8. The present and prospective contribution of global private international law unification to global legal ordering

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1. INTRODUCTION

The relationship between private international law (PIL) and global governance has recently been the subject of intense scholarly attention, and for good reason. Globalization, mainly driven by private initiative – resulting in global production chains and markets; radically increased mobility of people, goods, services and capital; and instant sharing of information around the world through mass media and cyberspace – gives rise to multiple cross-border legal issues with PIL aspects. This happens in a world without a centralized system exercising legislative, executive or judicial power. A world without a central *government* depends, by default, on various forms of global *governance.*[1]

This state of affairs has given rise to two strands of scholarly reflection. A first strand, epitomized by the work of Alex Mills, highlights the inherent, 'hidden' global governance role of PIL. Mills' acclaimed book *The Confluence of Public and Private International Law*[2] criticizes the still prevailing view that PIL is just 'an aspect of national law, reflecting domestic ideas of "justice" and conceptions of private rights'.[3] Such a view fails to recognize the 'foundational principle' of justice pluralism which is inherent in PIL, even though it is predominantly embodied in domestic law. PIL rules reduce the potential for conflict between substantive private laws. PIL contributes to the global legal architecture by distributing regulatory authority between States and by reflecting public international norms – human rights and economic rights.

[1] According to Craig Murphy, the term 'global governance' was coined by the independent 'self-named "Global Governance Commission"' supported by the United Nations Secretary General, which reported in 1995. C.N. Murphy, 'The Emergence of Global Governance' in T.G. Weiss and R. Wilkinson, *International Organization and Global Governance* (London, 2014).

[2] A. Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge, 2009). The book advocates 'a change in the consciousness of academics, judges, practitioners and legislators, to replace the idea of the "conflict" of laws with the idea of the confluence of public and private international law', p 308.

[3] Ibid, p 298.

A second strand, exemplified by the work of Horatia Muir Watt, takes a more critical, sceptical stand to PIL and highlights its shortcomings, in particular in relation to the gross imbalances of private (economic) power in the world:

> [PIL] not only fails to do the job it is formally designed to do, but by carrying with it into the transnational arena, a set of assumptions borrowed from the liberal theory of state without any correlated concerted protection of the common good, it also ensures the legal promotion of such informal power in the name of private autonomy.

Her PILAGG initiative has inspired engaged debate and interdisciplinary research, culminating in what is to date the leading publication on our theme, *Private International Law and Global Governance*.[4]

The two approaches – one uncovering the unseen global governance role of PIL, the other highlighting its deficiencies and even complicity in maintaining global disorder – converge in their criticism of the national/international law dichotomy and the divide between public and private law, and consequently the current 'schism'[5] between PIL and public international law. Both advocate a view of PIL that is open to the interaction of all these fields of law. PIL can best be seen as being part of transnational law.[6] Also, both stress the 'untapped resources'[7] of, or hidden in,[8] PIL.

Both approaches also concur, however, in paying relatively little attention to PIL insofar as it is embodied in international, global sources. Alex Mills emphasizes the institutional role of the Hague Conference on Private International Law as an 'advocate of the international systemic perspective' of PIL,[9] but does not discuss, or illustrate his arguments with, the legal instruments the organization has produced and which it also services, or its potential in creating new instruments.[10] Likewise, the PILAGG project – perhaps because of its concentration on the unchecked exercise of informal economic power by private actors beyond the State – has not given special attention to the role and potential of global PIL instruments.[11]

It is true that global instruments concerning PIL – including foremost those produced and serviced by the Hague Conference on PIL – cover only a limited area of cross-border activity, and economic activity in particular. Yet they transcend national

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[4] H. Muir Watt, in H. Muir Watt and D. Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford, 2014). The quotation is from p 343.

[5] H. Muir Watt, 'Private International Law beyond the Schism' (2011) 2 (3) *Transnational Legal Theory* 347–427.

[6] Cf P. Jessup, *Transnational Law* (New Haven, 1956).

[7] H. Muir Watt (fn 4), p 344.

[8] A. Mills (fn 2), *passim*.

[9] Ibid, pp 215–16.

[10] Except for a reference to the confirmation of the 'international status of party autonomy in the context of jurisdiction' by the 2005 Hague Choice of Court Convention, p 293. See also his discussion of this instrument in Muir Watt and Fernández Arroyo (fn 4), pp 256–57.

[11] But see the contributions by A. Mills (previous fn), R. Wai, referring to the Choice of Court Convention (see also fn 66 below), and S. Corneloup, referring to the 1993 Hague Intercountry Adoption Convention, in Muir Watt and Fernández Arroyo (fn 4), pp 256–57, and 308–15.

PIL, which gives them particular significance – present and prospective, from a global governance perspective – regarding both their content and their form.

1.1 Regarding Content: Unification and Cooperation; Protection of International Private Rights

While 'the operation of private international law constitutes an international system of global regulatory ordering – a "hidden" (private) international law',[12] 'the international ordering constituted by [PIL] rules is not coordinated, but fractured and dissonant'.[13] In other words, 'conflict of laws contributes to transnational legal order, yet conflict of laws is itself transnationally disordered'.[14]

Unification of PIL, through global and regional instruments, aims to bring order to this conflict of national conflict of laws systems. Indeed, a growing number of such instruments not only establish regulatory ordering by unifying rules on jurisdiction of national authorities, applicable law or recognition and enforcement of foreign decisions – the triplet usually identified with PIL – but also create permanent forms of direct transnational institutionalized cooperation between national administrative authorities and courts in support of such regulatory ordering.[15] This latter feature has opened up new horizons, beyond the reach of national PIL systems, with potential still to be further explored. In addition, PIL instruments increasingly give expression to internationally recognized rights in their formulation of PIL rules.

1.2 Regarding Form: Multilateral Treaty Instrument

It is a characteristic of global PIL instruments that their content primarily deals with the legal relationships and transactions of private actors; yet where they take the shape of multilateral treaties or conventions, they form part of the general law of treaties. The international convention is listed in Article 38(1)(a) of the Statute of the International Court of Justice (ICJ) as a primary source of international law. But PIL lawyers are generally not well trained in viewing PIL instruments in the context of wider treaty law, or indeed in the general context of public international law. Similarly, public international lawyers seldom refer to PIL instruments.

Christopher Whytock[16] has helpfully linked the unification of PIL through global and regional instruments to the concept of transnational legal order (TLO), developed by Halliday and Shaffer. A TLO is 'a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law

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[12] Mills (fn 2) p 299.

[13] Ibid, p 304.

