training, development of new laws and legal institutions, and capacity building." Hammed Hanafi, *The Borderlines of Rule of Law, Good Governance and Sustainable Development: A Disclosure*, 1 AFR. J. OF L. & CRIMINOLOGY 117 (2011).

98. DAVID KENNEDY, LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY 17

the exploitative activities of some multinational companies (MNCs) and poor Corporate Social Responsibility (CSR) in poor developing countries, there were calls to both the international community and national governments of resource-rich developing countries – "To ensure that there is a balanced legal framework in place that recognizes the interests of the broader population. . ."[99] This is in line with both the functional and well-being theoretical approaches as presented in this paper. The functional theory subscribes that Law should be functional by considering the distinctiveness of developing countries in which it is expected to reform, and the well-being theory proposes the necessity of the Law to serve the needs for the welfare of the indigenous people.

From all indications, the new approach emphasizes that "attention to the Role of Law in development offers an opportunity to re-focus attention on the [indigenous] political choices and economic assumptions embedded in policy making" that favor the local populace.[100] There is a suggestion for the centrality of Law as a facilitator of development process when it was highlighted that more recent legal reforms throughout Latin America have focused on local necessities as a way to increase transparency in most institutions and nation building.[101] There is a common conjecture by many scholars that such reforms also improve good governance and by extension economic development.[102] Scholars have argued that "for the Law to be effective it must be meaningful" and functional in the societal context in which it is applied, "so citizens have an incentive to use the Law and to demand for institutions that work to enforce and develop the Law."[103] Furthermore, "[a] legal reform strategy should aim at improving legality by carefully choosing legal rules whose meaning can be understood"[104] in the context of local needs and which purpose will be "appreciated by domestic Law makers, Law enforcers, and economic agents, who are the final consumers of these rules."[105] This is "a crucial condition for improving the overall effectiveness of legal institutions, which over time, will foster economic development."[106] Tamaharan's work lends credence to the position of this paper that legal reform should be pursued based on the needs of the local people.[107] He argued that legal development (not law and development) projects without enjoying an artificial boost derived from money and pressure from

(Amanda Perry-Kessaris & John Hatchard eds., 2002).

99. *See* ANNE LINDSAY & GERALDINE MCDONALD, UNEARTH JUSTICE 61 (Catholic Agency for Overseas Development ed., 2006).

100. KENNEDY, *supra* note 98; Ikejiaku, *supra* note 2.

101. *See* Linn Hammergren, *Latin American Experience with Rule of Law Reforms and Applicability of Nation Building Efforts*, 38 CASE W. RES. J. INT'L L. 63, 66-68 (2006).

102. *See* Lydia Brashear Tiede, *Legal Reform and Good Governance: Assessing Rights and Economic Development in Chile*, 34 L. & POL'Y, 237, 238 (2012).

103. Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect* 2 (Working Paper No. 410, 2003).

104. *Id.*

105. MARY GORRETH NANTONGO, IMPACT OF LEGAL REFORM ON SUSTAINABLE LAND MANAGEMENT IN TIGRAY, ETHIOPIA (Norwegian University of Life Sciences) (2011).

106. *Id*.

107. *See* Tamanaha, *supra* note 92.

externality, must gather "sufficient local support from influential players to prevail in local socio-political contests over reform."[108] Local agendas and priorities need be engaged.[109] These potential "projects would be designed, run, and implemented by people who understand the situation, who know what is possible and understand what compromises must be made, and who have long term relationships— social and political capital— to draw on in the course of implementation."[110] While "none of this assures the success of legal development initiatives, because legal development in every country is uneven, this consummately of local process of legal reform avoids several of the key flaws that now plagues law and development projects."[111]

