

PILAGG Final Meeting 2011-2012

May 11, 2012

Here is a report of what has been discussed within the Final Meeting of PILAGG, on May 1st, 2012, at Sciences Po's lecture hall Jean Moulin (13 Rue de l'Université, 75007, Paris). It has been articulated around three panels (theory, methods and institutions of PIL) and two main speeches (the judge of the International Court of Justice Antonio Cançado Trindade and the Harvard Law School scholar David Kennedy).

Table I: Theory, Function, Foundations and Ambit of PIL

The day started by one of the main questions discussed within this year of PILAGG workshop: which are the function, the foundations and the ambit of PIL? This first table was composed by Sabine Corneloup (Université de Bourgogne), Gilles Cuniberti (Université de Luxembourg) and Alex Mills (University College London), and moderated by Horatia Muir Watt. The three main questions proposed within this topic to the participants were: how would you describe the function of PIL today? What are the global issues for which you feel that its tools could be developed? Is the distinction between public and private international law still valid?

Sabine Corneloup started by recalling the classic functions recognized to PIL, and particularly the coordination of legal systems. PIL saw an evolution within its methods to ensure such a function, admitting for example the *méthode de la reconnaissance* as an alternative to the bilateral rule. She also pointed out that PIL rules may nowadays have a regulatory function, favoring connecting factors that are not only based on proximity, but also on substantive results expected particular kinds of situations. This regulatory function arises further difficulties within the differentiation between the public and the private spheres in transnational issues.

Gilles Cuniberti answered to the questions proposed assuming that PIL has an utility, since it helps practitioners to solve disputes involving foreign elements. However, the existence of an autonomous purpose or project for the discipline might be questionable, the traditional answer being, indeed, that such a function of PIL does not exist. This assumption is based on the fact that PIL rules are before all private law rules, that do not arise questions of sovereignty. According hence to this traditional European vision of PIL (an inheritance of Savigny), based on neutrality, PIL cannot have a political purpose. However, this answer directly deduced from traditional doctrine shall also be nuanced. Firstly, Gilles Cuniberti reminded that, as pointed out by Sabine Corneloup, some choice-of-law rules pursue a material purpose. Then he elaborated on a possible function of PIL in a particular category of cases: those involving purely commercial situations, in

which actors would not need a particular protection. In these cases, PIL might pursue a facilitating purpose, by establishing simple and mechanic conflict rules.

Alex Mills proposed that PIL might be understood as a form of public international law, since it intervenes as a set of secondary rules attributing regulatory jurisdiction to a particular legal system. PIL might hence be assimilated to rules of public international law in jurisdiction. According to him, one's views on PIL depend on a choice: how do we choose to see PIL, according to what is more important to us?

Horatia Muir Watt then asked the participants whether the distinction between public and private international law is still relevant. In the view of Alex Mills, there are differences between public and private international law but they are not distinct. Public international law can only operate between sovereign States, although PIL can coexist at a federal and an international level. PIL should intervene within this variable geometry and allow the coexistence between federal and international rules. The difficulty here is to determine the extraterritorial effects of a regulation and its coordination within the international system. We need rules for the allocation of PIL rules.

Sabine Corneloup admitted that the distinction between public and private international law may still make some sense, but cannot completely reflect the actual situation. She departed from the definition of PIL given by Batiffol and Lagarde (the discipline which governs international relations involving private individuals), to assume that it does not anymore correspond to the reality, since many of such relations are nowadays submitted to public regulation (as for example in financial markets). Some private actors also escape from PIL by submitting themselves directly to transnational material norms, such as *lex mercatoria*.

According to Gilles Cuniberti, some questions, as the definition of States, necessarily remain governed solely by Public international law. He questioned hence the opportunity of using methods of PIL in conflicts of public law rules. This issue is debated in United States, where it has been perceived as limiting political compromise in the resolution of such conflicts. However, American PIL is based on the idea of a conflict of sovereignty, and has a methodology articulated around the false conflict, different from the one followed in Europe. In our case, where conflict rules are mechanical and have another structure, they would not be adapted for questions involving sovereignty issues. Alex Mills finished by reminding the utility of PIL as a possible tool to solve conflicts between different fields of law (arising the question of the necessity of a certain hybridism and its risks).