[14] C.A. Whytock, 'Conflict of Laws, Global Governance, and Transnational Legal Order', (2016) 1 *UC Irvine Journal of International, Transnational, and Comparative Law* 117, 119 (italics in the original).

[15] Cf H. van Loon, 'The Increasing Significance of International Cooperation for the Unification of Private International Law', in *Centrum voor Buitenlands Recht en Internationaal Privaatrecht, Universiteit van Amsterdam* (ed), *Forty Years On: The Evolution of Postwar Private International Law in Europe* (Deventer, 1990), pp 101–22.

[16] Fn 14.

across national jurisdictions'.[17] These norms 'engage legal institutions within multiple nation-states' and 'are produced by … a legal organization … that transcends … the nation-state'.[18] Establishing such norms is clearly beyond the reach of national, fractured PIL systems. By contrast, (global) PIL instruments engage not just the authorities of one jurisdiction, but of multiple States, and are developed not at the national level, but by intergovernmental organizations. Viewing the unification of PIL in a TLO perspective also helps to see PIL in the broader context of processes of public and private transnational law making, through both 'hard' and 'soft' law – for example, in the field of human rights and environmental (including climate change) law.[19]

Whytock concludes: 'there currently is no global conflict-of-laws TLO of general legal scope'. However, apart from two geographically limited TLOs – 'a highly institutionalized European … and a minimally institutionalized Latin American conflict of laws TLO':

> there is at least one global conflict-of-laws TLO with narrow legal scope – a global family law TLO – and another that is incipient – a global conflict-of-laws TLO for civil and commercial matters. Both TLOs have been produced at the transnational level by the Hague Conference on Private International Law.[20]

This is a recognition of the contribution of the work of the Hague Conference to transnational legal ordering, but one which invites further analysis and exploration.

This chapter falls into two sections. The first section will attempt to illustrate in more detail the contribution of Hague Conference work to global legal ordering. The second section will explore some future possibilities for global legal ordering through the development of global PIL instruments.

2. THE CONTRIBUTION OF GLOBAL PIL CONVENTIONS TO GLOBAL LEGAL ORDERING

Whereas the unification of substantive laws seeks to reduce legal diversity, PIL is based on acceptance of diversity of substantive laws, on openness to foreign concepts of justice – applying a foreign law or recognizing a foreign judgment may lead to an outcome different from the internal law or decision of the forum's courts[21] – while upholding certain vital national and transnational values.[22] Global PIL unification through multilateral treaties goes beyond national PIL in at least three respects: it (1) elevates the idea of justice pluralism to the global level; (2) orders the diversity of national PIL systems, thus ensuring continuity across borders of legal status, and family

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17 T. Halliday and G. Shaffer (eds), *Transnational Legal Orders* (Cambridge, 2015), p 5.
18 Ibid, p 15.
19 Ibid, Chapters 11–13, and 8.
20 Whytock (fn 14), 131.
21 Cf W. Goldschmidt's well-known *Derecho Internacional Privado – Derecho de la Tolerancia*, 10th ed (Buenos Aires, 2009).
22 Cf also A.V. M. Struycken, 'Co-ordination and Co-operation in Respectful Disagreement: General course', *Recueil des Cours/Collected Courses*, Vol. 311, 2011.

and business relations established under national substantive laws; and (3) reflects globally recognized human and economic rights.

The first aspect of global PIL unification enriches the idea of global justice – certainly a cornerstone of global governance – with the notion that justice in civil and to a large extent also commercial matters is in fact pluriform. The second aspect makes justice pluralism work at the global level and enables private actors to enjoy legal certainty and predictability in their civil and commercial relations and transactions around the globe. The third aspect connects legal pluralism with individual rights defined in other public international law instruments.

The principle of justice pluralism is firmly embedded in the Hague Conventions. Mutual openness to foreign laws and mutual recognition of foreign decisions are the rule. Exceptions are foreseen; but very significantly, their application – in particular with regard to purely national values[23] – must meet a high threshold (the well-known 'manifestly contrary to public policy' clause).[24]

Justice pluralism comes in a variety of forms. When in the 1960s the United States, Canada and other common law countries joined the Hague Conference, a development began – which continues today – aimed at bridging the differences between civil and common substantive law systems, but also differences *within* each of these two families, and between unitary and federal systems.[25] Bridging, while respecting, differences between secular and faith-based substantive legal systems was already a concern when, shortly after Egypt and Israel had joined the Hague Conference, the 1970 Hague Divorce Convention was drafted;[26] but this has since become a more prominent concern of the Conference.

Various governance strategies[27] have progressively been developed to make the Hague model of 'balanced openness' work for different fields of transnational human relations and transactions. These strategies aim to (1) reduce overlap of jurisdiction of national authorities; (2) ensure that the same law applies whenever an issue arises; (3) give effect to foreign decisions; and (4) establish direct institutionalized forms of judicial and administrative cooperation. Increasingly, these strategies have been related to governance principles and strategies in other fields of international law, in particular the field of human rights.

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[23] In those cases where public policy limits the application of foreign laws or the recognition of foreign decisions to give effect to norms of *international* law, the qualifier 'manifestly contrary' may, depending on the circumstances, become more questionable.

[24] For a concise overview of 'early innovations' introduced by the Hague Conference since the Second World War, see H. van Loon, 'The Global Horizon of Private International Law', Inaugural lecture (2015), *Recueil des Cours/Collected Courses*, Vol. 380, 2016, pp 1–108 (at pp 29–36). Parts of this chapter build and draw on this lecture.

[25] See id, 'Legal Diversity in a Flat, Crowded World: The Role of the Hague Conference', in *Revue hellénique de droit international* (2009) 62(2), 494–509; and in *International Journal of Legal Information* (2011) 39(2), 172–85; 'Embracing Diversity – The Role of the Hague Conference in the Creation of Universal Instruments', Ch 2 in V. Ruiz Abou-Nigm, M.B. Noodt Taquela (eds), *Diversity and Integration in Private International Law*, Edinburgh (Edinburgh University Press, 2019).

[26] Cf fn 53 below.

[27] Or, in the terminology of A. Mills (fn 2), 'strategies of "meta-justice"' (p 20).

2.1 Family Law

As we saw, Whytock refers to 'a global family law TLO' developed by the Hague Conference. He also correctly notes, however, that national 'settlement' varies – at least in terms of ratification of these Conventions.[28] There is indeed reason to single out the group of Conventions dealing, in particular, with children's issues.

2.1.1 The Hague Children's Conventions

The 1980 Child Abduction Convention,[29] the 1993 Adoption Convention, the 1996 Child Protection Convention and the 2007 Child Support Convention, with its Protocol on applicable law, are complementary not only to each other, but also to the protection of the rights of children and families under international human rights instruments.

