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IS INTERNATIONAL LAW RELINQUISHING ITS EXCLUSIVELY PUBLIC LAW NATURE?

*Hercules Booysen**

I. INTRODUCTION

The most basic question confronting any student of international law is certainly, what *is* international law? What norms does it encompass and what relationships does it govern? As we have seen through the ages, these questions can be answered highly philosophically, elaborately or fundamentally. This is, however, neither the intention nor the purpose of this article. The purpose is very simply to address the ambit of international law. What norms should be classified under international law and should this classification be restricted to norms of a public law nature?

Is it correct to regard international law as consisting solely of public law norms and to describe it as “public international law?” Is international law basically made up of norms regulating the relationships between states? Or are there also norms which are primarily applicable to ordinary private individuals? Is there such a thing as a “private-law leg” of international law or should there be such a leg? According to what criteria should norms of a private or public law nature be classified? Should one look only at the source of a norm or also at its nature?

These are very basic questions of both theoretical and practical value. The practical value can be illustrated by two examples. First, many states have agreed to Specific Commitments, in terms of the General Agreement on Trade in Services, to open up their markets for legal services in “international law”¹ or “public international law.”² A

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1. See Schedule of Specific Commitments of Switzerland, pt. II.1 of the Sector-Specific

person admitted to a foreign country to render legal services in international law or public international law must know what these terms encompass. Is there a difference between international law and public international law? Do conventions such as the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading of 1924 as amended in 1968 (Hague-Visby Rules), or the Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention of 1929) qualify as international law?

These conventions all have their origins in public international law, but are intended to regulate relationships between individuals. In accordance with their nature, therefore, they can be regarded as falling within the realm of private law. There are a multitude of these conventions establishing what may be termed an international transport law, subdivided into international maritime, air, road and rail transport law. In the same vein, one may identify an international law of contracts in light of the United Nations (CISG); and an international law of bills of exchange in light of the UN Convention on International Bills of Exchange and International Promissory Notes of 1988, the Geneva Conventions on the Uniform Law of Bills of Exchange of 1930, and the Geneva Convention on the Uniform Law of Cheques of 1931. These examples are not exhaustive.

One should also ponder whether there can be any international law not "public" in either source or nature. Here again the answer is not a simple "no." The International Chamber of Commerce in Paris is a non-governmental institution which has published two sets of rules: the International Rules for the Interpretation of Trade Terms (Incoterms);³ and the Uniform Customs and Practice for Documentary Credits (UCP).⁴ The legal force of these rules is controversial, but one may regard them as an embodiment of custom or general principles of law recognized by states.⁵ The CISG also makes usage of the standard of whether parties knew, or ought to have known (this standard is regular-

Commitments.

2. See Specific Commitments of the European Communities and their Member States, pt. II.1.A.a of the Sector-Specific Commitments. It is expressly stated that EC law is excluded from public international law. See also the Australian Specific Commitments pt. II.1.A.a of the Sector Specific Commitments.

3. See International Chamber of Commerce, INCOTERMS 1990 (1990) (ICC Publication No. 460), for the 1990 version of the Incoterms.

4. See International Chamber of Commerce, Uniform Customs and Practices for Documentary Credits (rev. 1994) (ICC Publication No. 500).

5. See HERCULES BOOYSEN, INTERNATIONAL TRANSACTIONS AND THE INTERNATIONAL LAW MERCHANT 221, 237 (1995).

ly observed in international trade by parties to contracts in the particular trade), applicable to an international contract of sale.⁶ The rules of the ICC and the usage which the CISG refers to may be regarded as 'international' without the prefix "public."

In practical terms, if one is permitted to practice international law in a foreign country, can one also practice international transport law, international law of contracts, Incoterms, and the UCP? Whatever the answer, one cannot argue that these norms are national or intrinsically linked to a particular state.