Finally, Horatia Muir Watt asked which would be, according to the scholar guests, the new issues of global governance. Sabine Corneloup admitted that PIL would only be able to solve conflicts involving public law rules if it abandoned the idea that there are always true conflicts. However, the mere transposition of neutral conflict rules would not be a good solution. She then presented the example of the asylum law to demonstrate a case where PIL rules are not adapted

to a field outside the one for which they were specially elaborated. Gilles Cuniberti then presented the example of sovereign debt to show how PIL may be involved in global governance issues. Alex Mills finished by defending that there is no neutrality in PIL rules, as it had been highlighted by American scholarship. Hans Van Loon (Hague Conference on Private International Law) also participated to the debate by pointing out a new trend of PIL, enhancing the cooperation between judges and administrative authorities, which is based on instruments of public law.

Conference: Access of individuals to international justice

Antonio Cançado Trindade (International Court of Justice)

Antonio Cançado Trindade, who was introduced to the audience by Diego P. Fernández Arroyo, shared his experience within international jurisdictions, and how it impacted on his views of international law. According to him, the fact that international litigation normally involves State parties does not mean that the reasoning must necessarily be State-centered. The technique supported by the majority, according to whom only States are subjects of international law, has nonetheless revealed its insufficiency in some recent cases, as the Pulp Mill case, opposing Argentina to Uruguay. The situation of individuals has nonetheless been incidentally considered in some decisions, as the one regarding Navigational and Relating rights (Costa Rica v. Nicaragua), the Diallo case (Republic of Guinea v. Democratic Republic of Congo), the advisory opinion on Kosovo's declaration of independence, the case opposing Belgium to Senegal on Questions relating to the Obligation to Prosecute or Extradite and the recent decision on the Jurisdictional immunities of the State, opposing Germany to Italy. These decisions show that some elements may escape from the traditional reasoning purely focused on States. Furthermore, until the end of the XVIIIth century, international law literature considered the relations within the international community as well as the situation of populations. The abandon of this second aspect appeared later.

The creation of international tribunals on the purpose of protecting populations against their own State contributed to an evolution of international law. The advisory opinion n° 18/03 of the Inter-American Court of Human Rights on the Juridical Condition and Rights of Undocumented Migrants recognized the principle of non discrimination as part of mandatory rules of international law. It led to an important judicial revolution aiming to put the emphasis on the access to justice.

The adjudication of cases involving massacres reveals another example of disputes that could not be decided from a purely interstate perspective. In the cases of the Inter American Court of Human Rights involving massacres in Guatemala and in Peru, it has been decided that

plaintiffs should not necessarily be identified at the moment of the request, but just to be identifiable. It was justified by the fact that because of practical considerations, it was not reasonable to impose plaintiffs to establish their identity at the moment of the request.

However, in the case opposing Georgia to Russian Federation about the Application of the International Convention on the elimination of All Forms of Racial Discrimination, the International Court of Justice declined its jurisdiction for a question of admissibility related to the requirement of previous negotiations between the States. In order to reach this decision, the Court based itself on conventions that were not related to the protection of individuals. This solution is open to criticism, since jurisdiction clauses are not to be interpreted in a mechanical way, without taking into account the human relations underlying the case. For this reason, the judge Cançado Trindade submitted a dissenting opinion in this case. Diego P. Fernández Arroyo underlined that perhaps the main reason for broadly recognizing the individuals' rights *vis-à-vis* states is the very personal background of most judges, who come often from the executive branch of their governments. Judge Cançado Trindade agreed and recalled that a particular question involves the legal representation of victims in cases of massacre. In the IACHR case *Baena Ricardo v. Panama* (270 plaintiffs v. Panama), the representatives could not understand themselves, what led to important difficulties for the Court. The participation of individuals and private organizations remain however an important issue in proceedings before the International Court of Justice, since any of their remarks is sent to the adverse party, which might present it to the Court (what clearly reduces the possibilities for individuals to be heard).