A bird's-eye view of the history of the Hague Children's Conventions gives an idea of the development of justice pluralism, the nature and operation of the four strategies mentioned, and the interaction with human rights of children and families through these instruments.

Multilateral treaty making with specific regard to children started with the 1902 Hague Guardianship Convention, the rules of which were essentially based on the formal nationality link between children and States, with a strong sovereignty connotation. It then moved on to a system, laid down in the 1961 Child Protection Convention, which made more room for the child's habitual residence as a connecting factor,[30] thereby enhancing proximity and access to justice for children to child protection authorities. Yet States still were not ready to abandon their attachment to the nationality principle in the case of parental child abduction. It fell upon the 1980 Child Abduction Convention to deal with this issue.

The 1980 Convention leaves no room for the nationality factor, with its clearly discriminatory effect in the abduction context. It creates an obligation, with narrow exceptions, for States to return the child to the State of the habitual residence. Its 'openness' to foreign legal systems is remarkable: the State to which the child has been wrongfully removed must determine any breach of custody rights not in terms of its own law, but of that of the State of the habitual residence.[31] The 'horizontal' ordering of both jurisdictional and applicable law issues is embedded in a system of direct institutional cooperation through 'Central Authorities'. It is the foremost international instrument – now ratified by 101 States – to give shape to the 'vertical' human rights obligation to 'combat the illicit transfer and non-return of children abroad' as

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[28] Whytock (fn 14), 134.

[29] The Convention now has 99 States parties. For the full title, text, status of signatures, ratifications and accessions, and further details concerning this and all other instruments and documents of the Hague Conference, see www.hcch.net.

[30] In part as a result of the *Case concerning the application of the 1902 Convention between Netherlands and Sweden* before the ICJ, ICJ Reports, 1958, p 55. See H. van Loon and S. De Dycker, 'The Role of the International Court of Justice in the Development of Private International Law', in *Mededelingen van de Koninklijke Vereniging voor Internationaal Recht, 140, One Century Peace Palace, from Past to Present*, 2013, p 73 (at p 87), also accessible at www.knvir.org/wp-content/uploads/2014/02/preadvies-2013.pdf.

[31] Art 3(1)(a).

(subsequently) defined in Article 11 of the United Nations (UN) Convention of 1989 on the Rights of the Child (CRC).[32]

The 1996 Convention,[33] revising the 1961 Convention, finally integrates all four strategies, while making human rights imperatives the nuts and bolts in transnational situations. It grounds adjudicatory jurisdiction in the principle of habitual residence, while introducing a mechanism for the transfer of jurisdiction to a State of closer proximity to the child.[34] It incorporates key provisions of the Child Abduction Convention, while providing additional means to ensure that the return is not just prompt, but also safe.[35] Its applicable law provisions are again based on the child's habitual residence, but also ensure that parental responsibility subsists when the residence changes, thus guaranteeing continuity of such responsibility across borders.[36] It establishes a complete system for recognition and enforcement of the protection measures taken, subject to a limited number of grounds for refusal, two of which reflect human rights imperatives.[37] It establishes a system of permanent cross-border cooperation through 'Central Authorities', to support the taking and implementation of measures of protection.

The Convention has a wide scope, stretching from parental responsibility and contact between children and parents to public measures of protection or care, and from matters of representation to the protection of children's property. Moreover, it bridges secular legal systems and those based on Islamic law by making special provision for *kafalah* as a child protection measure. The Convention thus assists, in cross-border situations, in the implementation of a number of provisions of the CRC.[38] Conversely, the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography refers in its Preamble to the 1996, 1980 and 1993 Conventions.

Together with the 1980 Convention, the 1996 Convention constitutes the basis for a living global network of Central Authorities, as well as of 'liaison judges'. In contrast with the Central Authority device for which the Conventions make provision, the institution of liaison judges has been developed without an express treaty reference. An elaborate system of good practice guides and other publications, and a specialized database, further support the operation of the Conventions.[39]

The 1993 Adoption Convention[40] and the 2007 Convention on Child Support[41] and its Protocol complete the portfolio of modern Hague Children's Conventions. In

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[32] Cf H. van Loon, 'Protecting Children Across Borders: The Interaction between the CRC and the Hague Children's Conventions', in T. Liefaard and J. Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child* (Leiden, 2017), pp 31–46.

[33] Fifty-two States parties, including all 28 EU Members; the US has signed but not ratified.

[34] Which may include that of the child's nationality, Arts 8 and 9.

[35] Arts 7, 11 and 23–28.

[36] Art 12 (2).

[37] Arts 23(2)(b) and (c).

[38] Including Arts 9, 10, 12, 18, 20, 22 and 35 CRC.

[39] See www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction and www.hcch.net/en/instruments/conventions/publications1/?dtid=3&cid=70.

[40] One hundred and one States parties, including all EU Member States and the US.

[41] Forty-one States parties, including the EU and the US.

striking contrast with its 1965 predecessor,[42] essentially based on the traditional triplet of jurisdiction, applicable law and recognition, the 1993 Convention is characterized by the cooperation strategy, which supports the recognition of the resulting adoptions,[43] in combination with various substantive provisions. It has created an international benchmark with an orderly, rules-based, State-supervised global intercountry adoption system. Any intercountry adoption of any child under the Convention is the joint responsibility of the State of origin and the receiving State.[44] This enables States to give effect to their obligations under the CRC, including to the subsidiarity principle: reuniting children with their birth family or, if that is not possible, finding an alternative family for children in their own country has priority over intercountry adoption.[45] The Convention has had a far-reaching impact on internal laws and procedures, helping to improve States' child protection systems and stimulating programmes for supporting birth families.[46]

As yet, it has not been possible to unify rules on adjudicatory jurisdiction in maintenance (support) cases at the global level;[47] but the 2007 Hague Child Support Convention with its Protocol – building on the 1956, 1958 and 1973 Hague Maintenance Conventions on applicable law, and recognition and enforcement, as well as the UN Convention on the Recovery Abroad of Maintenance of 20 June 1956 – combines the strategies of recognition and enforcement and of administrative cooperation, and, through the Protocol, of applicable law. The 2007 Convention goes far beyond its predecessors in terms of access to procedures and assistance for obtaining support. Interestingly, it takes into account the differing capabilities of industrialized and emerging economies by offering a more and a less generous system for providing legal assistance,[48] and a more and a less elaborate system for recognition and enforcement.[49]

Together, the modern Hague Children's Conventions may be seen as a highly institutionalized TLO concerning children and families, with a manifest link to that of global human rights.

