How to Criticize U.S. Extraterritorial Jurisdiction (Part II)

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

There are better and worse ways to criticize U.S. extraterritorial jurisdiction. In Part I of this post, I discussed some shortcomings of a February 2023 report by China's Ministry of Foreign Affairs, "The U.S. Willful Practice of Long-arm Jurisdiction and its Perils." I pointed out that the report's use of the phrase "long-arm jurisdiction" confuses extraterritorial jurisdiction with personal jurisdiction. I noted that China applies its own laws extraterritorially on the same bases that it criticizes the United States for using. I argued that the report ignores significant constraints that U.S. courts impose on the extraterritorial application of U.S. laws. And I suggested that China had chosen to emphasize weak examples of U.S. extraterritoriality, such as the bribery prosecution of Frédéric Pierucci, which was not even extraterritorial.

In this post, I suggest some better ways of criticizing U.S. extraterritorial jurisdiction. Specifically, I discuss three cases in which the extraterritorial application of U.S. law appears to violate customary international law rules on jurisdiction to prescribe: (1) the indictment of Huawei executive Wanzhou Meng; (2) the application of U.S. sanctions based solely on clearing dollar transactions through U.S. banks; and (3) the application of U.S. export controls to foreign companies abroad based on "Foreign Direct Product" Rules. The Ministry of Foreign Affairs report complains a lot about U.S. sanctions, but not about the kind of sanctions that most clearly violates international law. The report says much less about export controls and nothing about Meng's indictment, which is odd given the tensions that both have caused between China and the United States.

Wanzhou Meng

In 2018, federal prosecutors in New York indicted Huawei executive Wanzhou Meng for bank and wire fraud. They then sought her extradition from Canada,

where she had been arrested at the request of U.S. authorities. The indictment was based on a meeting in Hong Kong between Meng and HSBC, a British bank, to convince it to continue doing business with Huawei despite concerns that the Chinese company might be violating U.S. sanctions on Iran. The prosecution's theory appears to have been that Meng's representations at this meeting ultimately caused HSBC's U.S. subsidiary to clear foreign transactions denominated in dollars through the United States in violation of Iran sanctions.

During the extradition proceeding, I filed an affidavit with the Canadian court explaining why the U.S. prosecution violated international law. Customary international law allows states to exercise prescriptive jurisdiction only when there is a "genuine connection" between the subject of the regulation and the regulating state. There are six traditional bases for jurisdiction to prescribe: territory, effects, active personality, passive personality, the protective principle, and universal jurisdiction.

Clearly the United States did not have prescriptive jurisdiction based on territory or nationality because the conduct occurred in Hong Kong and Meng is not a U.S. national. Passive personality, which recognizes jurisdiction to prescribe based on the nationality of the victim, also could not justify the application of U.S. law in this situation because the alleged misrepresentations were made to a non-U.S. bank. And bank and wire fraud do not fall within the categories of offenses that are subject to the protective principle or universal jurisdiction.

The only possible way of justifying the application of U.S. law would be effects jurisdiction, reasoning that Meng's meeting with a British bank in Hong Kong caused its U.S. subsidiary to continue clearing dollar transactions through New York. But, in this case, it was not clear that the alleged misrepresentations actually caused such effects in the United States. And even if they did, it is difficult to say that such effects were substantial, which is a requirement for effects jurisdiction under customary international law.

Apart from customary international law, it is also doubtful that Meng's conduct in Hong Kong fell within the scope of the federal bank and wire fraud statutes. Applying the presumption against extraterritoriality (a limit on U.S. extraterritorial jurisdiction discussed in yesterday's post), the Second Circuit has interpreted those statutes to require conduct in the United States that constitutes a "core component" of the scheme to defraud. Although U.S. courts are currently

divided on how much U.S. conduct is required under the federal bank and wire fraud statutes, Meng engaged in no U.S. conduct at all.

After nearly three years of house arrest in Canada, Meng agreed to a deferred prosecution agreement with the United States, in which she admitted that her statements to HSBC were false (though not that they violated U.S. law), and she returned to China. The agreement resolved a "damaging diplomatic row" between China and the United States. Because the indictment provides a clear example of U.S. extraterritorial jurisdiction in violation of international law, it is odd to find no mention of this case in the Ministry of Foreign Affairs report.

Correspondent Account Jurisdiction

A second example of U.S. extraterritorial jurisdiction that violates international law involves U.S. secondary sanctions. In contrast to Meng's indictment, the report discusses U.S. sanctions at length, but it does not focus on the kind of sanctions that most clearly violate international law. This is what Susan Emmenegger has called "correspondent account jurisdiction": sanctions imposed on foreign persons engaged in foreign transactions when the only connection to the United States is clearing dollar payments through banks in the United States.

The report calls the United States a "sanctions superpower" and specifically mentions U.S. sanctions against Cuba, Iran, Iraq, Libya, and Syria, as well as human rights sanctions under the Global Magnitsky Human Rights Accountability Act. "Sanctions strain relations between countries and undermine the international order," the report says. They can also cause "humanitarian disasters."

One can certainly criticize some U.S. sanctions as a matter of policy. As a matter of international law, however, most of these programs have strong support. U.S. sanctions typically take the form of access restrictions, limiting the ability of foreign parties to do business in the United States or with U.S. nationals. Under international law, these programs are based on the territoriality and nationality principles. In their comprehensive legal analysis of U.S. secondary sanctions, Tom Ruys and Cedric Ryngaert note that "most of these measures—denial of access to the US financial system, access to US markets, or access to the US for individual persons—merely amount to the denial of privileges" and "international law does not entitle foreign persons to financial, economic, or physical access to the US."

But correspondent account jurisdiction is different. The United States is currently prosecuting a state-owned bank in Turkey, Halkbank, for violating U.S. sanctions on Iran. According to the indictment, Halkbank ran a scheme to help Iran repatriate more than $20 billion in proceeds from oil and gas sales to Turkey's national oil company by using the proceeds to buy gold for Iran and creating fraudulent transactions in food and medicine that would fit within humanitarian exceptions to U.S. sanctions. The only connection to the United States was the clearing of dollar payments through banks in the United States.

As discussed above, customary international law requires a "genuine connection" with the United States. None of the traditional bases for jurisdiction to prescribe would seem to supply that connection. Halkbank is not a U.S. national, and it is being prosecuted for conduct outside the United States. Passive personality does not provide jurisdiction under international law because the only potential harm to U.S. persons from Halkbank's conduct is the risk of punishment for Halkbank's correspondent banks for violating U.S. sanctions, harm the United States is well placed to avoid. And clearing dollar transactions is not the sort of conduct that either the protective principle or universal jurisdiction covers.

