Linkages and Boundaries in Private and Public International Law

edited by
Verónica Ruiz Abou-Nigm,
Kasey McCall-Smith and Duncan French

LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW

Do private and public international law coincide in their underlying objectives when it comes to their respective contribution to the realisation of global values? How do they work together towards the consistency and efficiency of the international legal order? This edited collection sets out a vision: to serve modern society, the international legal order cannot be defined as public or private. Linkages and Boundaries focuses on the interface between private and public international law and the synergies that a joint approach brings to topical issues, such as corporate social responsibility and environmental law, as well as foundational concepts such as international jurisdiction, state sovereignty and party autonomy. The book showcases the dynamic interaction between the two disciplines, with a view to contribute to a dialogue that is still only in the early stages of delivering its full potential. The collection explores ways to deepen the dialogue between these two distinct but interrelated disciplines, with a view to further their progression towards a more integrated and holistic approach to legal problems that require an international approach. The book brings together well-known experts and new voices from both disciplines and from a wide range of jurisdictions in Europe, North America and South America.

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For our children.

Anna, Jacob, Matthew, Rebecca, Francisco, Ignacio, Nicolás,
Annabelle and Bryce.

FOREWORD

The subject-matter of this book may provoke at first glance an unavoidable feeling of *déjà vu*. Indeed, from time to time proposals to bring private and public international law together come out in the most varied ways and with different content. Such proposals have been particularly made by private international law scholars and the occurrences have dramatically grown during the last few years, both in terms of their number and in terms of the diversification and sophistication of the arguments set forth therein. Even though it hardly can be said that the current respective situation of both disciplines is similar to that of *ius gentium* times, when no distinction was made between them, it seems clear that the constructions which try to draw private and public international law closer together are now more justified than ever. In this sense, the book is both a timely and rich contribution.

The reason is simple to explain. Since its codification by states—and, consequently, its nationalisation—private international law has been generally viewed as a domestic issue. Nevertheless, it is evident that this traditional assumption is affected by several factors. Among the most visible (which are, at the same time, the most significant) we can mention the impact of international instruments, supranational integration (namely in the EU), the phenomena associated with globalisation (of social, financial, commercial, political and technological character), the increasing relevance of human rights to private legal relationships, the proliferation of non-national rules, standards and private legal orders, and the extraordinary success of private adjudication. All in all, these factors have not only eroded the foundations of the domestic conception of private international law, they have also had an impact on the formerly solid vision (invariably viewed as 'classical' in some civil-law countries) according to which private international law would be a sort of special private law but invariably, at its core, *private* law. On the other side, similar factors have suggested that public international law has lost its state-centred focus by paying increasing attention to the role of private entities and human beings within the context of the international legal order.

As a general and main consequence of the foregoing, a certain confluence of both disciplines is perceived. Obviously, they do keep their individuality and scientific autonomy even if they meet in some particular fields. Frequently, the points of view of private international law and of public international law on the same question are contradictory rather than complementary. However, that is not negative per se. There are many opposing views among the specialists of the same legal discipline and nobody considers that those specialists belong to different

legal fields. Additionally, some contradictions between the private and public aspects of international law are based more on long-standing caricatures rather than on conceptual disagreement.

The current proximity between private and public international law may be approached in many ways. The editors of this book have chosen to tackle the topic from three intertwined perspectives as identified by the three parts of this collection, namely (i) discerning synergies and shared values in international law, (ii) examining the functional commonalities in international law, and (iii) exploring the linkages and boundaries in international law.

Concerning the remit of each discipline, traditionally, public and private international law have occupied very different, mutually exclusive domains. On the one hand, classical public international law is said to be concerned solely with the interactions of states, thus constituting the legally binding rules and principles that govern state interaction. On the other hand, classical private international law is only concerned with the civil and commercial interactions between private actors. These assumptions have long existed and even today find support in both academic and professional circles. However, traditional definitions along these lines simply no longer reflect reality, if they ever did. Rather, changes in the political-legal landscape have led contemporary scholars and practitioners to reconsider the traditional boundaries of each discipline and how they interact with one another.