2.1.2 Other Conventions in the family law area

However, there is potential for far more interaction between PIL and human rights in other areas of the law of persons and families. The CRC is exceptional among human rights instruments insofar as it deals with several cross-border issues. By contrast,

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[42] Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (no longer in force).

[43] Chapter V, Arts 23–27.

[44] Art 17(c).

[45] Preamble and Art 4(b); cf Art 21(b) CRC.

[46] See the brochure published on the occasion of the 25th anniversary of the Convention, 2018, at https://assets.hcch.net/docs/ccbf557d-d5d2-436d-88d6-90cddbe78262.pdf.

[47] The main problem here is that while most countries are willing to accept that the maintenance creditor's habitual residence is sufficient to establish judicial jurisdiction (hence its inclusion in the 2009 EU Maintenance Regulation), other countries – in particular, the US – require the existence of minimum contacts between the maintenance debtor with the forum State; see *Kulko v Superior Ct*, 436 US 84 (1978).

[48] Arts 15 and 16.

[49] Arts 23 and 24.

other, older human rights instruments, with some exceptions,[50] tend to focus on human rights within one legal order only. Take the right to marry and found a family guaranteed by the UN Covenant on Civil and Political Rights (ICCPR) in its Article 23.[51] No mention is made of the international aspects of marriage and its effects. Yet should it not follow, in a mobile world society, that when a marriage is validly concluded in one country, it should in principle be considered valid in others? This is exactly the principle upon which the forward-looking 1978 Hague Marriage Convention[52] is built: it recognizes the validity of a marriage validly concluded not just in other Contracting States, but in *any* State.

This would seem to call for a more intense institutional dialogue between organizations active in the fields of PIL and human rights, supported by their member States. For example, the UN Human Rights Committee might include in its examination of reports under Article 23 of the ICCPR the issue of the cross-border implications of the right to marry – that is, the certainty and predictability necessary to uphold that right in cross-border situations. This might extend to issues such as the recognition of divorces validly established abroad which may have an impact on the right to a (second) marriage. Like the Marriage Convention, the 1970 Hague Divorce Convention deserves to play a much larger role in a human rights perspective of ensuring continuity of family relations across borders.[53]

Similarly, the 2006 UN Convention on the Rights of Persons with Disabilities (CRPD) has cross-border implications, a number of which are addressed by the 2000 Hague Protection of Adults Convention and the 1996 Child Protection Convention. Yet to date, there is little awareness of these links. It would be significant progress if the Committee on the Rights of Persons with Disabilities, which monitors the CRPD, were to systematically recommend ratification of these Hague Conventions to States parties.[54]

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[50] For example, the UN Convention of 28 July 1951 Relating to the Status of Refugees, and its Protocol of 31 January 1967, and the UN International Convention of 18 December 1990 on the Protection of the Rights of All Migrant Workers and Members of their Families.

[51] Art 23 ICCPR provides:

> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

[52] The Convention is often referred to in the methodology debate in Europe on recognition of situations validly established abroad as opposed to submitting them to the conflict of law rules of the forum, stimulated by P. Lagarde's seminal article, 'Développements futurs du droit international privé dans une Europe en voie d'unification, quelques conjectures' (2004) *RabelsZ.* 225.

[53] Not least because it offers a basis for the recognition, under certain conditions, of unilateral divorces existing under Jewish and Islamic law (Art 1).

[54] Cf Conclusions and Recommendations of the EC–HCCH Joint Conference on the Cross-Border Protection of Vulnerable Adults held in Brussels, 5–7 December 2018,

All in all, it may be concluded that, in contrast to the Hague Children's Conventions, other Hague Conventions in the family law area – although they form a largely coherent whole – have not yet had the impact they should have in a mobile world. In respect of these instruments, it would probably be more correct to speak of an 'incipient' or 'potential' TLO. More work needs to be done to raise their global governance potential (see also section 3).

2.2 Legal Cooperation

Before turning to the second global TLO identified by Whytock, 'for civil and commercial matters', we need to consider a group of Hague Conventions not included in his overview: the 1961 Apostille, 1965 Service, 1970 Evidence and 1980 Access to Justice Conventions.[55] It is true that these instruments do not apply the strategies of jurisdiction, applicable law and recognition and enforcement of decisions; they rely, in contrast, on the fourth strategy – cooperation. They apply across the board to matters of family law as well as commerce and trade, and are widely used around the globe. The Hague Conventions on the protection of children and adults have built on the cooperative machinery established, in particular, by the 1965 and 1970 treaties.

The Service and Evidence Conventions bridge important differences between civil law and common law systems of civil procedure. Together with the Access to Justice Convention,[56] they ensure equality of arms and thus support Article 14(1) of the ICCPR[57] in in cross-border situations. Similar to what the Conference has done for the Children's Conventions, an elaborate system of monitoring, completed by good practice guides,[58] supports the worldwide operation of the legal cooperation Conventions. They have had a great impact on regional[59] and bilateral instruments, and on national law. There is good reason to consider them together as a highly institutionalized TLO on legal cooperation.

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https://assets.hcch.net/docs/88f10f24-81ad-42ac-842c-315025679d40.pdf, stressing the complementarity of the 2000 Hague Convention and the CRPD, and inviting the UN institutions and the Council of Europe, the EU and the Hague Conference to cooperate with a view to raising awareness of, and promoting, the 2000 Convention and their respective work to support the implementation and operation of that Convention.

[55] With 118, 75, 62 and 28 States parties, respectively.

[56] These three Conventions are successive revisions of the Convention on Civil Procedure of 1 March 1954, itself a revision of the Convention on Civil Procedure of 17 July 1905, both of which are still in force.

[57] Art 14(1) ICCPR:

> All persons shall be equal before the courts and tribunals. In the determination … of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law …

[58] See, for example, https://assets.hcch.net/docs/ff5ad106-3573-495b-be94-7d66b7da7721.pdf and www.hcch.net/en/publications-and-studies/details4/?pid=2728&dtid=3.

[59] For example, the 2007 and 2001 EU Regulations on Service and Evidence in the Member States.

2.3 Civil and Commercial Matters

Whytock identifies an 'incipient global conflict of laws TLO for civil and commercial matters' produced by the Hague Conference. While its legal scope is relatively broad, this TLO 'enjoys only a very limited degree of institutionalization'.[60] It is true that as regards most of the existing Hague Conventions in this field, there is very little apparent settlement at the national level – at least in terms of ratification. In any event, recent legislative activity at the Conference makes the question relevant again of how the bridging of substantive law differences through the strategies of jurisdiction, applicable law, recognition and enforcement and cooperation, in combination with the shaping of 'vertical' private rights, plays out in the field of commerce and trade.