That leaves the effects principle—that by arranging transactions with Iran in dollars outside the United States, Halkbank caused the clearing of those transactions in the United States. As in Meng's case discussed above, the problem with this argument is that the effects must be substantial to satisfy customary international law. It is difficult to see how merely clearing a transaction between foreign nationals that begins and ends outside the United States rises to the level of a substantial effect, since it does not in any way disrupt the U.S. financial system.

Correspondent account jurisdiction is not just a violation of international law; it is also a violation of U.S. domestic law. U.S. sanctions against Iran are issued under a statute called the International Emergency Economic Powers Act (IEEPA). IEEPA authorizes the President to prohibit financial transactions only "by any person, or with respect to any property, subject to the jurisdiction of the United States." As I explain in greater detail here, if the United States does not have jurisdiction under international law, the sanctions are invalid as a matter of domestic law under IEEPA.

The Ministry of Foreign Affairs report wants to claim that U.S. extraterritorial

jurisdiction “violates international law.” But on sanctions, it spends most of its energy discussing programs that are consistent with international law. The report mentions correspondent account jurisdiction only briefly, accusing the United States of exercising jurisdiction based on “the flimsiest connection with the United States, such as … using U.S. dollar[s] for clearing or other financial services.” With this example, I agree. I simply wonder why the report did not focus on it to a greater extent.

Foreign Direct Product Rules

A third example of U.S. extraterritorial jurisdiction that the report could have emphasized involves U.S. export controls. On October 7, 2022, in a “seismic shift” of policy, the United States adopted new rules to limit China’s ability to develop advanced computing power, including artificial intelligence. (The rules were updated last month.) Most of these rules are consistent with international law, but the Foreign Direct Product Rules arguably are not.

First, the regulations limit the export from the United States of computer chips with advanced characteristics, other products that contain such chips, and equipment used to manufacture such chips. These restrictions are consistent with international law because they are based on U.S. territorial jurisdiction.

Second, the regulations add several Chinese companies, universities, and other entities to the U.S. Entity List and Unverified List, which prohibit those entities from receiving exports from the United States. Again, these restrictions are consistent with international law because they are based on U.S. territorial jurisdiction.

Third, the regulations prohibit U.S. engineers and scientists from helping China with semiconductor manufacturing even if those individuals are working on things that are not subject to export controls. These restrictions are consistent with international law because they are based on U.S. nationality jurisdiction.

Fourth, the regulations extend U.S. export controls extraterritorially to non-U.S. companies outside the United States. These rules are known as Foreign Direct Product Rules (FDP rules) because they prohibit foreign companies from exporting goods to China that are the direct products of technology that originated in the United States. Currently, the most advanced computer chips are

made in Taiwan, South Korea, and Japan. The machines to make these chips are manufactured in the Netherlands. But U.S.-origin technology is used in virtually all chip manufacturing. So, the effect of these FDP rules is to extend U.S. export controls to chips made in Taiwan, Japan, and South Korea even if those chips themselves contain no components that were originally made in the United States.

There is a serious question whether FDP rules violate international law. None of the traditional bases for jurisdiction to prescribe exists. These U.S. rules are not based on territory, effects, nationality, passive personality, the protective principle, or universal jurisdiction. The origin of technology is not a traditional basis for jurisdiction to prescribe. Of course, the traditional bases are not exclusive. They are simply well accepted examples of a more general requirement that the regulating state must have a "genuine connection" to whatever it wishes to regulate. But it is not clear that the origin of technology qualifies as a genuine connection.

One thing that makes this analysis more complicated is the reaction of other states. Customary international law is based on state practice, so one must pay close attention to whether other states consider the origin of technology to be a legitimate basis for export controls. China, of course, has protested the U.S. export controls. But Taiwan, Japan, South Korea, and the Netherlands have not. This is different from what happened 40 years ago when the United States imposed export controls on foreign companies to prohibit the sale of certain goods to the USSR to try to stop the building of pipelines from Russia to Europe. In that case, the United States' allies in Europe strongly protested the export controls as a violation of international law, and in the end the United States withdrew those controls. This time, U.S. allies are supporting the export controls on sales of advanced computer chips to China.

The Ministry of Foreign Affairs report makes no mention of FDP rules. It does claim that "[u]nder the pretext of safeguarding national security," the United States "has adopted a package of measures including the Entity List and economic sanctions to restrict foreign enterprises from obtaining raw materials, items and technologies vital to their survival and development." The report's specific mention of the Entity List, which essentially blacklists certain Chinese companies, is consistent with the emphasis on this list in other Chinese protests of U.S. export controls. But, as explained above, the U.S. Entity List does not

violate international law, whereas the FDP rules arguably do.

Conclusion

The United States frequently exercises extraterritorial jurisdiction. As I discussed in Part I of this post, so does China. Countries are within their rights to apply their laws extraterritorially so long as doing so is consistent with international law.

In these posts, I have used the Ministry of Foreign Affairs report as a foil because it has shortcomings. As I described yesterday, it uses confusing terminology, criticizes the U.S. for regulating on the same bases that China does, ignores constraints on U.S. extraterritoriality, and illustrates its points with weak examples (like the case of Frédéric Pierucci, which was not even extraterritorial). But I do not mean to suggest that the United States is beyond criticism. The United States does sometimes apply its laws extraterritorially in ways that violate international law, and, in this post, I have pointed to three examples.

It seems to me that China's criticism of U.S. extraterritorial jurisdiction would be more effective if it would focus on examples that violate international law rather than on examples that do not. China should be talking less about Frédéric Pierucci and more about Wanzhou Meng.

[This post also appears at Transnational Litigation Blog (TLB)]

How to Criticize U.S. Extraterritorial Jurisdiction (Part I)

Written by Bill Dodge, the John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis School of Law.

China has been critical of U.S. extraterritorial jurisdiction. In February, China's Ministry of Foreign Affairs issued a report entitled "The U.S. Willful Practice of Long-arm Jurisdiction and its Perils." In the report, the Ministry complained about U.S. secondary sanctions, the discovery of evidence abroad, the Helms-Burton Act, the Foreign Corrupt Practices Act, the Global Magnitsky Human Rights Accountability Act, and the use of extraterritorial jurisdiction in criminal cases. The report claimed that U.S. extraterritorial jurisdiction has caused "severe harm … to the international political and economic order and the international rule of law."