Of course, both disciplines will continue to exist even if they are challenged by arguments and features of a different kind, essential for the development (rather theoretical) of a transnational law and ultimately of a *global law*. Of course, self-reflective specialists on both sides have become progressively compelled to be aware of the evolution of the other discipline. Certainly, academics cannot limit themselves to only a part of the reality with which they are faced because the reality will remain as it is, complex by nature. In other words, a complete treatment of international law issues will almost always require the aggregation of all different possible perspectives whether traditionally private or public international law in nature.

Nevertheless, isolationist attitudes as well as diverse degrees of disinterest about what happens on the other side have always existed and are still present as surprising as they can be. In fact it has been something of a general rule among many public international lawyers; it is the wholly inappropriate perception that private international law is purely of domestic interest. More formally, some public international lawyers seem to think that their discipline is already too broad and contains too many topics as to add also 'private' issues. And some of them still consider that only states and international organisations can be subjects of public international law. Amongst *privatists*, the reason for isolationism rests on the strength of the historic 'emancipation' of private international law, which gained its independence from public international law in the second part of nineteenth century. In a similar way in which new states do everything to differentiate themselves from their former metropolis, private international law reinforced its scientific autonomy at the same time as it affirmed its legislative autonomy. An additional reason, clearly linked to the previous one, is a nationalist vision of law in general and of private international law in particular.

Even if some of those arguments could be understood within specific contexts, generally speaking they have lost their validity under the weight of the reality. Thus, the long awaited recognition of non-state actors as subjects of public international law destroys the formal fundament of isolationism among public international lawyers. Similarly, the idea of a private international law, which would not be international because of the pretended national character of its sources, is no longer acceptable.

All of the above becomes even clearer when the analysis is not encircled within a rather theoretical framework, but seen in relation to the practice of international law. Those who are involved in an activity linked with the 'reality' of international law as a lawmaker, judge, arbitrator, counsel or consultant, know that it is hardly conceivable not to be somehow confronted with the other discipline. International courts and tribunals face cases populated by elements of both disciplines and they deal with them according to the nature of their particular function. For instance, in the context of arbitral disputes, tribunals are beginning to develop truly transnational principles, rules and methodologies of private international law that are completely devoid of connection with the state. Similarly, much of what we describe as domestic private international law has its origins outside the domestic sphere of states.

The third part devoted to exploring linkages and boundaries in international law touches on various fields in which private and public international law cannot live apart: human rights, environment and corporate social responsibility. To illustrate in regards to human rights, it is worth highlighting that despite its 'public' character, international human rights law has a direct impact on the legislation and jurisprudence of private international law. Such impact is executed on diverse issues and in different circumstances in order to grant, namely, access to justice, workers' rights or the superior interest of the children, for example. Closely related to this, it is apparent that private international law can hardly be conceived as a simple 'neutral' tool to allocate competences among different jurisdictions when the existence of a rampant process of 'materialisation', which penetrates all the issues with social, political and economic considerations, is realised. Actually, the changing nature of private international law has spurred academic debate suggesting that it may, like public international law, also play a regulatory function. At the same time, international human rights tribunals now have to deal with private international cases. The situation is particularly common in matters of family law.

On the basis of the foregoing, it remains clear that the contribution made by Verónica, Kasey and Duncan to the debate on this crucial issue is huge. The book is full of fresh ideas aiming to develop the notion of private and public international law as components of a general legal system concerned with the regulation of international and transnational relations. Needless to say, their effort was worth it.

Diego P Fernández Arroyo
Professor at Sciences Po Law School
Paris, 30 November 2017

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LIST OF CONTRIBUTORS

María Mercedes Albornoz is Professor of Private International Law at the Center for Research and Teaching in Economics (Centro de Investigación y Docencia Económicas, CIDE), located in Mexico City. She graduated in Law at the National University of Litoral in Santa Fe, in her country of origin, Argentina. Then, she obtained a Master Degree in Private International Law and International Commerce Law, and a PhD in Law, both at Université de Paris II, in France. Her research focuses on Private International Law and on the interface between Law and Technology, encompassing International Contracts and E-commerce, Cross-border Flows of Personal Data, Online Dispute Resolution, as well as International Surrogacy Arrangements. Professor ALBORNOZ cooperates with the Mexican Ministry of Foreign Affairs as an External Advisor in Private International Law. She is a member of Mexico's National System of Researchers, of the American Association of Private International Law (ASADIP) and the Mexican Academy of Private International and Comparative Law (AMEDIP).

