D. French, K. McCall-Smith and V. Ruiz Abou-Nigm (eds)
Linkages and Boundaries in Private and Public International Law

Connecting Public and Private International Law

Alex Mills*

(Author's final version. Forthcoming, Hart, 2018)

1 Introduction

The relationship between public and private international law is a topic which has long been debated, and which remains highly controversial. Despite an increasing range of scholarship looking at connections between the two fields,[1] some modern public and private international lawyers would doubt that any deep relationship exists between the two subjects – at least, that is, before having had the opportunity to read this book. In a textbook on private international law, the principal mention of public international law is typically in an expression of regret that the use of the term 'private international law' is misleading because the subject is not *really* 'international law'.[2] In a textbook on public international law, private international law is generally not mentioned at all, except for an occasional acknowledgment that in civil matters rules of public international law jurisdiction and rules of private international law may, debatably, have some interaction.[3]

There are two main reasons why such doubts over the connections between public and private international law continue to be expressed. First, at least formally, rules of private international law *are* primarily national law, made by national courts or legislatures. In the division between the international and the domestic, they appear very much to fall within the sphere of domestic law. Sometimes rules of private international law are treated as rules of national private law, sometimes as rules of national procedural law – although as discussed further below they are better considered as their own distinctive field of law. Second, there is undoubtedly significant variation between the rules of private international law adopted in different states, and it would be very difficult to argue

* Reader in Public and Private International Law, Faculty of Laws, UCL, a.mills@ucl.ac.uk. Thanks to Elisa Morgera and Joseph Crampin for helpful comments, and to all the participants at the project conference in Edinburgh for the many fruitful discussions that transpired.

[1] See generally eg Alex Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009); Ralf Michaels, 'Public and Private International Law: German views on Global Issues' (2008) 4 Journal of Private International Law 121; Pascal Vareilles-Sommières, *La Compétence Internationale de L'État en Matière de Droit Privé* (LGDJ, 1997); Andrew L Strauss, 'Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts' (1995) 36 Harvard International Law Journal 373; Campbell McLachlan, 'The Influence of International Law on Civil Jurisdiction' (1993) 6 Hague Yearbook of International Law 125; F A Mann, 'The Doctrine of Jurisdiction Revisited After Twenty Years' (1984) 186 Recueil des Cours 19; Harold G Maier, 'Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law' (1982) 76 American Journal of International Law 280; Andreas F Lowenfeld, 'Public law in the international arena: conflict of laws, international law, and some suggestions for their interaction' (1979) 163 Recueil des Cours 311.

[2] See eg Paul Torremans *et al*, *Cheshire, North & Fawcett: Private International Law* (15th edn, Oxford University Press, 2017), p.15; Jonathan Hill and Maire Ni Shuilleabhain, *Clarkson & Hill's Conflict of Laws* (5th edn, Oxford University Press, 2016), p.3; Pippa Rogerson, *Collier's Conflict of Laws* (4th edn, Cambridge University Press, 2013), p.4.

[3] James Crawford and Ian Brownlie, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press, 2012), pp.474-5ff.

that, at least under current international law, any particular rules of private international law are mandated. The main exception traditionally mooted is the question of a state's exclusive authority (including civil jurisdiction) over questions of title to its land,[4] which is sometimes considered an implication of territorial sovereignty, but even this has been questioned in some states.[5]

This Chapter addresses these doubts by exploring six connections between public and private international law – connections of (1) principle, (2) history, (3) functional commonality, (4) policy incorporation, (5) shared objectives, and (6) methodology. Before addressing each of these, it notes a link between public and private international law which arises in the context of sources. This establishes a connection between these fields which is significant, but at the same time on its own quite limited.

2 Sources

The most obvious connection between public and private international law is that some rules of private international law are not found, or are not only found, in the domestic law of states – rules of private international law may be (and increasingly are) found in treaties. Some rules of private international law therefore take a form which is part of and governed by public international law, including its rules on the formation, validity and interpretation of treaties. Such treaties are most commonly negotiated under the auspices of an international organisation, the Hague Conference on Private International Law (which is discussed further below), but they may also be established by regional organisations as part of economic integration efforts, and at least historically could also often be found in bilateral or other regional agreements.[6] European illustrations of this practice include the Brussels Convention of 1968,[7] Rome Convention of 1980,[8] and the various iterations of the Lugano Convention.[9] While the former two Conventions have now been replaced with European Regulations, the Lugano Convention continues to function as a separate regional private international law treaty, designed to apply to non-EU Member States (particularly those in the

[4] Mills (2009), at pp.239-44. See eg Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1, 20 December 2012, Art 24(1). Under the common law this is traditionally analysed as a rule of non-justiciability rather than a rule of exclusive jurisdiction, although it is not clear whether this characterisation is helpful – it is principally a reflection of an historical common law distinction between local and transitory actions. See generally *British South Africa Co v Companhia de Moçambique* [1893] AC 602; Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, forthcoming 2018), Chapter 5.

[5] Note, for example, the abolition of the common law non-justiciability rule under the Jurisdiction of Courts (Foreign Land) Act 1989 (NSW), although the fact that a dispute concerns title to foreign land remains a significant factor in the exercise of jurisdictional discretion.

[6] On the international conventions operative between EU member states before European harmonisation, see eg P Jenard, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968', OJ 79/C 59/1, at pp.6-7; Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (consolidated version), OJ 98/C 27/1, Article 55.