Second, many constitutions regard the rules of customary international law as part of the law of the state.⁷ As long ago as 1890 when Britain still ruled the waves, the British Colonial Courts of Admiralty Act 1890 provided that in reaching their decisions, the Colonial Courts of Admiralty should have regard to international law and the comity of nations.⁸ The admiralty courts enjoyed jurisdiction over issues like salvage and collisions at sea. The ships involved in admiralty proceedings were more often than not owned by private persons. Primarily these courts had nothing to do with the relations between states. To give meaning to any of these provisions, the definition of international law is vital. If international law is circumscribed as a legal system governing the relations between sovereign states,⁹ it can only become relevant when these relations are affected. If neither the rights nor the duties of a state will be affected by an issue, international law will find no application. If, however, international law is seen as including norms dealing with topics such as international transport law and the international law of contracts, its relevance and municipal application will be greatly enhanced. For example, the international law which an admiralty

6. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 9(2), reprinted in 19 I.L.M. 671, 674 (1980) [hereinafter CISG].

7. See S. AFR. CONST. (May 8, 1996) ch. II (Bill of Rights), art. 25, regarding the way in which the German Basic law regards the general rules of public international law to be an integral part of federal law. English cases also regard customary international law as part of English law. See also cases in DAVID J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 75 (4th ed. 1991).

8. Colonial Courts of Admiralty Act 1890, 53 & 54 Vict. ch. 27, § 2(2).

9. For the usual definitions of international law, see ALFRED VERDROSS & BRUNO SIMMA, UNIVERSELLES VÖLKERRECHT-THEORIE UND PRAXIS 6 (3d ed. 1984); LASSA OPPENHEIM, INTERNATIONAL LAW 4 (Jennings & Watts eds., 9th ed. 1993); I.A. SHEARER, STARKE'S INTERNATIONAL LAW 1 (11th ed. 1994). Although the latter's definition is wider than the usual one which includes only the relations between states, international law is still primarily regarded as governing the *inter se* relationships of states. This is further borne out by the content of the work. According to the name and content of IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990), it is clear that public international law is a law governing the relationships between states.

court will then have to apply will include the general principles of, or any custom developed in, international transport law.

However, one must admit that even in municipal law the correct sphere of application for a specific branch of law cannot always be precisely determined. In the South African case *Reck v. Mills*¹⁰ it had to be decided whether part of a sea wreck could be removed. The court of first instance applied the Roman law which pertains to the ownership of wild animals to the facts. The appellate court decided the relevant rules were those protecting the possession, but not the ownership, which a person enjoys in respect of a thing. The applicable law, however, should have been the rules relating to salvage.¹¹

The correct description of a subject should, of course, not only depend on its practical relevance. From a purely jurisprudential point of view, it is important to describe a subject correctly. How a subject is described academically may influence court decisions although the law does not necessarily find its practical application in jurisprudential demarcations and subdivisions. Certain norms exist and function effectively in practice although legal science neither describes nor classifies them correctly—if it does so at all. For example, the rules governing an agreement between the State of New York and Gauteng, a province in South Africa, can possibly be found in what is described as public international law's treaty law (although neither of the entities possesses treaty capacity), or in one of their laws of contract, or in a book on constitutional law, or even in administrative law. Such an agreement is not easily classified with the result that the governing legal norms have not yet crystallized into one of the established branches of jurisprudence.

II. THE NEED FOR A PRIVATE-LAW LEG OF INTERNATIONAL LAW

A. General

Just because a need exists, does not mean that the law already contains the norms to govern it. Although a need does not necessarily create the law, this in fact very often happens in international law where there is no legislature to create the required norms. Although there is no legislature which can be petitioned for legislative action, there is also no need to wait for such action.

There are certain specific areas of the law where it is clear that a need for an international private-law leg of international law has already been identified. Sometimes adequate norms to address that need already exist in practice, although jurisprudence may not necessarily

10. *Reck v. Mills*, 1990 (1) SA 751(A).