Jean d'Aspremont is Professor of International Law at Sciences Po School of Law. He also holds a chair of Public International Law at the University of Manchester where he founded the Manchester International Law Centre (MILC). He is General Editor of the Cambridge Studies in International and Comparative Law and Director of Oxford International Organizations (OXIO). He is Editor-in-Chief of ESIL Reflections. He is a member of the Scientific Advisory Board of the European Journal of International Law and series editor of the Melland Schill Studies in International Law. He is a member of the Board of the European Society of International Law (ESIL).

Richard Collins is Lecturer in International Law in University College Dublin (UCD). He currently teaches and researches in the fields of public international law and philosophy of law. His recent monograph, *The Institutional Problem in Modern International Law*, was published in November 2016 with Hart Publishing. Prior to joining UCD, Richard was a lecturer at the School of Law, University of Sheffield (2009–14). He has held visiting research positions at the Universities of Amsterdam and Helsinki, and in 2018, he will be a visiting research fellow at Osgoode Hall Law School (Toronto), the University of Sydney and Monash University, Melbourne.

Ana María Daza Clark is Lecturer in International Law at the Law School, University of Edinburgh. She holds a PhD (University of Dundee), LLM Law

and Economics (Utrecht University), LLM Magister Iuris Communis (Maastricht University), Abogada (Bolivia). Her research interests cover international investment law, natural resources management (specially water resources) and public international law. She is of counsel at Abogados Asociados para la Navegacion y la Industria (AACNI-UK) and former Legal Director at the Public Utility Regulatory System (SIRESE) in Bolivia.

Sharon Foster has been Professor of Law at the University of Arkansas School of Law since 2000. She earned her bachelor's degree from the University of California at Los Angeles in 1983, her JD from Loyola Law School in 1987, her LLM in 1997 from the University of Edinburgh, and a PhD in law in 2007 from the University of Edinburgh. Prior to her position at the University of Arkansas School of Law, she was an adjunct professor at Loyola Law School in Los Angeles from 1998 to 2000. Between 1987 and 2000, she was in private practice in Los Angeles, focusing on construction and international law. Her recent publications have been in the area of competition law and international law.

Duncan French is Head of Lincoln Law School, University Taught Postgraduate Dean and Professor of International Law at the University of Lincoln. He was Chair of the International Law Association (ILA) Study Group on Due Diligence in International Law (2012–16) and Co-Rapporteur of the ILA Committee on International Law on Sustainable Development (2003–12) (lead author of five reports). His research focuses on public international law and various specific sub-fields thereof, including international environmental law, law of the sea, and international economic law.

Francesco Giglio is Professor of Civil and Private Law at the University of Surrey. He has degrees from Dott Giur (four-year LLB) (Rome), LLM (Freiburg iB), Dr iuris (Osnabrück), MSt, DPhil (Oxon). He has published articles and monographs on the law of obligations—especially torts, unjust enrichment and damages—from the perspective of both Roman law and Common law; and on private international law. In his research, which is characterised by a legal-theoretical approach with a focus on taxonomy, he seeks to understand the foundations and the operative mechanisms of legal institutions.

Lorna Gillies is Lecturer in Commercial Law at the University of Strathclyde. She was previously Lecturer and Senior Lecturer at the University of Leicester, then Senior Lecturer at the University of Essex. She researches and publishes extensively in private international law, with an emphasis on pragmatism in PIL vis-à-vis internet consumer contracts, Common European Sales Law (2008, 2011); residual jurisdiction rules in civil and commercial matters (2012); the Charter of Fundamental Rights and jurisdiction (2014); international protection of cultural objects (2015); PIL and consumers' social justice (2016), and the jurisdictional challenges of cross-border torts via social media (2017). She was cited by AG Trstenjak in C585/08 & C-144/09 *Pammer and Alpenholf*. Lorna is a PI to the Scottish Parliament (SPICe) for research services vis-à-vis Brexit. She is a founding member of

the UK Private International Law Academic Network and member of the Scottish Universities Legal Network on Europe (SULNE).