Horatia Muir Watt asked the judge Cançado Trindade whether it was possible to formulate arguments that could be accepted by the majority within its own conception of international law (based on relations between States). The judge answered that it was a difficult problem, since judges dissent in questions that are at the core definition of international law. Sometimes they may reach an agreement (as in the cases *Diallo* or the opinion about Kosovo), but the main problem might be the strategic underlying their reasoning, which is more inspired by arbitration proceedings than by judicial Courts. Antonio Cançado Trindade supports however that what is important is not only to judge cases, but to render decisions that are in conformity to justice (what could not be seen in the case *Georgia v. Russian Federation* and *Germany v. Italy*).

The audience also questioned the judge Cançado Trindade about the conservative behavior of the judges of the International Court of Justice (whether it is voluntary or just blind), the conception of justice that should conduct the argumentation and the consideration of *jus cogens* by the Court. In his opinion, the behavior of the majority is not blind, but is just the reflection of their own experiences. The justice underlying the argumentation should derive from the conception that judges have of their own mission. For him, the issue is not only to consider human rights at any cost, but assume, when they are applicable, that such considerations should prevail. Regarding *jus cogens*, Antonio Cançado Trindade does not understand the position

followed by the majority of the court, which is hostile to the application of these principles.

Table II: Methods: Impotence, Decline or Renewal?

The third panel of the day was dedicated to the methods of PIL, and was composed by Jeremy Heymann (Université Paris 1 Panthéon-Sorbonne), Yannick Radi (Leiden University), Geneviève Saumier (McGill University). The chair was Mathias Audit (Université Paris-Ouest).

Jeremy Heymann started by highlighting a movement on the methodology that, by the principle of proportionality, reduces the omnipresence of multilateralism or bilateralism and leads to a renewal of unilateralism and a justice based on result. A movement for new methods may be perceived in European Union, by the interference of the freedoms guaranteed by the Treaties on the choice of law analysis (as it may be seen in the cases *Garcia Avello* and *Grunkin Paul*, as well as in the decisions concerning corporate law). What is questioned is not the bilateral method itself, but the results to which it leads, and which are submitted to a proportionality test (or a control of necessity). The same phenomenon may be perceived in the field of human rights, within the ECHR case-law. Differently from the EU frame, which is closed, the ECHR has an universal perspective which may lead to question the reach of the principle of proportionality: is it inclined to become universal? It would then lead to a renewal of unilateralism, on the shape of a justice based on results.

Geneviève Saumier proposed an analysis of the methods of PIL from the perspective of their adaptation to a global governance analysis. Against the neutrality, which is a basic principle of PIL, public policy is today not only a secondary method, but a main one. It reveals a decline of neutrality. Another evolution may be perceived in the principle of party autonomy, which has been extended to other fields of law. It also points to emergent challenges, such as the evasion from State regulation. She rises however the question of the impotence of PIL before the issues proper to global governance. In human rights litigation, indeed, Quebec courts remain very reluctant to modify the nature of jurisdiction rules and take into account the substance of the claim, what leads to solutions preventing plaintiffs from seeking damages. In these cases, a possibility of renewal could be favored by guidelines limiting the use of discretionary rules on jurisdiction (as *forum non conveniens*). Another insufficiency of PIL rules relates to the application of non State law. It is generally forbidden before State courts, but widely admitted in arbitration, what favors a choice of this latter kind of adjudication, diminishing accountability before national tribunals. There is, hence, a certain impotence of PIL, but there is also a possibility for renewal, coming above all from non State actors.

Yannick Radi adopted a moderated positivist view in order to analyze the questions involving public and private law. One of the main difficulties is the problem of non-State actors

and the transnational activity of corporations. It leads to a circular problem, requiring a cooperation between States. He proposes different solutions. Firstly, the responsibility of the State of origin, on the basis of an obligation of due diligence imposing to States the prevention and the sanction of wrongdoings committed by actors linked to them. Secondly, he proposes an extension of methods, allowing for example a proportionality test within investment arbitration, in order to consider the legitimate expectations of the parties when deciding on cases where the law has an open texture (fair and equitable treatment, indirect expropriation). In these cases, it is not possible to distinguish a conflict of norms (between human rights and BITs, for example), but rather a conflict of interests, for which the test of legitimate expectations could be appropriated. Finally, he rises the question of the applicability of non State norms, which leads to a problem of authority, depending on the criteria of jurisdiction within global governance.