11. See Hercules Booyens, *Die toepassing van die wisselwet om vaderskap te bepaal en van die Romeins-Hollandse Reg op berging*, 53 THRHR 595 (1990).

have kept pace by describing the norms. In other instances, the need for a universal private law has been identified although the norms still appear to be lacking. It is possible to refer to only a few of these areas.

The following examples involve situations where no particular national law should, or can, govern the relations between non-state entities, and where these relations transcend national borders. In other words, we are investigating international relations which are unmistakably private in nature.

B. Participants in International Law

1. Multinational Corporations

The international role of big trading companies is not a phenomenon of the twentieth century. Even in the epoch of modern international law, which is usually traced back to the beginning of the seventeenth century, commercial interests dominated the development of international law.¹² Commercial companies played a decisive role during the colonial period of international law with many countries actually being colonized by commercial companies. In the United States, chartered British companies like the London Company, the Plymouth Company, and the Hudson Bay Company, played an important role in the colonizing process and exercised political and administrative powers far beyond those of a mere commercial enterprise. The same was true of the General Chartered Dutch East India Company, which actually began the colonization of South Africa.¹³ These companies which existed in virtually all European Colonial powers, were actually endowed with sovereign power.¹⁴ Their legal position in the international law jurisprudence of the nineteenth century was controversial¹⁵ and has not yet been finally established.¹⁶

In the latter half of the twentieth century, the international community turned its attention to the legal position of multinational corporations. The General Assembly's Charter of Economic Rights and Duties of States¹⁷ confirms the rights of states to control multinationals in their territories, and actually embodies an obligation on the multinationals not to intervene in the internal affairs of a host state,¹⁸ thereby recognizing their importance in international law. The limitations placed

12. See WILHELM G. GREWE, *EPOCHEN DER VÖLKERRECHTSGESCHICHTE* 343 (1984).

13. *Id.* at 349.

14. *Id.* at 350.

15. *Id.*

16. *Id.* at 345.

17. Charter of Economic Rights and Duties of States, U.N. GAOR, 29th Sess., U.N. Doc. A/RES/3281 (1975), reprinted in 14 I.L.M. 251.

18. *Id.*, art. 2.2(b).

on states by the principle of territoriality mean that it is not easy or always practical for individual states to control the activities of multinationals. It is therefore recognized that international law is in need of rules transcending the territorial sovereignty of states which can effectively govern the day to day activities of multinationals.¹⁹ Although there are codes of conduct constituting "soft law" for the regulation of multinationals,²⁰ the need appears to be for legal norms with a more precise application.

When seen as a confined system of public law norms, international law evinces serious jurisprudential problems in explaining the legal nature of codes of conduct. The most obvious problems are the lack of so-called international legal subjectivity on the part of multinationals, and the fact that they are addressed directly by the various codes of conduct. How is it possible for multinationals to be addressed directly, if they are not subjects of international law? After all, only states and organizations made up of states can be subjects in terms of traditional jurisprudential theory.²¹ This jurisprudential problem exists irrespective of whether or not the codes of conduct are regarded as embodying binding law. It is only when one adopts the view that the codes are *pro non scripto* and, therefore, totally irrelevant as far as multinationals are concerned, that the jurisprudential problem disappears. This, however, is a conclusion few publicists are likely to draw. Simply categorizing the codes of conduct as "soft law" does not resolve the problem as it is not the non-binding nature of the codes that must be explained, but the fact that within the bounds of traditional jurisprudence, the addressee cannot be addressed.

However, the real issue is whether jurisprudence, which is nothing other than the science of law, does not describe the law incorrectly. If international law is seen as a wider concept embracing international law rules of a private law nature, the jurisprudential problem is resolved. Actually, international law is shedding its public nature and is becoming directly applicable to non-state entities. The legal norms, although still public in origin, are of a private nature.²² Basically, we are concerned with norms that should be classified under the international *lex*

19. See IGNAZ SEIDL-HOHENVELDERN, *CORPORATIONS IN AND UNDER INTERNATIONAL LAW* 13 (1987).

20. See the discussions in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES* (Norbert Horn ed., 1980).

21. See Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR INTERNATIONAL ENTERPRISES*, *supra* note 20, at 8.

22. See Norbert Horn, *Codes of Conduct for MNE's and Transnational Lex Mercatoria: An International Process of Learning and Law Making*; in *LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES*, *supra* note 20, at 45, and particularly at 52.