There are better and worse ways to criticize U.S. extraterritorial jurisdiction. The Ministry of Foreign Affairs report pursues some of the worse ways and neglects some better ones. In this post, I discuss a few of the report's shortcoming. In a second post, I discuss stronger arguments that one could make against U.S. extraterritorial jurisdiction.

Confusing Extraterritorial Jurisdiction with Personal Jurisdiction

One problem with the report is terminology. The report repeatedly uses the phrase "long-arm jurisdiction" to refer to the extraterritorial application of U.S. law. The United States, the report says, has "expand[ed] the scope of its long-arm jurisdiction to exert disproportionate and unwarranted jurisdiction over extraterritorial persons or entities, enforcing U.S. domestic laws on extraterritorial non-US persons or entities, and wantonly penalizing or threatening foreign companies by exploiting their reliance on dollar-denominated businesses, the U.S. market or U.S. technologies."

In the United States, however, "long-arm jurisdiction" refers to the exercise of personal jurisdiction over non-resident defendants based on contacts with the forum state. The report seems to recognize this, referring in its second paragraph to the U.S. Supreme Court's decision in *International Shoe Co. v. Washington* (1945) and the requirement of "minimum contacts." But the report goes on use "long-arm jurisdiction" to refer the extraterritorial application of U.S. law. This is more than an academic quibble. Jurisdiction to prescribe (the authority to make law) and jurisdiction to adjudicate (the authority to apply law) are very different things and are governed by different rules of domestic and international law.

The report's confusion on this score runs deeper than terminology. The Ministry of Foreign Affairs seems to think that the United States uses the concept of "minimum contacts" to expand the extraterritorial application of U.S. law. The United States "exercises long-arm jurisdiction on the basis of the 'minimum contacts' rule, constantly lowering the threshold for application," the report states. "Even the flimsiest connection with the United States, such as having a branch in the United States, using [the] U.S. dollar for clearing or other financial services, or using the U.S. mail system, constitutes 'minimum contacts.'"

In fact, the requirement of "minimum contacts" for personal jurisdiction is quite stringent. Moreover, as I have recently noted, this requirement serves to *limit* the extraterritorial application of U.S. law rather than expand it. When foreign defendants lack minimum contacts with the United States, U.S. courts cannot exercise personal jurisdiction and thus cannot apply U.S. laws extraterritorially even when Congress wants them to. The Helms-Burton Act (one of the laws about which China's Ministry of Foreign Affairs complains) is an example of this. Congress clearly intended its cause of action for trafficking in confiscated property to discourage non-U.S. companies from investing in Cuba. But U.S. courts have been unable to apply the law to foreign companies because they have concluded that those companies lack "minimum contacts" with the United States.

China's complaint is not against U.S. rules of personal jurisdiction or the requirement of "minimum contacts." It is rather with the extraterritorial application of U.S. law. Using the phrase "long-arm jurisdiction" confuses the two issues.

Criticizing Extraterritorial Jurisdiction that China Exercises Too

The report also criticizes the United States for applying its law extraterritorially based on effects: "the United States has further developed the 'effects doctrine,' meaning that jurisdiction may be exercised whenever an act occurring abroad produces 'effects' in the United States, regardless of whether the actor has U.S. citizenship or residency, and regardless of whether the act complies with the law of the place where it occurred." This is true. For example, the U.S. Supreme Court has held that U.S. antitrust law "applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."

But China also applies its law extraterritorially based on effects. China's Anti-Monopoly Law provides in Article 2 that it applies not only to monopolistic practices in the mainland territory of the People's Republic of China but also "to monopolistic practices outside the mainland territory of the People's Republic of China that eliminate or restrict competition in China's domestic market." In 2014, China blocked an alliance of three European shipping company because of possible effects on Chinese markets.

China regulates extraterritorially on other bases too. Although the Ministry of Foreign Affairs characterizes the extraterritorial application of U.S. criminal law as "an extreme abuse," China applies its criminal law extraterritorially on all the bases that the United States employs. The Criminal Law of the People's Republic of China asserts jurisdiction based not just on territory (Article 6), but also on effects (Article 6), nationality (Article 7), passive personality (Article 8), the protective principle (Article 8), and universal jurisdiction (Article 9). Each of these bases for jurisdiction to prescribe is consistent with customary international law, and China has the right to extend its criminal law extraterritorially like this. But so does the United States.

In their excellent article *Extraterritoriality of Chinese Law: Myths, Realities and the Future*, Zhengxin Huo and Man Yip provide a detailed discussion of the extraterritorial application of Chinese law. "China's messaging to the international community is," they note, "somewhat confusing: it opposes the US practice of 'long-arm jurisdiction,' yet it has decided to build its own legal system of extraterritoriality." By criticizing the United States for exercising jurisdiction on the same bases that China itself uses, China opens itself to charges of hypocrisy.

Ignoring Constraints on U.S. Extraterritoriality

The Ministry of Foreign Affairs report also ignores important constraints on the extraterritorial application of U.S. law. It says the United States has "developed a massive, mutually reinforcing and interlocking legal system for long-arm jurisdiction" and has "put in place a whole-of-government system to practice long-arm jurisdiction."

In fact, U.S. courts limit the extraterritorial application of U.S. law in significant ways. First, as noted above, U.S. rules on personal jurisdiction (including

"minimum contacts") limit the practical ability of the United States to apply its laws abroad. As I have written before, "Congress cannot effectively extend its laws extraterritorially if courts lack personal jurisdiction to apply those laws."

Second, U.S. courts apply a presumption against extraterritoriality to limit the reach of federal statutes. Most recently, in *Abitron Austria GmbH v. Hectronic International, Inc.* (2023), the Supreme Court held that federal statutes should be presumed to apply only to conduct in the United States unless those statutes clearly indicate that they apply extraterritorially. At issue in *Abitron* was the federal trademark statute, which prohibits use of a U.S. trademark that is likely to cause confusion in the United States. The defendants put U.S. trademarks on products in Europe, some of which were ultimately sold to the United States. The dissent argued that the statute should apply to foreign conduct as long as the focus of Congress's concern—consumer confusion—occurred in the United States. But the majority disagreed, holding that there must also be conduct in the United States. As I have noted previously, this version of the presumption has the potential to frustrate congressional intent when Congress focuses on something other than conduct.