[7] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (consolidated version), OJ 98/C 27/1.

[8] Rome Convention on the Law Applicable to Contractual Obligations 1980 (consolidated version), OJ 98/C 27/2.

[9] Most recently, Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 2007, OJ 2007/L 339/3

European Free Trade Area). There are numerous other examples of similar treaties around the world, such as those adopted in Latin America.[10]

Where such treaties are not directly enforceable as a matter of national constitutional law, national rules may also be necessary in order to implement these public international law obligations of the state. But even where that is the case, it is nevertheless still obviously true that state parties to these treaties owe obligations of private international law to each other as a matter of public international law, and that the scope and content of those obligations may be determined through the application of principles of public international law. As a consequence of this, it is further possible that international courts and tribunals, including for example the International Court of Justice, might be seized with disputes concerning the interpretation or breach of a private international law treaty. This indeed occurred in relation to a dispute between Belgium and Switzerland regarding the Lugano Convention, submitted to the ICJ in 2009, although the proceedings were discontinued in 2011.

Is this enough to establish a significant connection between public and private international law? It may be observed that international lawyers do have a somewhat expansionist tendency to view anything in a treaty as automatically a 'subject' of international law, and it is certainly true that this is enough to make public international law *relevant* to private international law. But a deep connection between public and private international law is not *necessarily* established through this practice. A bilateral treaty which required each state to comply with a codified set of rules of contract law would affect the source of rules of contract law for those states, but this would not itself make contract law 'international' in character, at least not in a deep sense. However, if two states agree in a treaty to follow the same rules of contract law, or indeed the same rules of private international law, this signifies something more important than a change in formal sources. It signifies that the states adopting the treaty determined that it was necessary and appropriate to adopt such an international agreement – that regulation of contract law or private international law should take place at the international level, through the adoption of a formal commitment to harmonised rules of law. Such treaties do not, in practice, exist for rules of contract law, but they do exist in significant numbers for rules of private international law. To understand *why* states have adopted such treaties – and thus why the harmonisation of rules of private international law through treaties is a significant indicator of the international character of rules of private international law – requires a deeper examination of the connections between public and private international law.

3 Connections

This Chapter now examines six connections between public and private international law which are of greater significance, relating broadly to questions of the function and purpose of the two areas of law. These are not discrete points, but rather a series of filaments in a connecting web.

---

[10] See eg the Montevideo Civil International Law Treaty 1889, amended 1940; Los Leñas Protocol on the Recognition and Enforcement of Judgments of other Mercosur States 1992; Buenos Aires Protocol on International Jurisdiction in Disputes Relating to Contracts 1994; Inter-American Convention on the Law Applicable to International Contracts 1994.

3.1 Principle

The first stronger connection between public and private international law is suggested through a commonality of principles, which is particularly reflected in the central role played by the doctrine of comity in private international law. One of the fundamental premises of traditional private international law is that foreign law and courts are normatively equal to local law and courts. The choice between them is not, or at least not generally, one of superiority (outside a particular US tradition),[11] but one of appropriateness (which law or court is best placed to resolve the dispute) or legitimacy (which law or court is entitled to regulate the relationship). Private international law does not give priority to the state or the law which is most democratic, or the court or the law which a judge decides has the better procedures or outcomes, or even (again, outside a particular US tradition)[12] priority to forum law over foreign law. A guiding underlying principle of private international law is that a state should only impose its law or exercise its judicial authority in relation to a dispute where it has a recognised basis to do so; otherwise the proper course of action, motivated by comity, is to defer to another court's jurisdiction or apply another state's law. Where another court has exercised jurisdiction on an internationally recognised basis, the judgment of that court should further be recognised and enforced, subject to certain safeguards but without a review of the merits of the decision. The guiding principle is that the courts and the laws of fellow sovereigns are presumed to be equal to those of the forum, and entitled to mutual respect. Scholars and national courts frequently refer to the concept of 'comity' as a motivating force behind private international law and a source of this guiding principle.

One of the central concerns of public international law is, similarly, regulating the respectful coexistence of sovereign states. Public international law is based on the principle of sovereign equality,[13] which means that no state is superior to any other (there are no 'second class sovereigns'), and each state is obliged to recognise the sovereignty of each other state. Of course no-one claims that states are equal in terms of their resources or power, but as a matter of international law they are possessed of identical sovereignty, however large or small they are. It has long been understood that sovereign equality does not necessarily imply an identity of legal rights or obligations – states may agree to bilateral or multilateral treaties under which they have different rights or obligations, perhaps most famously illustrated by the powers given to the five permanent members of the Security Council under the UN Charter. This inequality of rights and obligations, however, does not reflect an inequality of sovereignty, but is instead correctly viewed as an exercise of that sovereignty. Sovereign equality is reflected in a variety of contexts in public international law – for example, through obligations of sovereign immunity (long understood to be based on the principle that no domestic court should sit in judgment on a foreign sovereign,

[11] Note the 'better law' approach advocated in Robert A. Leflar, 'Choice-Influencing Considerations in Conflicts Law' (1966) 41 New York University Law Review 267; Robert A. Leflar, 'Conflicts Law: More on Choice-Influencing Considerations' (1966) 54 California Law Review 1584.