*mercatoria*²³ because they are directly applicable to non-state entities. Alternatively, one can say simply that we are dealing with a private-law leg of international law. If one wishes to be still more precise: an international company law is developing.

2. Banks

If we remove the role banks play in international trade law, this law and the international trade on which it is based will simply cease to function. Banks play an important role in financing international sales agreements and in bridging the gulf of mistrust between unknown buyers and sellers located in different countries.²⁴ They form the payment mechanism in international sales agreements. Through private banks, foreign exchange contracts are concluded.²⁵ Because money is regarded as a medium of exchange created by virtue of a state's sovereignty,²⁶ banks actually fulfill delegated state functions whenever they exchange one country's currency for that of another. In its ultimate theoretical analysis, such a transaction is between states exchanging one state document, money, for another. However, the public nature of this type of transaction has disappeared. If banks, therefore, devise and participate in international clearing systems,²⁷ we have systems and transactions that can be classified as falling within the ambit of an international banking law. Cross-border banking activities are on the increase²⁸ although the international legal problems accompanying such activities do not always seem to be realized by the banks themselves.²⁹

The existence of an international banking law is also borne out by the UCP which apply to the relations between banks located in different states. In this instance, of course, the rules emanated from a private source, the International Chamber of Commerce in Paris. In this respect, therefore, they differ from private law norms contained in conventions like the CISG. They can only be described as international law without the prefix public. Although I do regard the UCP as having legal force as general principles recognized by states,³⁰ jurisprudentially

23. *Id.* at 59.

24. See BOOYSEN, *supra* note 5, at 233.

25. See generally NICHOLAS L. DEAK & JOANNE CELUSAK, INTERNATIONAL BANKING 13 (1984).

26. See HUGO J. HAHN, WÄHRUNGSRECHT 15 (1990); F.A. MANN, THE LEGAL ASPECTS OF MONEY 3-30 (1992); A. NUSSBAUM, MONEY IN THE LAW-NATIONAL AND INTERNATIONAL 11 (1950); BOOYSEN, *supra* note 5, at 342.

27. See ULF R. SIEBEL, MICHAEL PRINZ ZU LÖWENSTEIN & ROBERT FINNEY, GERMAN CAPITAL MARKET LAW 27 (1995).

28. See ROSS CRANSTON, LEGAL ISSUES OF CROSS-BORDER BANKING 109 (1989).

29. See F.R. RYDER, LEGAL PROBLEMS OF INTERNATIONAL BANKING 58 (1987).

30. BOOYSEN, *supra* note 5, at 237. See also Mark A. Wayne, Note, *The Uniform Customs*

their legal force is not a prerequisite for considering them part of a developing international banking law. Without a knowledge of the UCP, one can hardly comprehend how modern private international transactions are executed. Even if these rules are regarded as being without objective legal force, they form a kind of dispositive law, i.e., regulatory law, which can be selected by the parties to govern their agreement. These rules are more than mere contractual terms; their selection brings with it a wealth of legal interpretation and international precedent.

3. Individuals

Public international law recognizes that individuals can incur criminal liability in terms of the laws of war and humanitarian law.³¹ This was one of the few instances where international law has recognized that to be effective the state's corporate veil must be lifted to make individuals directly responsible for their acts. The deduction has already been made from the international concern and conventions in respect of human rights that international law is in the process of changing its character as an interstate legal system.³²

Although states participate in international trade, after the fall of communism this has become the exception rather than the rule. In international trade law states' primary function is regulatory. The GATT³³ and the GATS³⁴ are clearly based on the presumption that individuals are the primary players in international trade.