In most African countries for example, the legal reforms on anti-corruption Laws have not been effective over the past five decades (50 years).[112] This weak legal framework on anti-corruption has provided a fertile ground on which corruption at all levels, particularly political corruption, thrive. Within this period, "the magnitude of corruption in most African countries, to say the least is alarming, terrific, and disheartening. Corruption by political leaders has been identified as one of the major causes of poverty" and constraint to development, particularly in Africa due to the magnitude.[113] The "incidence of corruption remains one of the greatest challenges" and impediments to "democracy in the continent as virtually all democratic experiments are associated with reports of hyper-corrupt practices.[114] The embezzlement of public funds by unscrupulous leaders of most African countries leads to poverty, high debts, and other socio-economic associated problems" that retard development.[115] For example, "focusing exclusively on the top leadership, Transparency International estimates that Mobutu in Zaire and Abacha in Nigeria may have embezzled up to US $5 billion each.[116] The Global Witness reports, "several current leaders in Africa are plundering their own treasuries."[117] Including, "former Angola's President Jose Eduardo dos Santos, who it says keeps large sum in bank accounts abroad, and Equatorial Guinean President Teodoro Obiang, who calls oil revenue a 'state secret'."[118] Furthermore, "the Mwai Kibaki government in Kenya, which ousted President Arap Moi in an election in 2003, investigated embezzlement to the tune of $1 billion by former officials, and the notorious 'African Big Man' the late President Eyadema of Togo was seen as very

108. *Id.* at 242.
109. *Id.*
110. *Id.*
111. *Id.*
112. Poverty, Conflict and Development, *supra* note 22.
113. *Id.* at 19.
114. *See* ROBERT SEIDMAN, PUMZO MBANA & HANSON HU LI, AFRICA'S CHALLENGES: USING LAW FOR GOOD GOVERNANCE AND DEVELOPMENT (2006).
115. The Relationship between Poverty, Conflict and Development, *supra* note 22.
116. *Id.*
117. *Id.*
118. *Id.*

corrupt."[119] There have also been corruption charges including ongoing against African political leaders, their officials and "families who used embezzled funds to buy homes in France".[120] These were "Gabon's President Omar Bongo, Republic of Congo President Denis Sassou Nguesso, Burkina Faso President Blaise Compaore, President Teodoro Obiang Ngeuma of Equatorial Guinea, and Angolan President Jose Eduardo dos Santos."[121] Others are Nigeria political office holders who have been identified as corrupt,[122] and in spite of the current campaign against corruption in Nigeria by the Buhari-led government, little or no successful prosecution of corrupt political officials has been recorded. This is because of the weak legal frameworks and institutions in place in Nigeria, as well as clueless leadership style of Buhari.

The ineffective and weak legal frameworks in place in most African countries make it quite easy for corrupt funds to be stashed or siphoned overseas to foreign accounts. The "aim of the Rule of Law promotion more often than not was to transform local economies to better serve the interest of global investors, rather than improve the living standards of the local population."[123] This is coupled with sophisticated technology set up by the Western world that facilitates the transfer of corrupt funds overseas. The "United Nations Office on Drug and Crime notes that

119. *Id.*; Rami Azami, *Profligacy, Corruption and Debt*, DAILY TIMES (PAKISTAN) (February 10, 2005), https://journal.probeinternational.org/2005/02/10/profligacy-corruption-and-debt/.

120. Property, Conflict and Development *supra* note 22.

121. *Id.*; International Herald Tribune, *French Prosecutors Probe Embezzled Accusations Against African Leaders* (Dec. 1, 2008), http://www.iht.com/bin/print.php?id=6211623.