[12] For an influential approach favouring forum law in the case of a 'true conflict' of laws, see eg Brainerd Currie, *Selected Essays on the Conflict of Laws* (Duke University Press, 1963), p.181.

[13] See eg UN Charter, Article 2(1): "The Organization is based on the principle of the sovereign equality of all its Members."

because to do so would be inconsistent with the sovereign equality of states)[14] and non-intervention.

It does not take a leap of imagination to see the relationship between these two foundational principles – the normative equality of sovereign states in public international law, and the normative equality of their legal systems in private international law. This is not to suggest that in either case these are very solid or secure foundations. 'Sovereignty' in public international law and 'comity' in private international law are obviously highly contested concepts. The key issue regarding the term sovereignty in public international law is whether it describes an *a priori* feature of statehood, or is a reflection of the general rights and obligations of states *under* international law.[15] Put another way, the question is whether the principle of state sovereignty is a source or a product of international law – arguably it has shifted from the former conception to the latter over the course of the twentieth century. The classic *fin de siècle* definition of comity from the US Supreme Court, that it is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other",[16] similarly captures its inherent ambiguity at the beginning of the modern era of international law. Evidently comity cannot be a matter of 'absolute obligation', as no state is required to put the sovereignty of another state above its own. Nevertheless, it is more than courtesy, because the equal sovereignty of states is an important foundation of the international legal order, with significant normative pull. The role of comity in private international law thus suggests a vague but nevertheless important connection between the guiding principles of public and private international law – they both reflect and give effect to an underlying concept of sovereign equality.

3.2 History

A second major connection between public and private international law may be found in the historical links between the two subjects. A stronger connection between public and private international law can be revealed through understanding the historical origins of private international law, and indeed also public international law, as part of the 'law of nations'.[17]

The earliest origins of private international law are generally considered to be around the time of the Italian Renaissance – a time when an expansion of international trade and commerce led to an increase in the number of disputes with significant foreign elements, and thus in one important respect a time much like our own. The idea of private international law emerged to respond to these problems, as a mechanism to address the risk of conflicting legal treatment of private disputes, while at the same time accepting a degree of pluralism in substantive private law – the idea that different legal systems were normatively equal. But as private international law rules

[14] *The Schooner Exchange v. McFadden*, 11 US 116 (1812); *The Parlement Belge* (1879) 5 PD 197; *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening) [2012] ICJ Reports 99 at [57] ("The Court considers that the rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.").

[15] See eg Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press, 2008) p.291 (describing sovereignty as "the legal competence which states have in general"); note the more ambivalent position in Crawford and Brownlie (2012), at p.448.

[16] *Hilton v Guyot*, 159 US 113, 163-164 (1895).

[17] See generally Mills, *Confluence* (2009), Chapter 2; Alex Mills, 'The Private History of International Law' (2006) 55 International and Comparative Law Quarterly 1.

selected *between* normatively equal legal systems, they were not themselves viewed as *part* of those systems. Private international law rules were instead developed by Renaissance lawyers as a distinct part of the universal natural law, 'secondary' norms which facilitated and supported the existence of diverse local legal systems by coordinating legal diversity. Private international law was thus first conceived of not as part of the local law which differed from city-state to city-state, but as part of a universal (natural) international law system – the 'law of nations' – which encompassed the modern territory of both public and private international law.

This idea of private international law actually sustained and defined the discipline throughout most of its history. Under the statutist approach, perhaps the earliest idea of private international law, the potential for conflict between legal systems was addressed by attempting to develop a principled and analytical way of determining the scope or the effect of different laws. This was initially based on the idea that each statute 'naturally' belongs to one of two categories of laws, either 'personal' (thus applying only to citizens, but regardless of their location) or 'territorial' (thus applying to everyone in the territory, regardless of citizenship). Later scholars adopted variations on this basic approach, emphasising the importance of either territorial or personal characteristics or connections, but right up to the nineteenth century the essentially internationalist character of the field was maintained.

The two dominant nineteenth century figures in private international law, at least outside the Anglo-American tradition, may be singled out as influential archetypes. In the early nineteenth century, the German scholar Savigny argued for an account of private international law in which the basic unit of analysis is the 'legal relation', and the role of private international law was thus to 'ascertain the seat (the home) of every legal relation'. It was central to Savigny's approach that the private international law rules he developed were higher level, universal norms – part of an international system of law, derived from the asserted existence of a community of territorial states. The Italian scholar and political figure Mancini, working later in the nineteenth century, shared much of Savigny's approach, but argued for the adoption of nationality as the key connecting factor in private international law. This was based on a conception of the nation as founded on personal connections (the nation embodying the people and their history and culture) rather than Savigny's conception of territorial power. But like Savigny, Mancini viewed private international law rules as 'secondary norms' which are essentially part of a broader system of law – in his case, the law of a community of nations, rather than Savigny's community of territorial states. In both cases, rules of private international law were essentially characterised as serving an international function of global ordering or governance, coordinating relations between different legal orders – and in fact partly constituting the nature of the international legal order.