Kirsty Hood QC (LLB (Hons), DipLP, PhD—University of Glasgow) is an Advocate at the Scots Bar. She called to the Bar in 2001, and took silk in 2015. Whilst she maintains a varied civil practice, her particular expertise is in private international law. Kirsty's published work is principally in the area of private international law (and its interaction with the UK's constitutional structure)—she is the author of *Conflict of Laws within the UK* (Oxford University Press, 2007), was a contributor to Wilkinson & Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd edn (W Green, 2013), and is the contributor of the 'Cross-border Jurisdiction' section of the Scottish Family Law Service looseleaf. She also combines with her practice at the Bar, leading seminars on undergraduate courses and giving talks in the field of private international law. She is currently Clerk of Faculty at the Faculty of Advocates.

Dimitrios Kagiaros is Teaching Fellow in Public Law and Human Rights at the University of Edinburgh and a member of the Edinburgh Centre for Constitutional Law. He has taught on constitutional law, administrative law and human rights law courses at the University of Edinburgh and the University of Hull. He was awarded his PhD for his thesis 'Whistle-blowing and Democratic Governance: Public Interest limitations in Security and Intelligence' in 2015 from the University of Hull under the supervision of Professor Patrick Birkinshaw. His research interests include whistle-blower protection, the impact of the European sovereign debt crisis on human rights and the case law of the European Court of Human Rights in relation to freedom of expression.

Kasey McCall-Smith is Lecturer in Public International Law and programme director for the LLM in Human Rights. She is a US-qualified lawyer and holds a BA and JD from the University of Arkansas. Dr McCall-Smith was awarded an LLM (2002) and a PhD (2012) in Public International Law by the University of Edinburgh. Her research focuses primarily on treaty law and how treaties are interpreted and implemented at the domestic and supranational levels and she has published predominantly in this area. She is interested in the role of the UN human rights treaty bodies as generators of law. The increasingly blurred distinction between public and private international law in terms of human rights protection is another key theme on which she works. She currently serves as the Chair of the Association of Human Rights Institutes (AHRI).

Alex Mills is Reader in Public and Private International Law at University College London. He is the author of *The Confluence of Public and Private International Law* (Cambridge University Press, 2009) and co-author of *Cheshire, North and Fawcett's Private International Law* 15th edn (Oxford University Press, 2017). Dr Mills' research covers a range of topics in and beyond the fields of Public International Law and Private International Law (also known as the Conflict of Laws). He is particularly interested in areas which cut across traditional disciplinary

boundaries, including international investment law and arbitration, foreign relations law, international commercial arbitration, and transnational (non-state) law. In 2010, he was awarded the American Society of International Law's inaugural Private International Law Prize, and in 2015 he was Director of Studies for the Private International Law Programme of the Hague Academy of International Law. He is a member of the International Law Association Committee on the Protection of Privacy in Private International and Procedural Law, the Academic Research Panel of Blackstone Chambers, and the Editorial Board of the International and Comparative Law Quarterly.

Elisa Morgera is Professor of Global Environmental Law at the Strathclyde University Law School and Director of the Strathclyde Centre for Environmental Law and Governance. She specialises in international, EU and comparative environmental law and has published specifically at the intersection of biodiversity, the human rights of indigenous peoples and local communities, and corporate environmental accountability. Elisa is the Principal Investigator of the BENELEX project 'Benefit-sharing for an Equitable Transition to the Green Economy—The Role of Law', funded by the European Research Council (November 2013–October 2018).

María Blanca Noodt Taquela is Professor of Private International Law and Researcher for the Gioja Institute, University of Buenos Aires She was Professor of The Hague Academy of International Law and her course 'Applying the most favourable treaty or domestic rules to facilitate private international law co-operation' was published in the *Recueil des Cours* in 2016, tome 377. She is Professor of International Transactions, Comparative Law and International Arbitration for several Master of Laws in Argentina, Bolivia, Brazil, Colombia, Denmark, Ecuador, Spain, United Kingdom and Uruguay. She has experience in International Arbitration as Arbitrator of several Latin-American Institutions and as Counsellor. María Blanca is a Member of the Editorial Board of several law reviews and also a member of various Argentinean and International Academies and Professional Associations. She has authored several books and articles on Private International Law and International Arbitration.