122. Some of the list of the alleged corrupt Nigerian politicians are as follows: Senate President Bukola Sariki, Rt. Hon Yakubu Dogara, Governor Aminu Tambuwal, Governor Lalong, Governor Abdullahi Umar Ganduje, Governor Nasir El-Rufai, Governor Samuel Ortom, Governor Ishaku Darius, Governor Rochas Okorocha, Governor Bindo Jibrilla, Minister for Transportation, Rotimi Amaechi, Minister for Mines and Mineral Resources, Kayode Fayemi, Minister for Labour, Chris Ngige, PDP Chairman, Uche Secondus, PDP ex-Financial Secretary, Olisah Metuh, Raymond Dokpesi, Dudafa Waripamo-Owei, Robert Azibaola, Saminu Turaki, Timipre Sylva, Murtala Nyako, Senator Bello Tukur, Senator Hunkuyi, Senator AbdulAzeez Ibrahim, Senator Adamu Aliero, Senator Danjuma Goje, Senator Abdullahi Adamu, Senator Joshua Dariye, Orji Uzor Kalu, Babachir Lawal, Aliyu Wammako, Sullivan Chime, Rabiu Kwankwaso, Abdullahi Adamu, Abubakar Mohammed, Bello Hayatu, Sen. AbdulAzeez Nyako, Senator Alkali Mohammed, Dr. Aliyu Modibbo, Senator Andy Uba, Senator Nazif, Senator Magnus Abe, Dakuku Peterside, Senator Silas Zwingima, Se. Binta Massi, Mal. Nuhu Ribadu, Dr. Idi Hong, Murtala Nyako, Jummai Al-Hassan, George Akume, Aminu Masari, Gali Na'abba, Barnabas Gemade, Audu Ogbe, COAS Dambazau, Oserheimen Osunbo, Masiliu Obanikoro, Adam Oshiomhole, Jim Nwobodo, Atiku Bagudu, Governor Ahmed Abdulfatah, Abubakar Sani Bello, Usman Saidu Nasamu Dakingari, Senator Lokobiri, Chinweke Mbadinuju Bada, Gbenga Bada. *These 66 Nigerian politicians have been listed as corrupt by the ruling and opposition parties*, BUSINESS INSIDER (Apr. 4, 2018), https://www.pulse.ng/bi/politics/these-66-nigerian-politician-have-been-listed-as-corrupt-id8204890.html. As well as corrupt ex-oil minister Diezani Alison Madueke (and so many others); Yomi Kazeem, *The most fascinating details in United States' fifty-four page case against Nigeria's corrupt ex-oil minister*, QUARTZ AFRICA (July 18 2017), https://qz.com/africa/1032997/nigeria-oil.corruption-diezani-madueke-and-kola-alukos-one57-manhattan-condo-luxry-yachts-and-ferrari-racing/amp/.

123. Boulanger, *supra* note 14; KOLAWOLE OLANIYA, CORRUPTION AND HUMAN RIGHTS LAW IN AFRICA (2016).

siphoning off funds by wealthy elites is doubly problematic in Africa."[124] It argues "that by distorting the Rule of Law and weakening the institutional foundation of economic growth corruption is the single greatest obstacle to economic and social development" in Africa.[125]

On another angle, Hernando de Soto, in his works 'the Mystery of Capital' rightly rationalized that 'Capital' is a legal institution; and made us to see reasons that everything in a market is built on the foundations of norms and mapped out regulations.[126] From a well-being perspective, the more these norms and regulations are streamlined to suit indigenous needs, the more efficient and active the Law becomes.[127] A good illustration is an event titled: "The Rule of Law in Afghanistan," which was organized in 2013 – what was known in Germany as 'Rechtskultren' program of the Forum Transregionale Studien.[128] The event "had invited the head of a Rule-of-Law promotion project of the GIZ, the leading German agency for development cooperation, called 'Strengthening Administrative Education in Afghanistan'".[129] The project aimed at a more efficient public administration by helping to establish basic and advanced training for senior-level public service staff in Afghanistan.[130] Two Fellows of the Rechtskulturen program were also invited to comment on the presentation of the project.[131] The project, which was (maybe naively) meant to show as an example of "encounter between theory and practice," however ended up (maybe predictably) in a show-case of the "abyss that separates the two world" (developed and developing) about how the notion of legal reform works in theory and in practice.[132] The "motivation of representative of the GIZ sent to Afghanistan with a mission to implement a project with pre-defined goals was to present successes of the project and to ask for scholarly advice about how to address the very specific difficulties and failures encountered so far."[133] The representative "was open to criticism, but not in a position to change the fundamental structure of the project" with pre-defined goals (that is '*transplanted'*).[134] In contrast, "the scholars criticized the underlying assumptions of development projects in general and this specific intervention in Afghanistan in particular."[135] Scholars "questioned based on their own empirical research in Afghanistan, basic concepts used in the project description and presentation, such as 'corruption' or the 'rule of law'".[136] Scholars pointed to the damage that was

124. Poverty, Conflict and Development, *supra* note 22.

125. *Id.* at 81.

126. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

127. *Id.*

128. Boulanger, *supra* note 14.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

done by the presence of Western experts on the ground [in Afghanistan], such as surge of prices for food or rent.[137] Or by the artificial economy that was created by the demands of these experts for interpreters, drivers or bodyguards,"[138] which were destined to collapse once the experts left – in this sense the reform project was not designed based on indigenous needs.[139] In this direction, it agrees with the argument that the "aim of Rule of Law promotion more often than not was to transform local economies to better serve the interest of global investors, rather than improve the living standards of the local population." This direction is not functional and does not serve the interest of the indigenous populations – it is therefore against the stipulations of the functional and well-being theoretical approaches as presented in this paper. Equally, this is not the proposition of the new approach that this paper proffers; rather the new approach of seeing Law as a facilitator will help take into consideration indigenous needs and distinctiveness, "thereby remove disagreements over reform priorities and improve efficiency and accountability."[140]

Thus, the focus on Law as a development policy directed to suit the distinctiveness of a particular local community, "shares a great deal with other efforts to replace political and economic thinking with a general appeal to technical expertise and ideas about best practice,"[141] which serves the interests of the indigenous people as an aid or facilitator to both economic and political approach to development.[142]

V. SUMMARY AND CONCLUSION

This paper examines the approaches to the Role of Law and the importance of Rule of Law in economic development process. It critics the current approach which sees Law as a 'tool or mechanism for development itself' – that is as an 'end in itself'. The central argument of the paper is that the Role of Law and the role of the Rule of Law in development process has to be reconfigured away from the notional transfer of Western institutions to developing countries, and is expected to be located in the specific needs and culture of these countries.

The paper finds that even though there appears to be a close correlation between efficient Rule of Law and economic growth – a very essential attribute of economic development, and between respect for the Rule of Law, justice, political stability, and sustainable development. However, because the Rule of Law is a multidimensional concept that connotes wide-ranging different attributes that are very difficult to measure the implication is that societies are capable of experiencing economic development with or without the Rule of Law depending on the cul-

137. *Id.*
138. *Id.*
139. *Id.*
140. Ikejiaku, *supra* note 2.
141. Murungi, *supra* note 73.
142. Jan-Erik Lane, *Good Governance: The Two Meanings of "Rule of Law"* 1 INT'L J. POL. AND GOOD GOVERNANCE 1 (2010).

ture, political leadership, and attitudinal belief of the indigenous population. A good example as presented in this paper is the case of China under Deng Xiaoping, in spite of its poor credentials on the Rule of Law.

The paper in assessing the approaches to the Role of Law finds that both the international transplanting and natural inherent approaches used by the international development community for promoting the Law in the form of legal and judicial reforms have made reasonable progress. However, the bottom line is that such progress recorded in transforming local economies is aimed towards serving the interests of global investors or the western countries that champion such legal reforms. The position of this paper is that, this direction from the functionalist point of view is not functional because it does not serve the interests and well-being of the indigenous populations.

In conclusion, the paper proffers for a new approach "in order to make the international development law agenda 'functional'; [t]he strategy would be to approach Law as a 'facilitator of development reform,' rather than as 'a tool for development itself.'"[143] This approach of seeing Law as a facilitator will equally help take into consideration indigenous needs and distinctiveness, "thereby remov[ing] disagreements over reform priorities and improve efficiency and accountability."[144] This is a new direction which highlights the importance or necessity of "focusing the international system's approach to Law as a 'means to facilitate' local empowerment, social cohesion, and justice that is, as an approach to development consistent with the life choices and development goals of indigenous populations, rather than as it has generally appeared as an 'end in itself'."[145]

143. Ikejiaku, *supra* note 2.
144. *Id.*
145. *Id.*

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