This close relationship between public and private international law, viewed as integral parts of a broadly defined 'law of nations', faded in both theory and practice over the course of the nineteenth century. By the end of the nineteenth century, there was an increasing view that rules of private international law were not inherent parts of international law, because international law was concerned only with the 'public' relations between sovereign states. This theoretical development corresponded with an increased diversity of private international law rules in practice, partly prompted by a division which was ironically the product of the work of Savigny and Mancini – the debate over the use of territory (or personal territorial connections based on factual criteria

such as residence) or 'nationality' as connecting factors. This diversity made the view of private international law as fundamentally international in character increasingly seem untenable.

The diversification of rules of private international law was not, however, simply a product of disagreement over what rules to adopt. In the early twentieth century, in federal systems such as the United States, the analysis and development of private international law increasingly focused on problems arising within the system, involving its constituent states. The resolution of these problems increasingly drew on national policies and domestic *constitutional* concerns, and a lack of distinction between the inter-state and foreign contexts shifted the focus away from the traditional 'international' perspective on private international law.[18] There is an argument that a similar process has occurred again more recently, in the late twentieth century, as the development of EU private international law has focused on domestic objectives such as the efficient functioning of the internal market rather than international policy goals.[19]

One late nineteenth century response and reaction to these developments was a series of Hague Conferences on Private International Law, held between 1893 and 1904, to work toward the international harmonisation of private international law. This was of course the precursor to the foundation of the Hague Conference on Private International Law as an international institution in 1955.[20] Despite these efforts, in the early parts of the twentieth century, the idea that public and private international law were entirely separate disciplines appeared to become widely established. This was a product both of a narrowing of the domain of public international law, to exclude 'private' actors and their relations, limiting public international law to the law between sovereign actors, and of the reconceptualisation of private international law itself as a matter of national law and national policy. These matters are discussed further below.

3.3 Functional commonality

A third major connection between public and private international law that can be highlighted is a connection of functional commonality. Public international law includes so-called rules of 'jurisdiction', which determine the permitted scope of a state's exercise of regulatory authority.[21] A state may, for example, criminalise conduct in its territory, or the conduct of its nationals outside its territory. The essential approach is that each state act of regulation must be justified by one of the accepted grounds of jurisdiction in order to comply with public international law. In the absence of a connection of territory or nationality, states *may* be able to rely on universal jurisdiction for certain matters which are considered to be a concern for all states. The scope of universal jurisdiction is of course highly contested in public international law. It is clearly recognised in certain treaties, but only for a narrow range of international crimes.

---

[18] See generally eg Alex Mills, 'Federalism in the European Union and the United States: Subsidiarity, Private Law and the Conflict of Laws' (2010) 32 University of Pennsylvania Journal of International Law 369; Alex Mills, 'The Identities of Private International Law – Lessons from the US and EU Revolutions' (2013) 23 Duke Journal of Comparative and International Law 445.

[19] See generally eg Alex Mills, 'Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local?' (2016) 65 International and Comparative Law Quarterly 541.

[20] See generally https://www.hcch.net/en/about; Alex Mills and Geert De Baere, 'T.M.C. Asser and Public and Private International Law: The Life and Legacy of 'a Practical Legal Statesman'' (2011) 42 Netherlands Yearbook of International Law 3.

[21] See generally Alex Mills, 'Rethinking Jurisdiction in International Law' (2014) 84 British Yearbook of International Law 187.

The focus of discussion of jurisdiction in public international law is generally on exercises of public authority, particularly through criminal law. Because of the exclusion of 'private' concerns from public international law, doubts have sometimes even been expressed as to whether these rules apply to private law regulation or disputes. There is, however, little in principle to support such doubts. Rules of *private* law are exercises of 'public' governmental authority as much as rules of criminal law, and they are ultimately sanctioned through coercive judicial and executive powers. If a court orders that a party is liable to pay damages or face seizure of their property because they have breached tort law, this is not characteristically different from an order that they are liable to pay a fine or face seizure of the same property because they have breached criminal standards. The ultimate recipient of the penalty may differ, but the state power which is exercised to compel payment does not. Public and private law remedies indeed often overlap, and may be interchangeable. In different legal systems, different approaches are often taken to regulating the same issues – for example, competition law, defamation law or environmental law may be regulated by criminal law or by private law, or a combination of both. The distinction between public and private law has long been criticised as a legal artifice, and in any case does not appear materially relevant to the question of whether state regulatory power is implicated. A state's contract law, no less than its criminal law, pursues national policy objectives. As many scholars have observed,[22] all law is, at least in one sense, public law.

The case of *Kiobel v. Royal Dutch Petroleum Co* in which the US Supreme Court gave judgment in 2013[23] provides perhaps the clearest and strongest recent support for this argument – that *private* disputes still engage *public* international law jurisdiction. Various states intervened in the proceedings, including the European Commission on behalf of the European Union, and (jointly) the United Kingdom and the Netherlands (the home jurisdictions of the defendant). A central question in these submissions was whether it would be compatible with international law for US courts to hear the proceedings, given the lack of connections between the dispute or the defendant and the United States. While the arguments of the intervening states may have differed, they all demonstrated that States *do* believe that the rules of jurisdiction must be complied with in relation to civil proceedings, and that they *do* object if they think their nationals are being subject to exorbitant exercises of jurisdiction (a concern which a cynic might observe carries particular weight when those nationals are oil companies).