International trade law is based on the supposition that individuals will act internationally. If they do not act, the public international law

and Practice as a Source of Documentary Credit Law in the United States, Canada and Great Britain: A Comparison of Application and Interpretation, 7 ARIZ. J. INT'L. & COMP. L. 147, 167 (1989).

31. See *Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1175 (1993). See also Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 71, 77 (1985); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994).

32. See C. Flinterman, *EMH Hirsch Ballin Wereldburgers: personen in het internationale recht*, 4 RM THEMIS 139 at 140 (1996).

33. See Article XVII on state trading enterprises which makes it clear that the state, trading through its state trading enterprise, is the exception and should in any case adhere to the normal international business practices established for private traders. These provisions of GATT can be found in 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 9 (Stephen Zamora & Ronald A. Brand eds., 1990).

34. See, e.g., the definition of 'trade in services' in article 1(2) of GATS, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations Marrakesh, Apr. 15, 1994.

framework created by states will be meaningless. In this sense, the position of the individual in international trade law is fundamentally different from its position in conventional public international law. Because the individual is the principal actor in international trade law, its actions can and should create international law. Individuals can choose the CISG to apply to their international contracts in spite of its inapplicable provisions.³⁵ They can also exclude the operation of the CISG.³⁶ If individuals were to create a practice of consistently excluding the application of the CISG, they would ultimately render this public international law document without any effect. Reference has already been made to the fact that the CISG recognizes the binding effect of usage created by individuals, and that this usage applies to international contracts.³⁷ This is clearly a recognition of the law-creating effect of individual activity on the international level.

From a legal perspective, the position of the individual is no different from that of a bank or multinational corporation. They are all private law persons and non-public law entities. One must realize that these entities cannot operate on the same level as states. To say that the individual cannot be a subject of international law because it cannot conclude treaties³⁸ or appear before the International Court of Justice,³⁹ is a *non sequitur*. It only means that the individual cannot act on the same level as the state, and this is precisely the point. It acts on a lower level, namely what is known as the private law level. Any custom emanating from its international activities, is thus on this level.

C. Subjects in Need of International Private Law Regulation

1. The International Law Merchant

From the discussion of the players in the international sphere, it is clear that an international law applicable to individuals does in fact exist. This law has been given the name of the international *lex mercatoria*, that is, the international law merchant, and encompasses the international private law norms to which reference has already been made. The existence of such a law has been canvassed in various publications⁴⁰ and it is unnecessary to repeat what has been said in this re-

35. See VON CAEMMERER & SCHLECHTRIEM, KOMMENTAR ZUM EINHEITLICHEN UNKAUFRECHT 85 (1990).

36. See CISG, *supra* note 6, art. 6; VON CAEMMERER & SCHLECHTRIEM, *supra* note 35, at 79.

37. See CISG, *supra* note 6, art. 9.

38. See Vienna Convention on the Law of Treaties of 1980, art. 1.

39. See Statute of the International Court of Justice, art. 34(1).

40. See *Die internationale lex mercatoria: Das Erfordernis ihrer Umgestaltung zu einer rechtswissenschaftlichen Synthese und ihr Verhältnis zum Völkerrecht*, 30 ARCHIV DES

gard. Suffice it to say that although the existence of such an international law merchant can be traced back to the maritime law of the Middle Ages and even further to Roman times, it remains a controversial concept. In a statute like the Colonial Courts of Admiralty Act of 1890, a reference to international law could conceivably have been intended to include the international maritime law developed from Roman concepts by the maritime nations of Europe. After all, the law merchant had been called the private international law of the Middle Ages.⁴¹ This law has resurfaced after its demise in the face of the emergence of the national state and the resultant nationalistic codifications during the eighteenth and nineteenth centuries. Two diverse, but up to the minute, manifestations of the emerging international private laws are the European Union and the internet.