In respect of adjudicatory jurisdiction, the Hague 'Judgments Project' is instructive. The initial idea, launched in 1992, was to draw up a global judgments convention including required and prohibited bases of original jurisdiction, leaving an area of jurisdiction to national law (the 'mixed Convention' idea proposed by Arthur von Mehren). By the turn of the century, it had become clear that this idea – at least when it was to apply to a fairly broad area of civil and commercial law – was too ambitious. It failed in part due to differing politico-economic perspectives, in particular at the time between the EU and the US.[61]

The way forward was first to prepare an instrument on choice of court agreements and resulting judgments, and then move on to a broader one on recognition and enforcement.

The Choice of Court Convention introduces a number of innovations, thus supporting 'legal ordering by private parties' and expanding it by offering parties – especially small and medium-sized enterprises – the alternative of commercial arbitration to civil court litigation. Party autonomy, as the 1991 Basle Resolution of the Institut de Droit International recognizes, has a foundation in international human rights instruments.[62] The Convention enhances party autonomy, notably by introducing the presumption that the parties' choice of court is exclusive,[63] and by excluding the defences of *forum non conveniens* and *lis pendens.*[64]

Obviously, however, the Convention would have fallen short as a global governance instrument if it had not set limits to party autonomy. It expressly excludes choice of

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[60] Whytock (fn 14) 137.

[61] See A. von Mehren, 'Theory and Practice of Adjudicatory Authority in Private International Law: A Compararative Study of the Doctrine, Policies, and Practices of Common-Law and Civil-Law Systems', General Course *Recueil des Cours/Collected Courses*, Vol. 295, 2002, at pp 408–25, with further references, and F. Pocar and C. Honorati (eds), *The Hague Preliminary Draft Convention on Jurisdiction and Judgments*, Proceedings of the Round Table held at Milan University on 15 November 2003, Milan, 2005. See also, on the Hague Judgments Project, the chapters by A. Bonomi and R. Brand in this book.

[62] See the Resolution 'The Autonomy of the Parties in International Contracts Between Private Persons or Entities', www.idi-iil.org/app/uploads/2018/06/1991_vol_64-I_Session_de_Bale.pdf.

[63] Art 3(b).

[64] Art 5(2).

court agreements relating to consumer transactions[65] and employment contracts (including collective bargains) – even where such agreements are concluded after the dispute has arisen – as well as a number of other matters, including in the field of family law and succession. Also, the Convention gives the court of a State other than that of the chosen court, and the court requested to recognize and enforce the judgment of the chosen court, a number of tools to prevent unjust outcomes. The Convention therefore cannot be qualified as 'render[ing] marginal or exceptional what are standard regulatory concerns in private law about external effects of contractual relations on third parties, and protective concerns for parties to contractual relations',[66] but rather as a balanced PIL instrument.[67]

The work on a new Convention on recognition and enforcement of foreign judgments in civil or commercial matters was completed on 2 July 2019. Although this Convention will not bring order in terms of original adjudicatory jurisdiction, it will bring long-awaited uniformity and effectiveness regarding the treatment of foreign judgments. This will be of particular use in the relations between developed and emerging economies, and among emerging economies, many of which have played an effective part in the negotiations. Contrary to the Choice of Court Convention, the Convention includes judgments involving consumers and employees, while taking care to protect them. If broadly ratified, the new Convention will significantly contribute to global governance, since national rules on recognition and enforcement of foreign judgments widely differ at present.

The 2015 Principles on Choice of Law in Commercial Contracts constitute a further effort, in parallel with the work on the Choice of Court Convention, to reinforce party autonomy at the global level, here in respect of applicable law.[68] They are principles, not binding rules.[69] The soft law form lessens their force as a TLO, but has made it possible to propose new solutions beyond what would have been possible in a binding treaty.

For example, the Principles allow the parties to choose 'rules of law' that are not rules of State law, but rather rules that are 'generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the forum provides otherwise'.[70] This opens the way for parties to choose, for example, the

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[65] Cf, for a discussion on the protection of weaker parties, in particular in the context of e-commerce contracts, D.J.B. Svantesson, 'The Choice of Court Convention:—How Will It Work in Relation to the Internet and E-Commerce?' (2009) 5 *JPIL* 517.

[66] Cf R. Wai, 'Private v Private, Transnational Private Law and Contestation in Global Economic Governance', in Muir Watt and Fernández Arroyo (fn 4), pp 34–53 (at p 51).

[67] The Convention has been a source of inspiration for the recast Brussels I Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Arts 25, 31).

[68] See M. Pertegás and B.A. Marshall, 'Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts' (2014) 39 *Brooklyn Journal of International Law* 975 *et seq.*

[69] Therefore, they do not stand in the way of existing binding instruments such as the 1955 Hague Sales Convention, the 1994 Inter-American Convention and the 2008 Rome I Regulation, all of which admit the principle of party autonomy.

[70] Art 3.

substantive rules of the UN Convention on Contracts for the International Sale of Goods (CISG)[71] as rules of law governing their contract in situations in which the CISG would not otherwise apply according to its own terms, or the UNIDROIT Principles of International Commercial Contracts. Currently, such a choice is generally not afforded to parties litigating before national courts.[72]

Like party autonomy in respect of choice of court, contractual party autonomy cannot be unlimited; and like the Choice of Court Convention, the Principles exclude consumer transactions and employment contracts, whether concluded before or after a dispute arises, thus leaving the regulation of party autonomy in these matters to national or regional law.[73]

By their very nature, soft law instruments are easier to review than binding treaties.[74] One possibility for future work on the Hague Principles, mentioned in its Commentary, might be the determination of the law applicable to contracts in the absence of a choice of law agreement; another, as we have suggested elsewhere,[75] might be to provide more guidance in those instances where they now refer back to, and rely on, national law. For example, the provisions on overriding mandatory rules and public policy (Article 11) might be elaborated further in light of the global context in which the Principles purport to operate and the importance of corporate responsibility to respect core internationally recognized human rights in that context, as highlighted by the UN Guiding Principles for Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework.[76]

Whytock does not refer to the Hague Principles and focuses on the Conventions, finding that they are not widely ratified. But he rightly notes that 'non-ratification does not necessarily mean a lack of national settlement or … concordance between the

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[71] The United Nations Convention of 11 April 1980 on contracts for the international sale of goods, Art 1 of which defines its geographical scope.