Third, some lower courts in the United States impose additional limits on the extraterritorial application of U.S. law when foreign conduct is compelled by foreign law. In 2005, U.S. buyers sued Chinese sellers of vitamin C for fixing the prices of vitamins sold to the United States. The U.S. court found the Chinese sellers liable for violating U.S. antitrust law and awarded $147 million in damages. Although the anticompetitive conduct occurred in China, it had effects in the United States because vitamins were sold at higher than market prices in the United States.

The Chinese companies appealed, arguing that they were required by Chinese law to agree on export prices. The case went all the way to the U.S. Supreme Court on the question of how much deference to give the Chinese government's interpretation of its own law. Ultimately, in 2021, the Second Circuit Court of Appeals held that Chinese law did indeed require the anticompetitive conduct and that the case should therefore be dismissed on grounds of international comity because China had a stronger interest in applying its law than the United States did. This is a remarkable decision. Although Congress clearly intended U.S. antitrust law to apply to foreign conduct that causes anticompetitive effects in the United States, and although applying U.S. law based on effects would not violate

international law, the U.S. court held that the case should be dismissed in deference to Chinese law.

To be clear, I disagree with these constraints on the extraterritorial application of U.S. laws. I think Congress should have more authority to define rules of personal jurisdiction, particularly when it wants its laws to apply outside the United States. I disagree with *Abitron*'s conduct-based version of the presumption against extraterritoriality. And I filed two separate amicus briefs (with Paul Stephan) urging the Supreme Court to take up the international comity question and make clear that lower courts have no authority to dismiss claims like those in Vitamin C that fall within the scope of U.S. antitrust law. But whether these constraints are wise or not, ignoring them provides a distorted picture of U.S. extraterritorial jurisdiction.

Weak Examples

The Ministry of Foreign Affairs also weakens its case by relying on examples that do not support its arguments. The report singles out the indictment of French executive Frédéric Pierucci for violating the U.S. Foreign Corrupt Practices Act (FCPA), a story he recounts in his 2019 book *The American Trap.* Here is how the report describes what happened:

> *In 2013, in order to beat Alstom in their business competition, the United States applied the Foreign Corrupt Practices Act to arrest and detain Frédéric Pierucci on charges of bribing foreign officials. He was further induced to sign a plea deal and provide more evidence and information against his company, leaving Alstom no choice but to accept General Electric's acquisition, vanishing ever since from the Fortune 500 list. The U.S. long-arm jurisdiction has become a tool for its public power to suppress competitors and meddle in normal international business activities, announcing the United States' complete departure from its long-standing self-proclaimed champion of liberal market economy.*

I have read Pierucci's book, and his story is harrowing. But the book does not show what the report claims.

First, and perhaps most significantly, application of the FCPA in this case was not extraterritorial. Pierucci was indicted for approving bribes paid to Indonesian

officials to secure a contract for Alstrom from his office in Windsor, Connecticut (p. 65). He seems to acknowledge that the bribes violated the FCPA but counters that the statute was "very poorly enforced" at the time (p. 67) and that he "received no personal gain whatsoever" (p. 71). These are not valid defenses under U.S. law.

Second, Pierucci was not arrested to facilitate GE's acquisition of Alstom. The U.S. Department of Justice (DOJ) began investigating Alstom's payment of bribes in late 2009 (p. 54), and Pierucci was arrested in April 2013 (p. 1). Alstom's takeover discussions with GE began during the summer of 2013 (p. 162), and the deal was made public in April 2014 (p. 155). Pierucci plausibly claims that GE took advantage of Alstom's weakened position, noting that "Alstom is the fifth company to be swallowed up by GE after being accused of corruption by the DOJ" (p. 164). But I saw no claim in the book that DOJ's investigation of Alstom was intended to bring about its acquisition by a U.S. competitor.

Finally, it is hard to credit the report's assertion that prosecuting bribery constitutes "meddl[ing] in normal international business activities." China has joined the U.N. Convention Against Corruption. In 2014, China fined British company GlaxoSmithKline 3 billion yuan (U.S.$489 million) for bribing Chinese doctors. Earlier this year, China launched an unprecedented campaign against corruption in its health care industry. And, of course, fighting corruption remains a top priority of President Xi Jinping.

Conclusion

Perhaps it seems unfair to criticize a report from a foreign ministry for making mistakes about law. Perhaps the report should be seen merely as a political document. But the report itself discusses legal matters in detail and charges the United States with "violat[ing] international law." Whether the report is a political document or not, the shortcomings that I have discussed here weaken its credibility and undermine its arguments.

There are better ways to criticize U.S. extraterritorial jurisdiction. In Part II of this post, I will offer some examples.

[This post also appears at Transnational Litigation Blog (TLB)]

Second Issue of the Journal of Private International Law for 2023

The second issue of the *Journal of Private International Law* for 2023 has just been published. It contains the following articles:

DJB Svantesson & SC Symeonides, “Cross-border internet defamation conflicts and what to do about them: Two proposals”

Conflicts of laws in cross-border defamation cases are politically and culturally sensitive and their resolution has always been difficult. But the ubiquity of the internet has increased their frequency, complexity, and intensity. Faced with the realities of the online environment—including the virtual disappearance of national borders—several countries have acted unilaterally to preserve their values and protect their interests. Some countries enacted laws favouring consumers or other potential plaintiffs, while other countries took steps to protect potential defendants, including publishers and internet service providers. As a result, these conflicts are now more contentious than ever before. We believe there is a better way—even-handed multilateral action rather than self-serving unilateral action. In this article, we advance two proposals for multilateral action. The first is a set of soft law principles in the form of a resolution adopted by the Institut de Droit International in 2019. The second is a proposed Model Defamation Convention. After presenting and comparing these two instruments, we apply them to two scenarios derived from two leading cases (the first and one of the latest of the internet era) decided by courts of last resort. The first scenario is based on Dow Jones & Company Inc v Gutnick, which was decided by the High Court of Australia in 2002. The second is based on Gtflix Tv v. DR, which was decided by the Court of Justice of the European Union at the end of 2021. We believe that these two instruments would produce more rational solutions to these

and other cross-border defamation conflicts. But if we fail to persuade readers on the specifics, we hope to demonstrate that other multilateral solutions are feasible and desirable, and that they are vastly superior to a continuing unilateral "arms race." In any event, we hope that this article will spur the development of other proposals for multilateral action.