As concluding remarks, Jeremy Heymann proposed that the principle of proportionality places individuals at the same level of States, since they can exercise some pressure in order to obtain a change of legislation (as in the ECHR Wagner case). Geneviève Saumier and Yannick Radi questioned whether the movement of transparency seen in investment arbitration (and encouraged by the overlap between private and public interests proper to this field) could have effects on commercial arbitration. Coming to the point of proportionality, Jeremy Heymann concluded that there is no prevailing method, but rather an overlap between old and new methods.

International Law, Political Economy and Center-Periphery Analytics

David Kennedy, Harvard Law School

David Kennedy delivered an address based on his forthcoming article “The Political Economy of Centers and Peripheries”, which will be published in the Leiden Journal of International law. Before his speech, Mikhail Xifaras (head of the Doctoral Program of SPLS) and Horatia Muir Watt recalled that PILAGG was born in June 2011 as a “stream” of the IGLP (Institute for Global Law & Policy) Workshop organized by David Kennedy at Harvard Law School. The talk dealt with the interplays between political economy, international law and the core-periphery relationships. Although Kennedy’s thoughts could hardly be restated in couple of lines, what follows will attempt to briefly sketch out some of the main ideas. The focal concern is the absence from international law scholarly inquiry of attempts to grasp the complex dynamics of power, domination and influences within the global order. On the contrary, what one witnesses are a progressive specialization and a retreat of production of knowledge within isolated precincts of different fields of expertise. In this context, Kennedy reflects on what would it take for

international law to get more responsive to the political economy of the world. According to Kennedy, there are two major avenues for research: a thorough and a nuanced examination of center-peripheries dynamics within socioeconomic systems, and the study of the role of legal arrangements in the distribution of power and wealth between the centers and the peripheries, in the reproduction of inequalities and injustices, and in the challenge of these patterns. It is a call to re-frame (or to reinterpret) international law – doctrines, institutions, discourses, professional styles, sensibilities and postures – through the core-periphery analytics and to envision the legal project as a terrain for specific political engagement.

[David Kennedy's paper may be download from:

<http://blogs.sciences-po.fr/pilagg/files/2012/05/David-Kennedy-Paper-PILAGG-FM.pdf>]

Table III: Institutions, Method, Policy and Governance?

The final table was dedicated to institutions, and composed by Frédérique Mestre (UNIDROIT) and Hans van Loon (Hague Conference on Private International Law). The table was moderated by Diego P. Fernández Arroyo.

The first question submitted to the table was: what are the most methodological changes imposed by policy choices? Frédérique Mestre started by stating that UNIDROIT considers questions related to governance, but that it was difficult to apprehend to concept of policy choice (in the sense of *choix politique*). UNIDROIT pursues some objectives, such as legal certainty (which leads to the reduction of risks and costs) as well as the respect of a certain equity. UNIDROIT policy choices evolved within the years. Its activity was initially mostly academic, furnishing studies to international organizations. Then it also pursued the codification of private law. UNIDROIT is however a inter-governmental organization, created under the Society of Nations, and its activity is hence financed by States.

The moderator reminded that the nature of the rules adopted by UNIDROIT is often criticized, because they are the result of a strong participation of experts and a weak State participation. Although recognizing the problem of legitimacy underlying the question, Frédérique Mestre acknowledged that the activity of UNIDROIT could not have evolved in a purely inter-governmental structure. The group worked however without having the purpose of imposing a new law for the entire world, and in a transparent way. She finished by reminding the statement made by the French member of the council of direction of UNIDROIT, who proposed that the lawyer ignoring UNIDROIT principles within the elaboration of an international contract would commit a professional fault.