[72] The EU Rome I Regulation 593/2008 on the law applicable to contractual obligations, for example, permits the parties to incorporate a non-State body of law or an international convention into their contract only by reference – that is, subject to, not in lieu of, the law designated by the Regulation. In contrast, in international commercial arbitration, it is undisputed that parties may choose non-State law.

[73] Paraguay's statute of 2015 introducing the Hague Principles into its law also excludes franchising, agency and distribution contracts from its scope.

[74] Cf, for example, the ongoing work on the UNIDROIT Principles, www.unidroit.org/work-in-progress-studies/studies/contracts-in-general/1363-study-l-principles-of-international-commercial-contracts.

[75] H. van Loon, 'The Global Horizon of Private International Law' (fn 24), No 59.

[76] www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. As courts or arbitral tribunals apply, or take into account, State public policy or overriding mandatory rules, these domestic norms may reflect international human rights norms. However, having regard to the transnational situations in which courts and arbitral tribunals are called to apply the Principles, it would be helpful to remind them of the special responsibility businesses have to respect those norms. This would suggest adding to Art 11 a phrase such as: 'When applying this Article, courts and arbitral tribunals shall be mindful of internationally recognised human rights norms that may inform the public policy (*ordre public*) or overriding mandatory provisions of the law of the forum or other state concerned.'

transnational … and the national and local levels'.[77] Indeed, the principle of party autonomy, introduced by the 1955 Hague Sales Convention and elaborated in later Hague Conventions (eg, the 1978 Agency Convention), has influenced regional and national law around the world. The idea that party autonomy may extend to property relations (1985 Hague Trusts Convention, 2006 Hague Securities Convention) has had an impact beyond Contracting States. The 1971 Traffic Accidents Convention and 1973 Products Liability Convention have had a certain influence on the EU Rome II Regulation on the law applicable to non-contractual obligations.

3. FUTURE POSSIBILITIES FOR PIL INSTRUMENTS IN SUPPORT OF GLOBAL GOVERNANCE

3.1 Facilitating Access to Foreign Law

As a result of the growing global interdependence of economies, societies and cultures, judges, legal practitioners, government officials and the general public are increasingly seeking access to foreign law.[78] A global conference jointly organized by the Hague Conference and the European Commission in 2012 confirmed 'the need for, and the advantages of, co-operative mechanisms to be developed at the global level to facilitate access to foreign law'.[79] Research conducted by the Hague Conference, including through meetings of experts, resulting in the adoption of the Guiding Principles to be Considered in Developing a Future Instrument, has outlined several options for such a global instrument.[80]

So far, however, no further work has been undertaken in this regard. Yet the need for access to foreign law will continue to grow, in part as a result of the increasing impact of regional and global PIL instruments. The development of a new instrument on access to foreign law is an obvious candidate for global PIL unification in support of global governance.

3.2 Ensuring Continuity of Personal Status and Family Relations across Borders

Globalization creates an increasing need for a global legal architecture that enables individuals and families to navigate the diversity of laws in the world without being unduly frustrated in the exercise of their fundamental rights. Article 28 of the Universal Declaration of Human Rights, according to which 'Everyone is entitled to a social and

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[77] Whytock (fn 14), 137.

[78] Cf the chapters by Y. Nishitani and L. Teitz in this book.

[79] www.hcch.net/en/news-archive/details/?varevent=248.

[80] The Guiding Principles, attached to the Recommendations and Conclusions of the Joint EU–Hague Conference meeting (see previous fn), have inspired the Electronic Legal Material Act, adopted by the US Uniform Law Commission, and are now in force in 20 States; see www.uniformlaws.org/Act.aspx?title=Electronic%20Legal%20Material%20Act, Comments on Sections 5, 7 and 8.

international order in which the rights and freedoms set forth in this Declaration can be fully realized', may, in the context of contemporary globalization, be viewed as implying a recognition of this need. Continuity of personal status and family relations across borders, in particular, may be seen as an emerging human rights imperative in itself.[81]

This is an important point because it supports, and lends urgency to, a comprehensive agenda for the global unification of PIL in the area of the law of persons and families, embedding it in the broader public international law context of the protection of human rights. It reinforces the significance of work currently being done in this field by the Hague Conference (the Parentage/Surrogacy Project; 'family agreements involving children'), but also of work that, for the time being, has been discontinued, such as civil protection orders and cohabitation outside marriage, including registered partnerships.[82] It also gives an impulse to the active promotion around the world of existing instruments dealing with marriage and divorce, their property consequences, as well as wills and succession or, where necessary, their revision (cf Part II A(2) above). The fact that some of these instruments, including the 1978 Matrimonial Property and 1989 Successions Conventions, while having had little success in terms of ratifications at the global level, have influenced regional work, in particular in the EU,[83] may inspire an approach whereby the regional instruments would constitute, in turn, the starting point for renewed efforts to deal with these complex family property issues at the global level.

3.3 Linking PIL Unification to the United Nations 2030 Agenda

The 2030 UN Agenda Transforming Our World: The 2030 Agenda for Sustainable Development[84] includes a number of global governance goals to which global PIL unification could contribute. Two of these are migration and environment.

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[81] See H. van Loon, 'Ensuring Continuity of Personal Status and Family Relations across Borders: The Interaction between Private International Law and Human Rights', in H. Muir Watt et al. (eds), *Global Private International Law – Adjudication without Frontiers: The Global Turn in Private International Law* (London, 2019, 530–38).

[82] Cf the Conclusions and Recommendations of the Council of the Hague Conference of 2018 and 2017, https://assets.hcch.net/docs/715fc166-2d40-4902-8c6c-e98b3def3b92.pdf; https://assets.hcch.net/docs/77326cfb-ff7e-401a-b0e8-2de9efa1c7f6.pdf.

[83] For example, Regulation 2016/1103 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, influenced by the 1978 Hague Matrimonial Property Convention; and Regulation 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, influenced by the 1989 Hague Successions Convention.

[84] https://sustainabledevelopment.un.org/post2015/transformingourworld.

3.3.1 Migration[85]

Although a growing issue in many parts of the world, migration is still essentially left to unilateral, national policy making, even – in respect of third countries – in an integrated area such as the EU.[86] The 2030 Agenda includes migration in the global development framework for the first time. Goal 10.7 calls on States to 'facilitate orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies'.[87] On 10 December 2018 the United Nations adopted the non-binding Global Compact for Safe, Orderly and Regular Migration.[88]

Migration is a major source of PIL issues, many of which are dealt with by global and regional PIL instruments. But may PIL conversely contribute to governance regarding migration? Obviously, regulating migration in all its facets, including issues relating to permanent integration of migrants in the receiving State, would be overambitious. Yet certain aspects of migration might lend themselves to regulation though a global legal framework inspired by global PIL unification, focused on those forms of migration that require direct institutional cooperation, in particular temporary or circular migration. This would also contribute to several objectives of the 2018 Global Compact.