G McCormack, "Conflicts in insolvency jurisdiction"

The Hague Judgments Convention 2019 contains an insolvency exception. The paper suggests that the proposed Hague Jurisdiction Convention should contain an insolvency exception that mirrors that contained in the existing Hague Judgments Convention. It is also submitted that international instruments in the field of insolvency, and related matters, are best dealt with by the United Nations Commission on International Trade Law (UNCITRAL).

L Theimer, "Protection against the breach of choice of court agreements: A comparative analysis of remedies in English and German courts"

In fixing the place and provider for the resolution of disputes in advance, choice of court agreements increase procedural legal certainty and the predictability of litigation risks. Hence, their protection is crucial. This article undertakes a functional comparison of the remedies for breach of exclusive choice of court agreements in English and German courts, painting a picture of different approaches to a common problem. English courts, now no longer constrained by EU law, employ an entire arsenal of remedies, most strikingly the anti-suit injunction and damages effectively reversing a foreign judgment. In contrast, German courts exercise greater judicial restraint, even though damages for the breach of a choice of court agreement have recently been awarded for the first time. Against this backdrop, two distinct but interrelated reasons for the diverging approaches are identified and analysed, the different conceptions of choice of court agreements and the different roles of comity and mutual trust.

V Shikhelman, "Enforcement of foreign judgments – Israel as a case study"

This article shows how enforcement of foreign judgments in Israel works in

practice. Using an original hand-coded dataset, the article seeks to determine empirically which factors increase the likelihood of a foreign judgment being enforced by Israeli courts. To do so the article makes use of two major theories about enforcement of foreign judgments – international comity and vested rights. Also, the article hypothesises that enforcement can be influenced by specific characteristics of the Israeli court and the foreign judgment.

The article finds that the best predictor of foreign judgment enforcement in Israel is the specific characteristics of the foreign judgment and of the Israeli court – cases with a contractual-commercial nature, and cases brought before one of the central districts of Israel are more likely to be enforced. Additionally, the volume of trade between the issuing country and Israel might also be a certain predictor of enforcement. Finally, the article finds that the due process in individual cases might have some influence on the enforcement decision.

D Zannoni, "How to balance respect for diversity and the rights of the vulnerable? (Non-)recognition of forced and underage marriage under the lens of the European Convention on Human Rights"

Partly in view of the migratory phenomenon to which Europe is exposed, forced and underage marriages nowadays deserve careful consideration both as social phenomena and as legal institutions. This paper aims to verify whether and to what extent forced and underage marriages should be recognised in Europe. On the one hand, recognising the validity of these acts could arguably clash with fundamental values and rights protected by the European Convention on Human Rights and the Convention on Preventing and Combating Violence against Women and Domestic Violence. On the other hand, it is not possible to a priori exclude that a flat refusal to recognise a marriage validly established abroad might entail a violation of further rights of the spouses and ultimately have detrimental consequences for the parties that the refusal aims to protect. The aim is to assess whether private international law tools and techniques can offer a proper balance between respect for the fundamental values of reception societies and protection of the rights and interests of the parties involved.

Review Article

B Hayward, Putting the recognition and enforcement of foreign judgments in

context: *Comparative Recognition and Enforcement*, by Dr Drossos Stamboulakis

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The Jurisdiction Puzzle: Dyson, Supply Chain Liability and Forum Non Conveniens

Written by Dr Ekaterina Aristova, Leverhulme Early Career Fellow, Bonavero Institute of Human Rights, University of Oxford

On 19 October 2023, the English High Court declined to exercise jurisdiction in *Limbu v Dyson Technology Ltd*, a case concerning allegations of forced labour and dangerous conditions at Malaysian factories which manufactured Dyson-branded products. The lawsuit commenced by the migrant workers from Nepal and Bangladesh is an example of business and human rights litigation against British multinationals for the damage caused in their overseas operations. Individuals and local communities from foreign jurisdictions secured favourable outcomes and won jurisdictional battles in the English courts over the last years in several notable cases, including *Lungowe v Vedanta*, *Okpabi v Shell* and *Begum v Maran*.

The *Dyson* case is particularly interesting for at least two reasons. First, it advances a novel argument about negligence and unjust enrichment of the lead purchasing company in a supply chain relationship by analogy to the parent company liability for the acts of a subsidiary in a corporate group. Second, it is one of the few business and human rights cases filed after Brexit and the first to be dismissed on *forum non conveniens* grounds. Since the UK's EU referendum in 2016, the return of *forum non conveniens* in the jurisdictional inquiry has been seen as a real concern for victims of business-related human rights and environmental abuses seeking justice in the English courts. With the first case falling on jurisdictional grounds in the first instance, the corporate defendants started to collect a 'Brexit dividend', as cleverly put by Uglješa Grušic in his case

comment.

Facts

The proceedings were commenced in May 2022. The claimants were subjected to forced labour and highly exploitative and abusive conditions while working at a factory in Malaysia run by a local company. The defendants are three companies in the Dyson corporate group, two domiciled in England and one in Malaysia. The factory where alleged abuses took place manufactured products and components for Dyson products. Claimants argued that Dyson defendants were liable for (i) negligence; (ii) joint liability with the primary tortfeasors (the Malaysian suppliers running the factory and local police) for the commission of the torts of false imprisonment, intimidation, assault and battery; and (iii) unjust enrichment. They further alleged that the Dyson group exercised a high degree of control over the manufacturing operations and working conditions at the factory facilities and promulgated mandatory ethical and employment policies and standards in Dyson's supply chain, including in Malaysian factories.

The English courts are already familiar with the attempts to establish direct liability of the English-based parent companies for the subsidiaries' harms relying on negligence and the breach of duty of care owed to the claimants. In *Vedanta* and *Okpabi*, the UK Supreme Court made it clear that the parent company's involvement and management of the subsidiary's operations in different ways can give rise to a duty of care.

Broadening the scope of the parent company liability in a corporate group beyond strict control opened paths to supply chain liability. While lead purchasing companies, like Dyson, are not bound by shareholding with their suppliers, they often exercise a certain level of managerial control over independent contractors. Such involvement with particular aspects of a supplier's activities leads to the argument that a lead company could also be liable in negligence for a breach of the duty of care. The unjust enrichment claim that Dyson group has been enriched at the claimant's expense is a relatively novel legal basis, although it has already been raised in similar cases. To the best of my knowledge, in addition to the *Dyson* case, at least four legal actions focusing on supply chain liability are progressing in England: Malawian tobacco farmer claims against British American Tobacco and Imperial, Malawian tea farmer claims against PGI Group Ltd, Ghanaian children accusations against cocoa producer Olam and forced

labour allegations by Burmese migrants against Tesco and Intertek.