2. A Common Private Law for Europe

Even among the critics of the international law merchant, it is conceded that some of the private law systems in Europe are facing a measure of internationalization.⁴² The idea of a Europe without borders seems to be irreconcilable with strong nationalistic private law codifications. On the one hand, a solution is sought in a European codification embodying the best from the different national systems.⁴³ On the other, the universal private law based on Roman law principles which existed from the Middle Ages until codifications rendered it obsolete, has begun to emerge as the glittering star which should not only lead the modern Westerner back to its cultural origins, but also offer a possible solution.⁴⁴ As Reinhard Zimmermann has said of the task of creating a new European legal tradition, "[t]his venture, whether undertaken by means of legislation or legal science (and legal training!) would be doomed to failure if one were to lose sight of the common historical foundations of European private law."⁴⁵ But, at the same

VÖLKERRECHTS 196 (1992); *Volkereg en sy belang vir privaatregtelike verhoudings* 15 OBITER 95 (1994); *Völkerrecht als Vertragsstatut internationaler privatrechtlicher Verträge*, 59 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 245 (1995); INTERNATIONAL TRANSACTIONS AND THE INTERNATIONAL LAW MERCHANT, chs. 1 & 2 (1995). See also, Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487 (1995); Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 442 (1995).

41. See FREDERIC R. SANBORN, *ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW* 125 (1930).

42. See Otto Sandrock, *Das Privatrecht am Ausgang des 20. Jahrhunderts: Deutschland-Europa- und die Welt*, 51 JURISTEN ZEITUNG 1, 4 (1996).

43. *Id.* at 7. See also Reinhard Zimmermann, *Konturen eines Europäischen Vertragsrechts*, 50 JURISTEN ZEITUNG 477 (1995).

44. See Reinhard Zimmermann, *Das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit* 47 JURISTEN ZEITUNG 8, 20 (1992).

45. See Reinhard Zimmermann, *Roman-Dutch Jurisprudence and its Contribution to Euro-*

time, this solution has been regarded as inadequate because the old European *jus commune* is seen as a system which catered for an agrarian community,⁴⁶ ill-suited to the needs of a modern industrialized Europe.

The principles of Roman law as expounded by Dutch jurists had a profound influence on European common law.⁴⁷ These Roman-Dutch law principles not only survived the European national codifications, but were actually adapted to modern circumstances. As a result of a multitude of circumstances, some of them rather idiosyncratic, the principles did not survive in Europe but they did on the southern tip of Africa where Roman-Dutch law was, and still is, the common law of South Africa.⁴⁸ One can expect that in view of the changes gripping South Africa, especially a deliberate process of Africanization, the existence of Roman-Dutch law in South Africa will come under severe strain. The time has perhaps arrived for the foreign child, raised and nurtured with such passion in South Africa over more than three centuries, to be handed back to its natural forbearers where there is a need for a legitimate blue-blooded off-spring to manage and keep together the enlarged estate.

Roman-Dutch law and the international law merchant share the same background. They are based in Roman law; survived the Middle Ages; were subsequently developed by jurists;⁴⁹ lost their importance with the national codifications; and are being rediscovered by jurists and thus by jurisprudence because of the needs of a world drawn closer and made smaller by modern technology.⁵⁰

The fact that Europe is in need of a European private law does not mean that this European private law must now also be regarded as an international or a universal private law. It is merely a corroboration of a trend in the international community manifesting a quest for a private-law leg of international law. A return to the European *jus commune* as the basis of an international private law is also not feasible in today's all-embracing international community. International law has long shed

pean Private Law, 66 TUL. L. REV. 1685, 1721 (1992) (footnotes omitted).

46. See Fritz Rittner, *Das Gemeinschaftsprivatrecht und die europäische Integration*, 50 JURISTEN ZEITUNG 849, 854 (1995).

47. See Zimmermann, *supra* note 45, at 1711.

48. See WOUTER DE VOS, REGSGESKIEDENIS 226 *et. seq.* (1992).

49. See BOOYSEN, *supra* note 5, at 40, for a history of the international law merchant. On the development of the Roman-Dutch law see DE VOS, *supra* note 48, at 51; J.C. DE WET, DIE OU SKRYWERS IN PERSPEKTIEF 57 (1988); J.W. WESSELS, HISTORY OF THE ROMAN-DUTCH LAW 95 (1908).