This is a reflection of a broader trend. In a range of ways, public international law scholarship has, in recent years, re-opened its attention to matters which were traditionally characterised as 'private' and thus as falling outside the scope of the discipline, recognising that they have important 'public' governance implications and effects.[24] To put this another way, public international law has increasingly recognised (once again) that private law relations *matter*. This concern is by no means

[22] See eg Jeremy Waldron, 'The Rule of Law in Public Law', in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015), p.56 ("Maybe we should say that in the last analysis all law involves the operation of the state on society; all law is public law in some ultimate sense", citing to Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (University of California Press, 1967), p.282). The argument may also be found in various places in Emile Durkheim, *The Division of Labour in Society*, trans. George Simpson (The Free Press, 1933, originally published in French in 1893).

[23] 133 S.Ct. 1659 (2013).

[24] See generally eg Christine E. J. Schwöbel, 'Whither the private in global governance?' (2012) 10 International Journal of Constitutional Law 1106; Robert Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society' (2005) 46 Harvard International Law Journal 471.

limited to questions of private international law in the traditional sense (rules on jurisdiction, choice of law, and recognition and enforcement of judgments), but encompasses a variety of private legal relations which have important and significant impacts on a whole range of matters of international and public concern, including some which are addressed in this book – such as sovereign bonds, or global supply chains, or carbon trading contracts, or claims arising out of cross-border health care. The term 'private international law' is sometimes co-opted to capture this broader range of international private law-making. But traditional private international law still has a particular significance to this regulation, because it is, in practice, private international law which determines how regulatory authority over private law questions is allocated between states – itself an important function of global governance. The private international law decision about which state or states gets to regulate private legal relations also *matters*, along with the content of that regulation (generally, what rights and obligations are created under private international contracts), because that allocation determines what legal system regulates the contracts.[25] This in turn determines, for example, what public interests are accommodated (potentially affecting or overriding contractual rights and obligations), and whether in practical terms a party is able to achieve access to justice – if litigation can only take place in a forum which is remote or expensive, this may not be realistically possible. It is also private international law which determines the even more contested question of when regulatory authority may be taken away from states altogether and exercised by non-state parties – when arbitral tribunals may resolve disputes instead of courts, and when either may apply principles of non-state law instead of state law to govern the relationship between the parties.[26] Put simply, if public international lawyers care about private law regulation, and they should, public international lawyers must care about private international law. This recognition that public international law rules of jurisdiction apply to matters of private law reveals a functional commonality between public and private international law rules. Both impose limits on the circumstances in which a state may assert its regulatory authority over a particular person, relationship or event.

It is important to recognise that while public international law establishes that a state may not impose its regulation in the absence of a recognised justification, it does not (at least generally) *require* that state regulation be exercised where such a recognised justification exists. Principles of access to justice, developing particularly in the context of human rights law, *may* in future have an increased role in requiring states to exercise and perhaps even expand their grounds of civil jurisdiction,[27] but at present they have had a limited influence, except in relation to the protection of weaker parties (like consumers or employees) and less frequently in the adoption of forum of necessity rules of jurisdiction. Their effect has been felt more in the context of practical barriers

---

[25] See generally Horatia Muir Watt and Diego P Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press, 2014); Mills, *Confluence* (2009).

[26] See further Mills, *Party Autonomy in Private International Law* (forthcoming 2018).

[27] See generally James J Fawcett, Máire Ní Shúilleabháin and Sangeeta Shah, *Human Rights and Private International Law* (Oxford University Press, 2016); Mills (2014); Michael M Karayanni, 'The Extraterritorial Application of Access to Justice Rights', in Horatia Muir Watt and Diego P Fernández Arroyo (ed), *Private International Law and Global Governance* (Oxford University Press, 2014); Amnesty International, 'Injustice incorporated: Corporate abuses and the human right to remedy' (2014), POL 30/001/2014, available at http://www.amnesty.org/en/library/info/POL30/001/2014/en; Francesco Francioni, *Access to Justice as a Human Right* (Oxford University Press, 2007); James J Fawcett, 'The Impact of Article 6(1) of the ECHR on Private International Law' (2007) 56 International and Comparative Law Quarterly 1.

to litigation, such as the availability of legal aid.[28] States are generally free, under public international law, to decide whether to exercise any of the available grounds of jurisdiction.

An important implication of this is that there is scope for a range of different rules of private international law to function compatibly with public international law. So while it is true that public international law does not generally dictate specific rules of private international law, that does *not* establish that there is no connection between the two disciplines. Public international law defines the outer limits within which national rules of private international law must operate. Those national rules are then an implementation of both public international limits, and, within those limits, policies concerning matters of private international law, which may themselves be national or international in character. Private international law is thus a hybridisation of international obligation and national and international policy. The picture of jurisdiction in private international law also includes considerations of territoriality and personality (through connections of nationality, domicile, and residence) as competing approaches to international ordering, mirroring these conceptions in public international law. It also perhaps includes consideration of ideas of universal civil jurisdiction as an emerging principle, through the idea of a forum of necessity, based on arguments that the rights or interests of individuals should be recognised alongside those of states.[29]