Judgment

The court had to resolve the jurisdictional question of whether the case would proceed to trial in England or Malaysia. The English common law rules are founded on service of the claim form on the defendant and are based on the defendant's presence in the jurisdiction. In general terms, jurisdiction over English-domiciled parent companies is effected within the jurisdiction as of right. Following Brexit, proceedings against an English parent company may be stayed on *forum non conveniens* grounds. Foreign subsidiaries are served outside the jurisdiction with the court's permission, usually on the basis of the 'necessary or proper party' gateway. In the *Dyson* case, the English defendants asked the court to stay the proceedings based on *forum non conveniens*, and the Malaysian defendant challenged the service of the claim form, arguing that Malaysia is a proper place to bring the claim.

The court agreed with the corporate defendants, having applied the two-stage test set out by the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*. The first stage requires consideration of the connecting factors between the case and available jurisdictions to determine a natural forum to try the dispute. The court concluded that Malaysia was 'clearly and distinctly more appropriate' [122]. Some factors taken into account were regarded as neutral between the different fora (convenience for all of the parties and the witnesses [84], lack of a common language for each of the witnesses [96], location of the documents [105]). At least one factor was regarded as a significant one favouring England as the proper place to hear the claim (risk of a multiplicity of proceedings and or irreconcilable judgments [109]). However, several factors weighed heavily in favour of Malaysia (applicable law [97], place where the harm occurred [102]). As a result, Malaysia was considered to be the 'centre of gravity' in the case [122].

Under the second limb of the *Spiliada* principle, the English courts consider whether they should exercise jurisdiction in cases where the claimant would be denied substantial justice in the foreign forum. The claimants advanced several arguments to demonstrate that there is a real risk of them not obtaining substantial justice in Malaysia [125–168], including difficulties in obtaining justice for migrant workers, lack of experienced lawyers to handle the case, the risk of a split trial, the cost of the trial and financial risks for the claimants and their

representatives, limited role of local NGOs to support the claimants. The court did not find cogent evidence that the claimants would not obtain substantial justice in Malaysia [169]. A stay of proceedings against English defendants was granted, and the service upon the Malaysian company was set aside [172]. Reaching this conclusion involved consideration of extensive evidence, including contradictory statements from Malaysian lawyers and civil society organisations. The Dyson defendants have given a number of undertakings to submit to the jurisdiction of the Malaysian courts and cover certain claimants' costs necessary to conduct the trial in Malaysia, which persuaded the court [16].

Comment

The *Dyson* case marks a shift from the recent trend of allowing human rights and environmental cases involving British multinationals to proceed to trial in the UK courts. Three principal takeaways are worth highlighting. First, the claimants in the business and human rights cases can no longer be certain about the outcome of the jurisdictional inquiry in the English courts. The EU blocked the UK's accession to the Lugano Convention despite calls from NGOs and legal experts. The risk of dismissal on *forum non conveniens* grounds is no longer just a theoretical concern.

Second, the *Dyson* case demonstrates the difficulties of finding the natural forum under the doctrine of *forum non conveniens* in civil liability claims involving multinationals. These complex disputes have a significant nexus with both England, where the parent or lead company is alleged to have breached the duty of care, and the foreign jurisdiction where claimants sustained their injuries. The underlying nature of the liability issue in the case is how the parent or lead company shaped from England human rights or environmental performance of its overseas subsidiaries and suppliers. In this context, I agree with Geert van Calster, who criticises the court's finding about Malaysia being the 'centre of gravity' in the case. I have argued previously that the *forum non conveniens* analysis should properly acknowledge how the claimants frame the argument about liability allocation between the parent company and other entities in the group or supply chain.

Finally, the *Dyson* case is not the first one to be intensely litigated on the *forum (non) conveniens* grounds. In *Lubbe v Cape*, *Connelly v RTZ* and *Vedanta*, the English courts accepted jurisdiction, acknowledging that the absence of a means

of funding or experienced lawyers to handle the case in a host state will lead to a real risk of the non-availability of substantial justice. The court in *Dyson* reached a different conclusion, but its analysis of the availability of substantial justice for claimants in Malaysia is not particularly persuasive, especially considering the claimants' 'fear of persecution, detention in inhumane conditions and deportation should they return to Malaysia' [71].

One aspect of the judgment is notably concerning. Claimants referred to the conduct of the Dyson defendants as being 'aggressive' and 'heavy-handed' [71], [73]. In concluding remarks, the court accepted there were deficiencies in Dyson's responses to the claimants' requests for the documents [173]. Yet despite this acceptance, the court has on multiple occasions relied on the defendants' undertakings to cooperate with the claimants to ensure the trial can proceed in Malaysia [136], [147], [151], [152], [166], [169]. Undoubtedly, the ruling will be appealed, and it remains to be seen if the English courts will be willing to try cases involving British multinationals in the post-Brexit landscape.

Call for Papers: Public Interest Litigation (NILR)

The Netherlands International Law Review (NILR) has issued a call for papers, in particular for private international law perspectives of public interest litigation.

Public interest litigation

Globally, we are witnessing an increase in what is called 'public interest litigation'. In particular, climate change lawsuits taking place in several countries (e.g. in the Netherlands the *Urgenda* and *Shell cases*) are generating global attention. Another example of this type of litigation concerns the protection of privacy (e.g. the lawsuits against *Facebook* and *TikTok*). Although there is not yet a well-defined definition of the phenomenon, it is generally accepted that public interest litigation is understood to mean legal action that is taken on a human

rights or equality issue of broad public concern.

Call for papers

The Netherlands International Law Review (NILR) invites researchers to submit abstracts for an upcoming *Special Issue* devoted to *Public Interest Litigation*. We are interested in papers focusing on questions of private international law and/or public international law with regard to this phenomenon in a broad sense. We particularly encourage contributions that address private international law questions.

Abstracts should be no longer than 500 words and should be submitted by January 2nd 2024 to nilr@asser.nl. Submissions are limited. The selection criteria will be based on the quality of the research and its originality. We also strive to ensure a diversity of represented legal systems and topics. If an abstract is accepted, this will be communicated by February 1st 2024. After acceptance, draft papers are to be submitted at the latest by May 1st 2024. The draft papers will be assessed by the editorial board of the NILR according to standard criteria. This assessment will be communicated to the author shortly afterwards.