Andreas Rühmkorf is Lecturer in Commercial Law at the University of Sheffield (UK). He is the author of *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar, 2015). His research primarily focuses on corporate social responsibility (CSR), global supply chains and corporate governance. His most recent publications include G LeBaron and A Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance', published in *Global Policy* in 2017, and the chapter 'Global Sourcing through Foreign Subsidiaries and Suppliers: Challenges for Corporate Social Responsibility' in A de Jonge and R Tomasic (eds), *Research Handbook on Transnational Corporations* (Edward Elgar Publishing, 2017).

Verónica Ruiz Abou-Nigm is Senior Lecturer in International Private Law at the Law School of the University of Edinburgh. She is assistant editor in *Dicey, Morris & Collins The Conflict of Laws* (Sweet & Maxwell) and specialist editor in *Shawcross & Beaumont on Air Law* (LexisNexis). She is co-author of D McClean and V Ruiz Abou-Nigm, *Morris on The Conflict of Laws* (Sweet & Maxwell, 2016) and author of *The Arrest of Ships in Private International Law* (Oxford, Oxford University Press, 2011). She has published numerous contributions in the fields of private international law and maritime law. She is Member of the American Association of Private International Law (ASADIP) and represents it at The Hague Conference for Private International Law (HCCH). She is Member of the International Academy of Comparative Law (IACL). She is Vice-President of the European Law Faculties Association (ELFA).

Amanda Wyper worked in commercial legal practice as a solicitor specialising in pensions law for a number of years before undertaking her PhD at the University of Edinburgh. Amanda's PhD research considered the introduction of pension auto-enrolment into workplace pensions in the UK, looking at the legislative intention and evaluating the consequences. Amanda undertook original qualitative empirical research as part of her doctoral work and completed her PhD in July 2016. She has taught on a number of commercial and financial LLM courses and also tutored on the diploma in professional legal practice at the University of Edinburgh.

Introduction: Systemic Dialogue: Identifying Commonalities and Exploring Linkages in Private and Public International Law

VERÓNICA RUIZ ABOU-NIGM, KASEY McCALL-SMITH AND DUNCAN FRENCH

I. Mutually Strengthening Dialogue

The international legal order is neither public nor private; if it is to serve modern society it cannot be. An interdisciplinary and open outlook is a core feature of all contributions to this book. Scholars from both private and public international law and indeed from other disciplines such as commercial law, public law and private law have accepted the challenge to join in a collective effort to rethink the linkages and boundaries, and the functional commonalities, of both branches of international law.

Private international law (or conflict of laws, as it is also known in the common law tradition) is the discipline concerned with cases with a foreign element. Its relationship to, and interaction with, public international law, is however a matter of significant debate. Traditionally private international law has distinguished itself—or so its scholars would like to believe—by its cosmopolitan open lens, sustained by a robust and sophisticated doctrinal framework. Nevertheless, for those outside the discipline (including public international lawyers) it can seem unduly technical, process-driven and, above-all, a matter of domestic law.

Bearing in mind that the mere inclusion of private international law in the international law 'world' is itself contested, the controversies and divergences transpiring from the different perspectives shared in this collection are many. Yet, the will to engage in meaningful dialogue and to strengthen the connections prevails.

The disciplines this collection is concerned with the move in and out of binary distinctions between both private and public and between domestic and international. They develop in a constant dynamic flux. Both public and private international law play an important role in shaping 'the global'; hence, systemic consistency and the need to contribute to the development of 'the global good' seem to be amongst the main challenges for both disciplines at the present time.

Global issues are pressing and demand private and public international law attention. Such issues include, but are not limited to, human rights, environmental protection, religious pluralism, gender equality, a sustainable global economy, poverty alleviation, prevention of conflicts between countries, humanitarian assistance, and the preservation of cultural diversity. This collection can only touch upon a few of these issues and then primarily from the perspective of the international legal order. Nevertheless, it is quite clear that the 'international' is being infused by the 'domestic', as well as various transnational legal orders, as developed by international organisations, sovereign states, transnational corporations, international professional associations and others. This multiplicity of influences and actors has resulted in a growing body of international agreements, legal statutes, technical standards and 'soft law'.