This is not to say that private international law is 'subsumed' by public international law. Private international law has its own policy concerns and interests, which operate within the public international law framework. Some of these have been discussed earlier in this Chapter, and some are discussed further below. And rules of private international law are also some of the most important evidence of what states view as accepted grounds of public international law jurisdiction, and what they view as 'exorbitant'. Private international law sources were indeed historically one of the strongest influences on the development of public international law jurisdictional rules, and they can and should continue to influence that development. Perhaps most distinctively, private international law rules almost universally recognise the direct power for private parties to determine the law which governs their legal relationship or the courts which have power over them, through an exercise of party autonomy in the form of a choice of law or choice of court clause. This is a challenge for public international lawyers – private international law encompasses a conception of individuals as having a kind of jurisdictional power, which does not seem to fit comfortably in traditional inter-state conceptions of public international law. It seems to accept a kind of individual sovereignty, alongside the sovereignty of the state.[30]

But aside from such points of friction, the functional commonality between the two disciplines of public and private international law highlights the importance of recognising that they are in a relationship of close mutual influence. Put simply, private international law rules are shaped by rules of public international law, because they operate within the constraints of international rules on jurisdiction. But rules of public international law have also been shaped, and continue to be shaped, by the practices of states in the context of private international law, which at times go beyond and challenge the traditional framework of public international law jurisdiction.

---

[28] Note eg the Hague Convention of 25 October 1980 on International Access to Justice.
[29] See further Mills (2014).
[30] See further Mills, *Party Autonomy in Private International Law* (forthcoming 2018); Mills (2014).

3.4 Policy incorporation

A fourth significant connection between public and private international law relates to the matter of policy incorporation. This arises particularly in the development of rules of the private international law doctrine of public policy, which operates as a defence against the recognition and enforcement of a foreign judgment, or an exception to the application of foreign law. Public policy is the means through which states may determine that other policy considerations outweigh those of private international law itself – that the usual obligations to recognise a foreign judgment or apply a foreign law are trumped by the harm which would be caused in doing so in the particular circumstances, because the judgment or law offends against important principles. Public policy, in other words, is the limit of the principle of normative equality which underlies private international law.[31] It tells us 'how different is too different'. For this reason, however, public policy must be construed narrowly, otherwise it would risk undermining private international law altogether – a foreign judgment or law must not be rejected simply because it is different, but only where that difference is fundamentally objectionable.

Different considerations apply, however, where the public policy concerned is not derived from national policy or interest, but from concerns of public international law such as international human rights law – sometimes referred to as 'truly international' public policy. In these circumstances, the application of public policy is not a projection of one state's norms on matters which would otherwise be governed by the other state, a denial of mutual respect, but rather a recognition and enforcement of norms which bind both states. National courts have rightly suggested that they should be readier to apply public policy in such circumstances – for example, in a House of Lords decision, refusing to apply Iraqi law which purported to nationalise aircraft seized in the 1990 invasion of Kuwait, contrary to the UN Charter and resolutions of the Security Council.[32]

In such cases, giving effect to norms of international law by refusing to apply foreign law or recognise a foreign judgment essentially involves prioritising other rules of public international law over the rules of 'jurisdiction' which provide the foundations of private international law – but such a prioritisation may well be demanded by public international law itself. It might normally be perfectly compatible with international law, and perhaps even a requirement, for UK courts to apply Iraqi law to questions of title to property located in Iraq, but doing so in the circumstances of the Kuwait Airways case would have involved violating a Security Council resolution and indirectly giving effectiveness to an unlawful use of force, both contrary to other obligations of public international law. It may be suggested therefore that a state which breaches important norms of international law can no longer expect to benefit from the principles of sovereign equality and comity which underpin public and private international law.

This internationalised conception of public policy thus highlights a distinct connection between public and private international law. While private international law might ordinarily reflect public international rules of jurisdiction, through the doctrine of public policy it is also open to the direct

---

[31] See further Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4 Journal of Private International Law 201.

[32] *Kuwait Airways v Iraqi Airways* [2002] UKHL 19. For further analysis see Alex Mills, 'The Mosul Four and the Iran Six', in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects: Emergence, Encounter and Erasure through Object and Image* (Oxford University Press, forthcoming 2018).

consideration and application of other matters of public international law which might in certain cases trump those ordinary jurisdictional rules.

3.5 Shared objectives

A further element to the 'internationalism' of private international law may be found in its own distinct policy objectives. As noted earlier, private international law has its own policy concerns and interests which occupy the space of regulatory discretion left by public international law. Like public international law, it governs the allocation of regulatory authority between states, relying traditionally on territorial or personal connections to justify regulation. But within the discipline of private international law, there are a range of policy goals which have been developed, which relate to how this regulation should function. And importantly, a number of these policies are themselves international in their scope and conception.

For example, rules of private international law have traditionally (through choice of law rules in particular) sought to achieve objectives of decisional harmony, ensuring that the same decision is reached wherever in the world a dispute is litigated. Together with rules limiting overlapping jurisdiction and requiring the recognition and enforcement of foreign judgments, this policy aims to minimise the risk that parties may be subject to inconsistent regulation, leading to potentially conflicting exercises of state enforcement powers. Another related principle is that incentives and opportunities for forum shopping should be reduced (through a combination of both choice of law rules and jurisdictional rules), and thus litigation should take place in the most appropriate forum rather than the forum which most favours the claimant – which would risk again parallel proceedings and inconsistent regulation, as well as inefficient dispute resolution. To put these policy goals another way, private international law has long been concerned, among other things, with facilitating cross-border activity by coordinating the peaceful coexistence of sovereign states, striving to reduce the 'conflict of laws' between them.