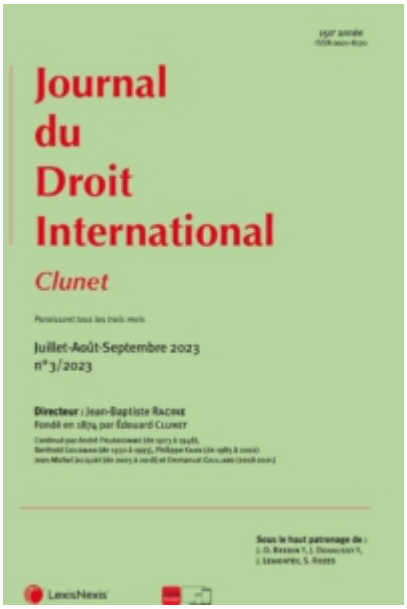
NILR

The Netherlands International Law Review (NILR) is one of the world's leading journals in the fields of public and private international law. It is published three times a year, and features peer-reviewed, innovative, and challenging articles, case notes, commentaries, book reviews and overviews of the latest legal developments in The Hague. The *NILR* was established in 1953 and has since become a valuable source of information for scholars, practitioners and anyone who wants to remain up to date concerning the most important developments in these fields.

Journal du Droit International Clunet – issue 2023/3

The third issue of the *Journal du Droit international-Clunet* of 2023 was released in July. It contains three articles and many case notes.

The first article Regard québécois sur le projet de Code de droit international privé français (A view from Quebec on the project of a french private international law Code) is authored by Prof. Sylvette Guillemard (Université Laval). The abstract reads as follows:



> *A draft of a French private international law code project was presented to the Minister of Justice in March 2022. As soon as it was submitted, it was immediately commented on by various parties ; its qualities are admired as much as its shortcomings are pointed out. In 1994, the Quebec legislator adopted a book dedicated to private international law in its new Civil Code. After nearly 30 years, it was able to reveal its flaws and demonstrate its advantages. Therefore, neither too old nor too young, it appeared to us as an excellent object of comparison with the French project. At the end of the exercise, we may conclude that French law can only emerge as the winner of this "operation of shaping the rules [of private international law] into a whole", to borrow the words of Rémy Cabrillac.*

Dr Djoleen Moya (Université catholique de Lyon) is the author of the second article Vers une redéfinition de l'office du juge en matière de règles de conflit de

lois ? (Towards a redefinition of the obligation for a judge to apply choice-of-law rules?). Dr Moya is continuing the reflection of her doctoral work *L'autorité des règles de conflit de loi – Réflexion sur l'incidence des considérations substantielles*, recently published. The abstract reads as follows:

> *The latest developments in matters of divorce, both in domestic law and in private international law, have largely renewed the question of the obligation for a judge to apply choice-of-law rules. Traditionally, the Cour de cassation considers that in matters of divorce, judges must apply, if necessary ex officio, the applicable conflict rule, because unwaivable rights are concerned. However, this solution is under discussion. First, the qualification of divorce as an unwaivable right is questionable, especially since the admission of a purely private divorce by mutual consent in French law. But above all, the Europeanisation of the applicable choice-of-law rules seems likely to call for a new definition the judges' procedural obligations. If we add to this the recent reorientation of the Cour de cassation's position and the solutions stated in the draft Code of Private of International Law, the question undoubtedly calls for a reassessment.*

The third article is authored by Prof. Sara Tonolo (Università degli Studi di Padova) and deals with Les actes de naissance étrangers devant la Cour européenne des droits de l'homme – à propos de l'affaire *Valdís Fjölnisdóttir et autres c/ Islande* (Foreign birth certificates before the European Court of Human Rights – about the *Valdís Fjölnisdóttir and others v/ Iceland* case). The abstract reads as follows:

> *The European Court of Human Rights ruled on the recognition of the filiation status within surrogacy in the Valdís Fjölnisdóttir and others v. Iceland case. This perspective leaves many questions unanswered and prompts further reflection, particularly with regard to the role that private international law can play in the protection of human rights, in the context of the difficult balance between the protection of the right to private and family life and the margin of appreciation reserved to member states.*

The full table of contents is available here.

PhD Studentship in Private International Law at University College London

Written by Ugljesa Grusic, Associate Professor at University College London, Faculty of Laws

Dr Ugljesa Grusic and Prof Alex Mills are pleased to announce that, alongside the UCL Faculty of Laws Research Scholarships which are open to all research areas, this year we have an additional scholarship specifically for doctoral research in private international law. The scholarship covers the cost of tuition fees (home status fees) and provides a maintenance stipend per annum for full time study at the standard UKRI rate. The annual stipend for 2023/24 (as a guide) was £20,622. The recipient of the scholarship will be expected to contribute to teaching private international law in the Faculty for up to 6 hours per week on average, and this work is remunerated in addition to the stipend received for the scholarship.

We particularly welcome applications with research proposals in fields that fall within our areas of interest, which are broad and include the following sub-topics within private international law: protection of weaker parties; environmental protection; business and human rights; sustainable development; digital technology; party autonomy; the relationship between public and private international law; private international law theory and/or methodology; colonialism; and private international law issues in arbitration and foreign relations law.

More information about UCL Faculty of Laws, our PhD programme, the process of applying and the scholarship is available here, here and here. Applicants should apply through the normal UCL Faculty of Laws PhD application process. All applicants within the relevant subject areas will be considered, but we recommend that applicants also specify in their application that they wish to be considered for these scholarships. The deadline date for applications for the

2024/25 academic year is 16 November 2023.

Prospective students are welcome to get in touch with either Dr Grusic at u.grusic@ucl.ac.uk or Prof Mills at a.mills@ucl.ac.uk.