This edited collection is the result of a two-year project (2015–17) led by academics from the Law Schools of the University of Edinburgh, Scotland, and the University of Lincoln, England. The project focused on the dialogue between academics from two disciplines, with participants from Europe, North America and South America. With many of the chapters jointly written by a scholar from each discipline, this collection seeks to use the discourse and strictures of co-authoring to challenge each other, to question unstated assumptions and to improve understanding across both branches of international law.

The methodology of the project, which in turn contributed to the edited collection, was especially innovative. The project focused on 'learning from each other'. And the scope—and need—for mutual learning proved to be far greater than commonly acknowledged. Originally we paired up public and private international law scholars from different jurisdictions and different legal traditions, but this methodology proved more challenging than was originally conceived. In several cases, the disciplinary differences were found to be insurmountable. In others, sufficient commonality was found.

Nevertheless, the project facilitated the conversation between scholars from different legal traditions, on legal issues concerning the international legal order broadly conceived. In this context, the role and indeed the respective value of these two disciplines is viewed with different lenses in modern legal scholarship. Thus, based on methodological pluralism, the participants explored numerous avenues for strengthening the dialogue between these disciplines with a view to enhancing the discourse and the outreach of international law in its many guises. As Professor Fernández Arroyo notes in the preface, there have been various previous attempts to consider the linkages between public and private international law. However, in this collection, which was designed and written by academics not only from both disciplines but also with contributions from public and private lawyers, the overall tone and content has emulated in its methodology what other books have often envisaged as desirable in their subject-matter.

From the outset of the project, it was clear that the task of finding common ground across all of the areas of international law selected would be of variable difficulty. Through presentations and many convivial discussions with the project participants, we learned very quickly that some of the perceived lack of

convergence between the disciplines actually could be distilled quite simply into the classic dualist approach to international law as the problems were often articulated as boundaries between private domestic law and public international law. For others, it was a matter of definitional disagreements and the lack of convergence over terminology. On all difficulties, we resisted the temptation to revert to old caricatures and pushed our colleagues and ourselves to examine how private and public international law might evolve to overcome these boundaries by capitalising on any common ground.

The book's focus is thus on the interface between public and private international law at various distinct levels, of both theory and practice. It is also recognised that such interaction is rarely achieved at an optimal level. Tackling identified disciplinary linkages, the book seeks to highlight the synergies that already exist, as well as setting up a dialogue aimed to enhance both disciplines, and therefore promote their engagement with the international and regional realities that they are intended to manage. Developing coherent and consistent discourses, and avoiding fragmentation, in public and private international law seems to be the challenge of our disciplines at the present time. This book approaches the development of these discourses as a necessary support for a pluralist, rather than fragmented, international legal landscape. It may be labelled as an issue of perception, but perception is crucial if we are interested in overcoming the failure to communicate that these mutually exclusive discourses have generated.

In this context, the diversity of the participants, in different stages of their academic careers and coming from very different legal backgrounds and traditions has therefore proved invaluable. We believe it is important to move beyond theory into practice if we are to seek to understand, if not invariably close, such divergence. On a general conviction that both disciplines have an innate belief in the capacity of law to move towards the progressive development of humankind at the global level, this book examines different paths to strengthen the bridges that could enhance the role played by international law broadly conceived in the construction of our modern, integrated society. Ultimately, we learnt it is always exhilarating to engage in new ways of thinking.

II. Discerning Synergies and Shared Values in International Law

The opening chapter from a leading scholar on the interface between public and private international law, *Alex Mills*, sets the scene for the dialogue from a historical, conceptual and functional perspective. Exploring six connections between private and public international law—connections of principle, history, functional commonality, policy incorporation, shared objectives and methodology—this first substantive single-authored chapter sets the complexity of the scene where the conversations between the two disciplines that follow in the book are to

develop. *Mills* introduces the reader to the spectrum of specific issues related to a systemic perspective of international law and provides a solid common ground from which the connections between these two interrelated disciplines of international law can be built. In the second chapter, *Jean D'Aspremont* and *Francesco Giglio* in 'Windows in International Law', draw from Roman law to craft a new descriptive and analytical framework based upon the ideas of windows, (de)coders and travellers to confront contemporary understanding of private and public international law. These three concepts provide the vantage points from which the methodological moves at work behind legal argumentation in private and public international law are described and compared. The contribution identifies in legal thought and practice several common denominators between public and private international law in terms of methodology and legal reasoning. In shedding light on convergences between these two areas of international law, this second chapter reinforces the idea that both disciplines rest on common methodological patterns. This descriptive and analytical framework in addition to an insightful contribution to the dialogue is in itself a very useful tool for further reading of this book. The concepts are also used by contributors in other parts of the book, therefore, to a certain extent these first two chapters provide the fabric into which the overall argument of the book is woven.