It is of interest that these concerns have *not* been traditionally addressed in public international law jurisdictional rules, which simply allow for potentially overlapping and conflicting exercises of regulation, without rules of priority to decide which rule or rules should prevail. But there is increasing recognition in international law of the need to avoid conflicting regulation, of the benefits of states acting in cooperation rather than independently and unilaterally. This is a context in which public international law may have something to learn from private international law.

In any case, the objectives of decisional harmony, of avoiding a conflict of laws, are not objectives which can be reached by each state acting unilaterally in adopting its own national rules of private international law, in pursuit of national policies. They require a process of formal or informal coordination, the recognition by states that they have collective interests and goals which may be best served through rules of private international law which are, at least to some extent, internationally harmonised. Thus even where the source of private international law is national law, many of its ambitions, effects and objectives are (at least traditionally) international. It is or at least can be international in its outlook and its function.

It is this 'internationalist' perspective on private international law which is exemplified by the work of the Hague Conference on Private International Law. The work of the Hague Conference, in preparing treaties dealing with matters of private international law, is more than just equivalent to

harmonising contract law – it is more than international in form, and more than just the development of public international law sources for private international law. It is a continuation of private international law's international origins and ambitions, and its public function or potential function as a matter of global governance. According to this tradition, part of the function of rules of private international law is fundamentally 'public', 'international', and 'systemic' in its substantive character – it has at least a relationship of functional equivalence to some of the global governance ambitions of public international law. Similar 'public' functions can be observed in federal or similar systems in which private international law rules serve the function of ordering the internal distribution of regulatory authority, a role which private international law has increasingly played in the European Union, Australia and Canada. While as noted above these developments have in the past *discouraged* thinking about private international law from an international perspective (by instead increasing focus on the issues as they arise within a federal system), ironically they illustrate the way in which private international law might be applied to achieve equivalent public, systemic objectives, at the international level, closely aligned to those of public international law.

Private international law can undoutedly exist without such an internationalist approach. Private international law rules can be designed to act purely for national policy interests, and make no effort at international coordination or achieving systemic policy goals. But rules of private international law are often poor devices to achieve substantive policy objectives, and the international systemic goals of traditional private international law are potentially a unique contribution which it could make to global governance. An internationalist vision of the character and objectives of private international law has been strongly influential in the history of the discipline, and could well remain central to its future.

3.6 Methodology

A further potential connection between public and private international law is a connection of methodology. Private international law essentially addresses the problem of deciding which court or legal order gets to regulate an issue, when there are multiple courts or legal orders which have connections with that issue. As well as serving its own purposes, private international law also presents a methodology or a technique which might be adopted and adapted in other contexts. This raises the question of whether public international law could be one such potential context.[33]

There are two distinct ways in which private international law might be applied by analogy at the international level – the first relates to jurisdiction, and the second to choice of law. In the context of jurisdiction, it may first be noted that there has been a proliferation of international courts and tribunals, both institutionalised (for example, the ICJ and the WTO dispute settlement system) and *ad hoc* (for example, international investment law). The increase in the number of courts and tribunals raises the possibility that more than one forum may be seised of a single dispute or two (or more) closely related disputes. Clear rules governing the relationship between international courts and tribunals have not developed as part of international law, although a number of

[33] See particularly eg Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of Public International Law', in Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, 2011).

potential principles have emerged,[34] drawing on the more sophisticated experience of private international law in the management of parallel proceedings.[35] The two main techniques are those of *forum non conveniens* and *lis pendens* (in either case supported by the further doctrine of *res judicata*). The first of these (closely associated with the common law) asks each court to analyse the dispute and to determine whether it is the most appropriate forum to resolve the issues, regardless of whether it is first seised of the dispute. A stay of proceedings may be indefinite, or it may be temporary to allow a foreign court to resolve closely related issues before proceedings continue.[36] The second of these (closely associated with the civil law tradition and EU regulation) gives priority to the court first seised, as either a mandatory or discretionary requirement.[37] Either technique is adaptable to the international level as a way of framing mutually respectful relationships between international courts and tribunals, often (tellingly) articulated as a matter of comity.[38]

The second potential area of application of private international law principles at the international level concerns questions of substantive law. As is well known, public international law has developed a range of distinct 'regimes' – the regimes of trade law, investment law, environmental law, human rights law, and increasingly numerous others. One of the most pressing problems of public international law is how to deal with questions of regime interaction – how to try to ensure that these independently developing regimes do not contradict each other, and that international law does not thereby become incoherent as a system. In public international law research this is often described as the problem of fragmentation – there are a range of techniques available to public international lawyers to resolve such questions, but it is unclear whether these are satisfactory or sufficient (or themselves coherent).[39] The issue of fragmentation is not only a theoretical question but is also reflected in a range of quite specific practical problems. For example, can a state block the import of goods, contrary to trade law obligations, on environmental law grounds? Can a state cancel the license of a foreign investor for failure to comply with human rights law? Private international law is sometimes viewed as a potential source of further techniques which might be drawn on to address these kinds of question. Adapted to this context, the techniques of private international law would still strive to accommodate multiple normatively equal legal orders, but the legal orders would not be those of states, but regimes or fields of public international law.