New article published in African Journal of International and Comparative Law

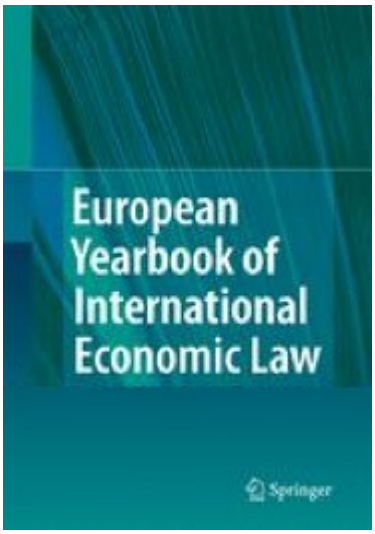
A new conflict of laws article was just published today on the *African Journal of International and Comparative Law*. It is titled: CSA Okoli, A Yekini & P Oamen, "The *Igiogbe* Custom as a Mandatory Norm in Conflict of Laws: An Exploration of Nigerian Appellate Court Decisions."

The abstract reads as follows:

Under the Igiogbe custom of the Bini Kingdom of Edo State Nigeria, the eldest surviving son exclusively inherits the ancestral home of his deceased father. This custom is a mandatory norm in conflict of laws. Litigation on the custom has been described as a matter of life and death. There is a widely shared view among academic writers, practitioners, and judges that this customary law is absolute. Contrary to this popular view, this work argues that the Igiogbe custom can be displaced by statute and other customary or religious laws. To substantiate this position, this article examines all the reported appellate court decisions on the Igiogbe custom and other connected principles. It is often taken for granted that every Bini man is subject to customary law, thereby leading to the overriding application of the Igiogbe custom. Recent developments in case law suggest otherwise. There is a conflict of personal law question that is often ignored in most litigation concerning the Igiogbe. Careful consideration of this question can potentially lead to the application of other systems of succession law (statutory,

religious, and other customary laws) other than the Igiogbe custom. Besides, these conflict of laws techniques and constitutional human rights norms can be used to strike the appropriate balance between competing interests and reasonable legitimate expectations of the deceased and their heirs.

European Yearbook of International Economic Law 2024: Call for abstracts (and papers)



The editors of the European Yearbook of International Economic Law (EYIEL) welcome abstracts from scholars and practitioners at all stages of their career for the EYIL 2024. This year's Focus Section will concentrate on **International and European Economic Law – Moving Towards Integration?** In the General Section, the EYIEL will address **Current Challenges, Developments and Events in European and International Economic Law**.

For the **Focus Section**, abstracts can cover any topic relating to the interlinkages and integration of economic law with other fields such as labour and human rights, environmental protection or climate change. This could cover developments in the WTO as well as in bi- and pluslateral trade agreements, in investment law or in EU law. We particularly welcome contributions addressing the following aspects:

- Labour, human rights and sustainable development provisions and chapters in FTAs; ? Developments in WTO jurisprudence and other

dispute settlement mechanisms relating to the integration of non-trade topics in the WTO;

- Innovations in investment treaty law in relation to sustainable development, environmental law and/or human rights;
- New approaches inside and outside the WTO (e.g. fisheries agreement, environmental goods agreements);
- Comparative analysis of developments relating to interlinkages and integration of economic law in different regions (Europe, North- and South-America, Asia, Africa, Pacific)
- Specific instruments and clauses within agreements integrating and determining the relationship of trade and non-trade topics, including techniques to counter fragmentation and advance integration/harmonization;
- "Greening" of EU law and European economic law;
- Global value chain regulation and governance models for sustainable production and consumption;
- Dogmatic approaches to systemic integration in international (economic) law.

For the **General Section**, abstracts should address topics of current relevance to European and International Economic Law. Similarly, reviews of case-law or practices and developments in the context of international organisations are encouraged.

Abstracts should not exceed 500 words. They should be concise and clearly outline the significance of the proposed contribution. **Abstracts** together with a **short bionote** should be submitted **until 31 October 2023** via email to eyiel@leuphana.de.

Successful applicants will be notified by **31 December 2023** that their proposal has been accepted. They are expected to send in their final contribution by **30 April 2024**.

Final submissions will undergo peer review prior to publication. Given that submissions are to be developed on the basis of the proposal, the review will focus on the development of the paper's central argument put forward in the abstract.

Submissions addressing particular regional and institutional developments should be analytical and not descriptive. Due to its character as a yearbook, the EYIEL will not publish articles which will lose their relevance quickly. Submissions should not exceed 12,000 words (including footnotes and references), though preference may be given to shorter submissions. They should include an abstract and a biographical note. Submissions need to be in conformity with the EYIEL style guidelines.

The editors of the EYIEL welcome informal enquiries about any other relevant topic in the field of international and European economic law. In case you have an idea or proposal, please submit your enquiry via e-mail to eyiel@leuphana.de.

Just released: International Child Abduction by Mayela Celis (Madrid: Dykinson, 2023 – in Spanish)

I am thrilled to announce that my book on international child abduction has been published this week (María Mayela Celis Aguilar (aka Mayela Celis), Madrid: Dykinson, 2023, 604 pp. – in Spanish). More information is available here.

I am most grateful to Prof. Marina Vargas Gómez-Urrutia and Hans van Loon for having written the Foreword of this book and for their support throughout this process. This book is dedicated to the memory of Adair Dyer, former Deputy Secretary General of the Hague Conference on Private International Law (HCCH), whom some of you may have known.

As stated in the publisher's website (translation into English): "This monograph conducts a critical study of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* by analysing both case law and doctrine. In particular, it examines key concepts of the Convention, such as habitual

residence and rights of custody, as well as other problems that arise more frequently in its application. But not before carrying out a detailed study of the phenomenon of international child abduction from a multidisciplinary and human rights approach.

"From a case law perspective, this work analyses approximately **600 judgments – and decisions – issued in 46 countries party to the 1980 Hague Convention**, as well as decisions from **seven international or regional tribunals and bodies**. Moreover, it prominently studies the decisions rendered by the European Court of Human Rights and the Court of Justice of the European Union that were considered most relevant. In addition, reference is made to decisions and opinions of the Inter-American Commission on Human Rights, Inter-American Court of Human Rights, International Court of Justice, UN Committee on the Elimination of Discrimination against Women, and the UN Committee on the Rights of the Child. **25 mediatic or historical cases** are also analysed on the basis of news media or sociological and historical literature.

"From a doctrinal perspective, this book carries out a detailed study of the latest doctrinal developments, both European and Latin-American. Furthermore, from a legislative perspective, this work includes an analysis of the latest legislative developments regarding both hard law and soft law. With respect to the former, this work briefly studies the European Brussels II ter Regulation (2019/1111) and with regard to the latter, it analyses and provides critical comments on the Guide to Good Practice of the HCCH on Article 13(1)(b) of the 1980 Hague Convention."

Book reviews are very much welcome.