50. See also, The Rt. Hon. Lord Howe of Abervon, *Globalising the Law*, 23 INT'L BUS. L. 338, (Sept. 1995); Whitmore Gray, *Globalisation of Contract Law: Rules for Commercial Contracts in the 21st Century*, NEW ZEALAND L. J. 52 (1996).

its European exclusivity, and rightly so. What one is simply saying, is that international law can benefit generally from drawing on the experience of Europe in fulfilling the quest for a private-law leg of international law. If Europe were to get its European private law, this law would simultaneously constitute international law's regional private-law leg. In this sense, it would naturally influence the development of any universal private-law leg.

One should bear in mind that from an international law perspective, we are not talking about a uniform, universally applicable private law. International law is based on the existence of different sovereign states with different legal systems. What is required, are the legal norms to govern only the international legal relations of persons other than states or public international law organizations. A European *jus commune* will simply provide some general principles to fill the void in the private-law leg of international law. Like the civil law in early American law, a European *jus commune* can play a role in the jurisprudence (i.e. legal education) when there is a void in conventional international private law, when fundamental principles of justice are at stake, or when corroboration of the existence of a norm is sought.⁵¹

3. The Internet

Legal control of the internet is one of the newest problematic issues in international law.⁵² The internet is international and its legal regulation cannot be achieved by any single country. At the moment its legal regulation reminds one of the chaotic situation which existed in air traffic before the private-law aspects were regulated by international conventions. Under the territorial principle, particular states have the power to regulate certain aspects of the internet. However, such regulation will almost always have an effect in other countries giving rise to the typical problems of extraterritorial and conflicting legislation. What we really need is an international system directly applicable to private persons. It is, therefore, no wonder that the international law merchant has already surfaced as a possible applicable law and solution to the multiple-jurisdiction problem.⁵³ The international law merchant appears as a possible solution because it is perhaps the most widely recognized law with an international nature, but which applies directly to individuals engaged in transborder activities. However, for the internet, a pri-

51. See R.H. Helmholz, *Use of the Civil Law in Post-Revolutionary American Jurisprudence*, 66 TUL. L. REV. 1649, 1664 (1992).

52. See Joel R. Reidenberg, *Governing Networks and Cyberspace Rule-Making*, 45 EMORY L.J. 911 (1996); Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. INT'L L. 75, (1996); Jeremy Landau & Theodore Goddard, *Defamation and the Internet*, INT'L MEDIA L., Oct. 1995, at 75.

53. See Burnstein, *supra* note 52, at 109.

vate law with an application wider than that of the traditional law merchant is most probably needed — an application which will also cover such topics as libel and *injuriae*, not usually regarded as part of the law merchant.

III. CONCLUSION

It has been shown that the concept of international law is not as certain as one has been inclined to accept. The prefix “public” does not clarify international law as it may still encompass norms which are private law in nature, but which originate in public international law. As we approach the close of the millennium, international law is no longer a law of peace and war, or solely of public law: it has become a true system of law with branches like those of any municipal system. It is a system with its public law norms, its commercial norms, its private law norms, its criminal norms, and even its procedural norms.⁵⁴ Like any norms in a “regular” legal system, these norms apply to all persons, individuals and corporations alike, and to the state. The fact that jurisprudentially international law is not so described, is a flaw in jurisprudence rather than in the legal system. The jurisprudence of international law has, therefore, to a certain extent fallen behind the positive development of the law.⁵⁵ If one accepts this exposition, the solution lies, of course, with the universities teaching international law in its totality, and not in terms of a meaning attached to it in a bygone era characterized by the emergence of the national states with their all-embracing commercial and private law codifications.

54. John A. Spanogle, *The Arrival of International Private Law*, 25 GEO. WASH. J. INT'L L. & ECON. 477, 520 (1991).

55. See Juenger, *supra* note 40, at 500.