A proposal to this effect was submitted and discussed at the Hague Conference, but failed to obtain consensus.[89] It continues to be discussed in legal doctrine.[90] Three

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[85] See also the chapter by V. Ruiz Abou-Nigm in this book.

[86] A global legal framework for people on the move exists only for refugees, the 1951 UN Convention relating to the status of refugees and its 1967 Protocol. Regarding economic migrants, the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which emphasizes broad substantive rights for migrants, has been ratified mostly by developing countries, not by receiving countries.

[87] Cf IOM, Migration in the 2030 Agenda, https://publications.iom.int/system/files/pdf/migration_in_the_2030_agenda.pdf.

[88] www.un.org/pga/72/wp-content/uploads/sites/51/2018/07/migration.pdf.

[89] A proposal to this effect, submitted by the Permanent Bureau as a possible topic for work either at the Hague Conference or in some other – perhaps ad hoc – forum, was discussed at the Conference from 2006 to 2013. It was withdrawn, again on the Permanent Bureau's initiative, because no consensus could be reached on the proposal at that time. Cf 'Some reflections on the utility of applying certain techniques for international cooperation developed by the Hague Conference on Private International Law to issues of international migration', General Affairs and Policy, Preliminary Document No 8 (2006); Updates: Prel Doc No 23 (2007); Prel Doc No 6 (2008); Prel Doc No 8 (2009); Prel Doc No 7 (2010), www.hcch.net/en/governance/council-on-general-affairs/archive-2000-2015-, under Meetings of 2006–10. And cf the author's 'Vers un nouveau modèle de gouvernance multilatérale de la migration internationale', *Vers de nouveaux équilibres entre ordres juridiques, liber amicorum H. Gaudemet-Tallon* (Paris, 2008) pp 419 *et seq*.

[90] Cf the chapter by V. Ruiz Abou-Nigm in this book; and see S. Corneloup, 'Can Private International Law Contribute to Global Migration Governance?', in *Private International Law and Global Governance* (fn 4) pp 301–17 and Institut de Droit International, 2017 Hyderabad *Resolution on Mass Migrations*, Art 22 of which reads as follows:

> *Conclusion of a legal framework instrument on mass migration*: States are encouraged to negotiate a basic legal instrument, of a universal character, governing direct cooperation

aspects of temporary or circular migration would benefit from a form of direct institutional cooperation based on a multilateral framework: (1) institutionalizing the implementation of migration programmes mutually agreed by States of origin and receiving States; (2) combating trafficking and smuggling through the creation of a licensing and monitoring system for intermediaries; and (3) facilitating the easy, cheap and safe transfer of remittances.

3.3.2 Cooperation in the implementation of mutually agreed temporary migration programmes

In order to make temporary or circular migration programmes work, a certain degree of institutionalization is needed, with responsibilities defined for countries of origin and receiving countries, and channels and modes of cooperation.[91] As in the case, for example, of the 1993 Hague Adoption Convention, a network of national government bodies would ensure both internal policy coordination and cooperation with counterparts in other countries participating in the multilateral treaty framework.

Such a cooperative framework would support several objectives of the Global Compact, including Objectives 3 – 'Provide accurate and timely information at all stages of migration'; 4 – 'Ensure that all migrants have proof of legal identity and adequate documentation'; 5 – 'Enhance availability and flexibility of pathways for regular migration'; 6 – 'Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work'; 7 – 'Address and reduce vulnerabilities in migration'; 11 – 'Manage borders in an integrated, secure and coordinated manner'; 12 – 'Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral'; 14 – 'Enhance consular protection, assistance and cooperation throughout the migration cycle'; 18 – 'Invest in skills development and facilitate mutual recognition of skills, qualifications and competences'; 21 – 'Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration'; 22 – 'Establish mechanisms for the portability of social security entitlements and earned benefits'; and 23 – 'Strengthen international cooperation and global partnerships for safe, orderly and regular migration.'

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between States of origin and host States of mass migration flows, including temporary migratory flows.

[91] For example, countries of origin would ensure that migrants are well documented, free to leave the country, assisted in keeping contact with their families and entitled to return and reintegrate. Countries of destination would provide full information to migrants, prior to their departure from the country of origin, about their rights and duties and employment conditions, provide the necessary visas and work permits, monitor the implementation of work and residence permits and so on. They would also cooperate to establish joint training programmes and, where necessary, organize the return of the migrant.

3.3.3 Cooperation in establishing and monitoring a system of licensing and regulation of intermediaries facilitating migration

The involvement of intermediaries in the movement of people across international borders requires global regulation.[92] In addition to the criminal route, a treaty framework could establish certain minimum requirements as to expertise, experience, financial structure and objectives and supervision to which any agency or person involved in the recruitment of international migrants should be subject, and establish a system of licensing by national government bodies local on that basis. Again, the 1993 Adoption Convention could provide inspiration for such a system.

Such cooperation would, in particular, advance Global Compact Objectives 6 – 'Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work'; 7 – 'Address and reduce vulnerabilities in migration'; 9 – 'Strengthen the transnational response to smuggling of migrants'; 10 – 'Prevent, combat and eradicate trafficking in persons in the context of international migration'; and 11 – 'Manage borders in an integrated, secure and coordinated manner'.

3.3.4 Cooperation in facilitating the easy and cheap transfer of remittances

Remittances sent home by international migrants are often vital to their families, and even communities, and critical as a major source of income for many countries of origin. There is a role for States here to ensure that these money transfers are cheap, fast and safe; hence Goal 10.c of the 2030 Agenda: 'By 2030, reduce to less than 3 per cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 per cent.' The global treaty framework could ensure that countries of destination facilitate access to, and transparency of, the financial markets; and countries of origin ensure that families, in particular in remote areas, have access to financial services and receive their money. Joint programmes would provide assistance to counsel migrants, recipients and communities in countries of origin to make effective use of remittances.

Such cooperation would, in particular, advance Objective 20 of the Global Compact: 'Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants.'

Institutional cooperation with these three aims would require a light, flexible multilateral treaty framework. It would need to be binding to create the institutional infrastructure, but would only support temporary or circular migration programmes mutually agreed by States of origin and receiving States.