However, a note of caution on such endeavours is necessary. Traditional techniques of private international law are focused on choice, and avoiding overlaps – determining which legal order

---

[34] See generally Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford University Press, 2003).
[35] See generally Torremans *et al* (2017), Chapter 13.
[36] This is probably the best analysis of *The MOX Plant Case* (Ireland v. United Kingdom) (Order No 3, 24 June 2003) (UNCLOS Annex VII Tribunal, PCA), because at the time the tribunal stayed its own proceedings no case had been commenced before the Court of Justice of the European Union.
[37] See generally eg Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351/1, 20 December 2012, Arts 29-34; Campbell McLachlan, *Lis Pendens in International Litigation* (Brill, 2009).
[38] See eg Thomas Schultz and Niccolò Ridi, 'Comity and International Courts and Tribunals' (2017) 50 Cornell International Law Journal (forthcoming, available at SSRN: https://ssrn.com/abstract=2957570); *The MOX Plant Case* (Ireland v. United Kingdom) (Order No 3, 24 June 2003) (UNCLOS Annex VII Tribunal, PCA), [28].
[39] See generally the Report of the Study Group of the International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, 13 April 2006, A/CN.4/L.682; Tomer Broude and Yuval Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, 2011); Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

should apply, generally to the exclusion of others. It is not clear that the problems of public international law regime interaction are ones that should be resolved through such a technique – indeed the application of such a technique may be highly problematic. If we are asking whether a state can block the import of goods on environmental grounds, the answer should not be a choice – deciding whether it is *really* a trade issue or an environmental issue. It is clear that it is *both* a trade issue and an environmental issue. The solution should therefore not be found in a technique of choice, but in techniques of normative accommodation, or hybridisation – but here, a *horizontal* hybridisation rather than a vertical one. Some of those techniques can be found in international law itself, such as in the principles of treaty interpretation. There is also *some* private international law scholarship which has argued for such hybridisation instead of the traditional paradigm of choice in private international law, which might well be a profitable source of inspiration for public international lawyers.[40] This technique is also sometimes adopted by arbitral tribunals, which may hybridise rules of national contract law when applying non-state law, particularly if directed to do so by the parties.[41] This is not, however, the mainstream of private international law, particularly as practiced by courts.

But perhaps there is also a lesson for private international law in this experience. Is hybridisation something that courts could or should do more? It may indeed be argued that it is something that private international law already does in a range of *indirect* ways, such as through the rules on the proof of foreign law, or on the substance/procedure distinction, or through the device of depeçage. It is not only public international lawyers who may learn from the techniques of private international law – there is also scope for further reflection from private international lawyers as to whether the solutions developed in public international law for the problems of regime interaction offer lessons for private international law.

There is, finally, another more direct methodological intersection between public and private international law which may be highlighted. An international court or tribunal typically applies rules of public international law, but it may also be required to determine what law governs a contract. This might be a particularly common concern for investor-state arbitrations, where the parties often have a contractual relationship which can have an impact on the host state's investment treaty obligations. This raises the question of how the court or tribunal should decide what law governs the contract. As an international court or tribunal, it will at least generally have no 'forum choice of law rules' to apply, and applying those of any particular state could be problematically question-begging. The best answer to this conundrum could be that international courts and tribunals need their own 'transnational' choice of law rules, their own truly

[40] See eg Arthur Taylor Von Mehren, 'Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology' (1974) 88 Harvard Law Review 347. This idea is also developed in some contemporary scholarship on legal pluralism – see eg Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 Southern California Law Review 1155.

[41] See eg *Channel Tunnel Group Ltd v Balfour Beatty Constructions Ltd* [1993] AC 334; Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision-Making?' (2000) 17 Arbitration International 59; see discussion in Thomas Schultz, 'Some Critical Comments on the Juridicity of Lex Mercatoria' (2008) 10 Yearbook of Private International Law 667 at p.671ff. See similarly Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 International and Comparative Law Quarterly 747 at p.752ff; Carlo Croff, 'The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?' (1982) 16 International Lawyer 613.

internationalised private international law.[42] This was already arguably recognised by the Permanent Court of International Justice in the Serbian Loan cases in the 1920s.[43] The increased judicialisation of international dispute resolution, with a range of international courts and tribunals dealing with disputes that are likely to touch on a range of issues of national law, potentially opens up a new field for private international law – a direct need for the development of an internationalised private international law. The development of harmonised rules of private international law by institutions such as the Hague Conference would thus have the added benefit of creating transnational rules of private international law which may be essential to the work of international courts and tribunals.

4 Conclusions

The relationship between public and private international law is not uncontroversial, and it is not simple. It cuts across a whole range of dimensions. Connections of principle in ideas of comity and sovereign equality. Deep historical connections in the development of each discipline as part of the law of nations. A functional commonality, highlighted through the role of public international law rules on jurisdiction in shaping private international law, and visa versa. Direct policy incorporation, through the doctrine of truly international public policy. Increasingly shared international objectives of avoiding regulatory conflict. And perhaps through a mutual influence of methodologies. This is a dynamic and difficult terrain to explore, but it is important that private international lawyers are not blind to the global regulatory effects and potential of private international law, and that public international lawyers are not blind to the significance of private international regulation. The contributors to this book are to be applauded for their intrepid interventions.

---

[42] See further eg Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration: The Interplay Between National and International Law* (Oxford University Press, 2013).
[43] *Serbian Loans Case*, *France v Yugoslavia* (1929) PCIJ Ser A, No 20, Judgment 14.