Hans van Loon also positioned himself against the idea of policy choice, which seems to assume that the institution works following a particular policy and purpose. According to him, the reality is more complex. The statute of The Hague Conference mentions the purposes of the

organization, which refer however to its first flourishing period, and did not change since that time. In the definition of the purpose proposed by the statute, there is a fundamental number of policy considerations, which can be summarized on four points. Firstly, a focus on private interests (neither private rights nor States interests). Secondly, a focus on rules reflecting the diversity among legal systems (jurisdiction and choice of law), what implies the issue of neutrality. There are two ways to perceive this underlying principle: adopting the classic conception of neutrality, or assuming that the rules of another State are not necessarily worse than yours. Thirdly, the necessity of practical and empiric research, and fourthly, the use of multilateral binding instruments in order to allow predictable results. The Hague Conference also pursues more specific objectives, such as empowering individuals to choose the applicable law, establishing rational default choice of law rules, protecting the identity of people, allowing recognition of judgments, etc. The relative weight of these policy objectives vary from a country to another. All these aspects have to be negotiated; the outcome is unpredictable and the policy objectives of the convention are not fixed. The Hague Conventions however assume the possibility of public policy exceptions, what permitted States to prevent for ex. the application of German law prohibiting marriages between German nationals and Jews.

Diego P. Fernández Arroyo then asked the participants about the decision of adopting conventions on financial markets, and the methodology chosen. Were the organizations pressured on the choice of the topic? Hans van Loon answered that there was no pressure, and that the importance of the topic arose from a discussion with States, because of its economic importance and the cost of determining the applicable law in this field. He recognized, however, that the reason for the lack of success of the convention is due to private lobbying. Frédérique Mestre then reminded that UNIDROIT succeeded the Hague Conference on the topic, proposing to address similar questions from the perspective of the substantial law. The process was open, transparent, and pursued the objective of improving the internal stability of financial markets and the compatibility between different systems.

The moderator also questioned the participants about the problem of observers, which represent different interests, in addition to those of the States. This problem is not due to the organizations, but exists. Hans van Loon reminded that both organizations are relatively strict on the admission of observers. Frédérique Mestre answered that there was no real tension within UNIDROIT, and that the work of experts was appreciated as being technical, independent and functional. Certain elements permit nonetheless States to defend their politic preferences. Diego P. Fernández Arroyo mentioned some problems encountered by UNCITRAL about observers' participation in the elaboration of international instruments, pointing out that, in any event, non-state interests are not only represented by certain observers but also by many significant "state" delegates.

A new question then discussed the problem of the acceptation of the instruments elaborated

by the organizations. Hans van Loon answered by reminding that the organizations work in the shadow, and have some difficulties on imposing themselves. A further success of certain instruments is promoted by mechanisms of cooperation between organizations, as the United Nations, UNICITRAL, UNIDROIT and The Hague Conference, whose work is complementary. Frédérique Mestre invoked a problem of bureaucratic inertia, reminding however examples of successful instruments, such as the Cape Town Convention.

Gilles Cuniberti insisted on this question, asking the participants whether there exists a mechanism established by the organizations in order to evaluate the chances of success of their instruments, avoiding expenses for conventions that would never be ratified. Hans van Loon affirmed that The Hague Conference organized studies of feasibility, by which the operators are consulted in order to know if there is an interest on adopting a new instrument. There is also more work on the promotion of adopted conventions. Yannick Radi pointed out that a further collaboration between institutions is necessary. Sabine Corneloup asked whether it is possible to bypass lobbying after the adoption of the convention, but Hans van Loon acknowledged that such a solution is difficult to obtain for the organizations. Jeremy Heymann highlighted the State-centered character of both organizations, and asked whether it is due to the fact that the conventions are not elaborated for private operators. Frédérique Mestre answered however that organizations, States and operators work together.

Horatia Muir Watt reminded that The Hague Conference has been a methodological pioneer at least twice in its history: by the Convention on products liability, and by the child adoption conventions establishing administrative cooperation. She then asked whether a new methodological break is envisaged for the organization's new works on migration and displace of populations, allowing for example a human rights approach. Hans van Loon admitted that this approach is useful and necessary, but not necessarily within the activity of The Hague Conference. Horatia Muir Watt concluded highlighting that people are participating, and knowledge is being constructed within the work of these organizations, leading to the consolidation of a specialized regime. The challenge is however how the expert knowledge may fit in the reflection on how these regimes are constructed.

To conclude, Diego P. Fernández Arroyo announced that the results of the production of this extremely rich year will be gathered in a book to be published by Oxford University Press in a new collection fairly called "Law and Global Governance Series".