3.3.5 Environment

The 2030 Agenda is pervaded by concerns about the environmental challenges, including climate change, that the world community faces. One way in which PIL is significant here is its role in civil lawsuits through which citizens seek relief to obtain

[92] Abuses may take the form of trafficking (the coercive or deceptive transfer of people independent of their will for purposes of exploitation) or smuggling (a consensual transaction for the purpose of circumventing immigration controls), but in practice the two are often difficult to distinguish.

damages for, or injunctions to halt or reduce, environmental harm.[93] Such litigation may have cross-border dimensions, either because the environmental harm and the event causing it are located in different States, or because legal action is taken against a transnational company in the courts of its home State over environmental harm allegedly caused by that company, its subsidiary or contractors in the host State where they are operating. In the latter case, the cross-border element is not the effect of the harm, but the corporate legal structure or the economic organization of the company.[94]

The technical feasibility of a global instrument on adjudicatory jurisdiction, applicable law and recognition and enforcement of judgments, supported by a system of institutional cooperation at the global level, has been the subject of extensive research and discussion, including in the context of the Hague Conference on Private International Law. But this has not yet led to a decision to embark on negotiations on a global instrument in that forum.[95]

In the light of the 2030 Agenda, this state of affairs is unsatisfactory.[96] Based on recent developments in cross-border civil litigation and the emerging normative paradigm shift regarding environmental corporate responsibility,[97] these are some ingredients of a global PIL framework for civil litigation in environmental matters.

3.3.5.1 Jurisdiction Exclusion of *forum non conveniens* (FNC) regarding jurisdiction of the courts of the State of the defendant's domicile is crucial to avoid situations such as those that arose in cases such as *Bhopal* and *Chevron*.[98] Just as the Choice of Court Convention excludes FNC for exclusive choice of court agreements

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[93] See H. van Loon, 'Principles and building blocks for a global legal framework for transnational civil litigation in environmental matters' (2018) 23(2), *Uniform Law Review* 298–318.

[94] J. Ebbesson, 'Transboundary Corporate Responsibility in Environmental Matters: Fragments and Foundations for a Future Framework', in G. Winter (ed), *Multilevel Governance of Global Environmental Change* (Cambridge, 2006) pp 200 *et seq.*

[95] The Permanent Bureau prepared several studies on the topic, in particular, 'Note on the law applicable to civil liability for environmental damage' (A. Dyer), May 1992, *Actes et Documents* (*A&D) XVIIth Session, Tome I, Miscellaneous Matters*, pp 187 *et seq*; 'Note on the law applicable and on questions arising from conflicts of jurisdiction in respect of civil liability for environmental damage' (A. Dyer), April 1995, *A&D XVIIIth Session, Tome I, Miscellaneous Matters*, pp 72 *et seq*; and 'Civil Liability Resulting from Transfrontier Environmental Damage: A Case for the Hague Conference?' (C. Bernasconi), April 2000, *A&D XIXth Session, Tome I, Miscellaneous Matters*, pp 320 *et seq*. In April 1994, the University of Osnabrück, in cooperation with the Hague Conference, organized a scientific colloquium, the proceedings of which – mostly in English, some in French – may be found in C. von Bar (ed), *Internationales Umwelthaftungsrecht I* (Cologne, 1995).

[96] At the regional level, the Council of Europe in 1993 adopted a Convention providing substantive rules on civil liability, access to information and procedural matters, combined with rules on jurisdiction of the courts and recognition and enforcement of judgments; and in 2003 a comparable instrument, limited to damage caused by industrial accidents on transboundary waters, was adopted by the UN Economic Commission for Europe (UNECE). But neither instrument has entered into force.

[97] See 'Principles …' (fn 93), paras 6–12.

[98] See 'Principles …' (fn 93), paras 28–29.

falling within its scope (see section 2.3, above), it should be possible to exclude FNC for the purposes of cross-border litigation in environmental matters.

3.3.5.2 Close connection between claims as a ground of jurisdiction over multiple defendants where the court has jurisdiction based on the domicile of one This would facilitate litigation on environmental damage in which foreign subsidiaries of parent companies are involved. Article 8(1) of the Brussels I Regulation (recast) serves as an example.

The plaintiff should be able to sue the defendant in a non-contractual action in the court in the State either where the damage occurs or may occur, provided that the damage was reasonably foreseeable by the defendant, or where the event giving rise to the damage occurred.[99]

3.3.5.3 Applicable law The law of the State in which the damage occurs should apply, provided that the occurrence of the damage was reasonably foreseeable by the defendant, with an option for the person seeking relief to base his or her claim on the law of the State in which the event giving rise to the damage occurs.[100]

3.3.5.4 Recognition and enforcement Recognition and enforcement of a judgment could follow the model of the Hague Judgments Convention of 2 July 2019, including its Article 10 (punitive damages). No reciprocity should be required.

3.3.5.5 Judicial and administrative communication and cooperation It would be helpful to provide basic machinery for direct transnational cooperation between national administrative focal points ('Central Authorities'), with a view to facilitating cross-border service of documents, taking of evidence and transmission of applications for legal aid where such legal aid is available in the requested State;[101] authenticating the legal position of an organization or of plaintiffs under a class action;[102] providing information to foreign nationals and residents concerning decision-making processes on

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[99] Cf Art 10 (b) of the 1999 Preliminary draft Hague Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters:

> A plaintiff may bring an action in tort or delict in the courts of the State a) in which the act or omission that caused injury occurred, or b) in in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

See also the chapter by M. Mantovani and B. Hess in this book.

[100] The option is inspired by Article 7 of the EU Rome II Regulation on the law applicable to non-contractual obligations, but qualified in a way similar to the alternative jurisdiction ground.

[101] Cf 1965 Hague Service, 1970 Hague Evidence and 1980 Hague Access to Justice Conventions, on which D. McClean, 'Procedural Matters', C. von Bar (fn 95), p 195 (pp 202–03); 1993 North American Agreement on Environmental Cooperation, Art 6; 1998 UNECE Aarhus Convention Art 9.

[102] D. McClean (previous fn), p 204.

the environment in which they are allowed to participate;[103] and, generally, exchanging information on environmental matters with other focal points.[104]

As a bottom-up way of enforcing environmental standards, civil tort litigation forms an essential, effective complement to top-down governmental enforcement, in particular in the transnational context. This is an area where unified PIL rules would make a significant contribution to global governance.

[103] North American Agreement on Environmental Cooperation, Art 4; UNECE Aarhus Convention, Arts 6–8.

[104] This could – perhaps going beyond civil aspects – include exchange of information on progress made in implementing global agreements concerning the environment, including the 2015 Paris Agreement which, although it requires States parties to enhance public participation and public access to information (Art 12), does not – contrary to the non-binding 2011 OECD Guidelines for Multinational Enterprises Chapter VI Environment – establish a system of national focal points communicating and cooperating with each other across borders.