The final chapter of Part I is by *Kirsty Hood QC* who brings together two of the over-arching themes of the project. First, that an overly-rigid categorisation of the role and boundaries of private and public international law is unhelpful and should be rejected; and, second, that both disciplines have a role to play in resolving the conflict between state sovereignty on the one hand, and individual autonomy on the other. In particular, it explores whether such self-described 'international' rules have a role to play in resolving that tension, in what might be seen as an 'internal' setting. Taking the United Kingdom setting as a case study, the chapter explores how a state regulates the internal relationships between its component political parts (that is, between the organs of power within the state, and as between central government and its sub-state entities) and how the state interacts externally with other states and international bodies; specifically, it explores the role played by private and public international law in this resolution. This study of the UK's present situation thus demonstrates that the role played by private and public international law is not confined to the international sphere. The chapter reminds us of the practical and political importance of identifying convergences, ensuring paths for further communication, and providing robust foundations for strengthening normative connections, even within a state.

III. Functional Commonalities in International Law

Jurisdiction is generally acknowledged as a field where both disciplines meet. This function commonality is sometimes described as 'public international law rules of

jurisdiction applying to matters of private law and imposing limits on the circumstances in which a state may assert its regulatory authority over a particular person, relationship or event'.[1] Yet, the opening chapter of the second part of this book by *Duncan French* and *Verónica Ruiz Abou-Nigm* offers a different angle into the field and its meeting points between the branches of international law. Jurisdiction is a multifaceted concept that has generated a wealth of literature yet is yearning further study of the tensions at the crossroads of a common understanding of the concept in private and public international law. The first part of the chapter explores movements towards a more synergised understanding of jurisdiction. To contribute towards that end the chapter starts from the relatively uncontroversial premise that international law, both public and private, should seek to circumscribe outlandish jurisdictional claims and to adopt rules and principles to ensure the 'system' operates as smoothly—as efficaciously—as possible, and the second part of the chapter focuses on the steps that can be taken to improve the present arrangements. Three on-going developments are identified as potentially assisting in this field, at differing levels, for both public and private international law. First, the continuing development of, and coordination between, rule-based systems. Second, the increasing internationalisation of general principles in the determination of international competence and in the exercise of international jurisdiction. And third, perhaps of most interest (and controversy), the role of international judicial oversight of municipal jurisdictional decisions. Each might, in part, support states to more effectively demarcate overlapping jurisdictional claims and yet, it is argued, this is to improve coordination, as broadly understood, and not in any hope of establishing a top-down system of jurisdictional rules.

In recognising the importance of the argument that 'what counts is not the pedigree of a norm but the significance of its compliance pull',[2] the following chapter by *Richard Collins* and *María Mercedes Albornoz* examines the role of 'soft law' instruments as a form of 'global governance' considering their impact, in the fields of private and public international law. With the multiplication of regimes and institutions giving rise to a rather uncoordinated, fragmented and increasingly 'deformalised' regulatory landscape,[3] the concept of global governance, that is, of regulation without any system or centre,[4] continues to attract supporters. In fact, as recognised by an increasing breadth of literature, the collection of regimes, institutions and informal actors that make up the contemporary legal landscape seems to make increasingly problematic any clear distinction between the public/private, domestic/international, substantive/procedural in the ordering of many global

[1] In the terms of Alex Mills, ch 1 of this volume.

[2] H Muir Watt, 'The Relevance of Private International Law to the Global Governance Debate' in Muir Watt and DP Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford, Oxford University Press, 2014) 1, 13.

[3] M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *MLR* 1, 4–15.

[4] See JHH Weiler, 'The Geology of International Law—Governance, Democracy and Legitimacy' (2004) 64 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 547, 560.