Movement of persons and their personal status in a globalized world: Conference in Lyon (France) on 11-12 October 2018

The **University of Lyon III** will host the conference **"La circulation des personnes et de leur statut dans un monde globalisé"** on **11 and 12 October 2018**.

After a short introduction on the stakes and the historical aspects of the law on such movements, the first day will address the principles governing those movements (Human rights, EU rights, party autonomy and the States' interests) and day two the diverse methods, traditional or in test, to regulate them (Conflict of laws v. Recognition ; Impacts of public order, fraud and abuse of rights; Documents, constitution, absence and effects).

The conference is also remarkable by its panels since more than 60 scholars and professionals (lawyers, notary public, international organizations) from 7 nationalities are announced lead by Profs. Hugues Fulchiron (Lyon III), Hélène Gaudemet-Tallon (Paris II), Jean Foyer (Paris II), Paul Lagarde (Paris I), Hans van Loon (Former Sec. Gen. of the Hague Conference) and Horatia Muir Watt (Science Po.).

Publication of all the interventions is also planned. More information is available here

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Genocide by Expropriation – New

Tendencies in US State Immunity Law for Art-Related Holocaust Litigations

On 10 July 2018, the United States Court of Appeals for the District of Columbia Circuit rendered its judgment in the matter of Alan Philipps et al. v. the Federal Republic of Germany and the Stiftung Preussischer Kulturbesitz.

This case involves a claim by heirs of Holocaust victims for restitution of the „*Welfenschatz*" (Guelph Treasure), a collection of medieval relics and devotional art housed for generations in the Cathedral of *Braunschweig* (Brunswick), Germany. This treasure is now on display at the *Kunstgewerbemuseum Berlin* (Museum of Decorative Arts) which is run by the Stiftung Preussischer Kulturbesitz. The value of the treasure is estimated to amount to USD 250 million (according to the claim for damages raised in the proceedings).

The appeal judgment deals with, inter alia, the question whether there is state immunity for Germany and the Stiftung respectively. Under the US Federal Sovereign Immunities Act, foreign sovereigns and their agencies enjoy immunity from suit in US courts unless an expressly specified exception applies, 28 U.S.C. § 1604.

One particularly relevant exception in Holocaust litigations relating to works of art is the „expropriation exception", § 1605(a)(3). This exception has two requirements. Firstly, rights in property taken in violation of international law must be in issue. Secondly, there must be an adequate commercial nexus between the United States and the defendant:

> „A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

According to the Court's recent judgment in Holocaust litigation against Hungary (Simon v. Republic of Hungary, 812 F.3d 127, D.C. Cir. 2016), intrastate expropriations in principle do not affect international law but are internal affairs of the acting state vis-à-vis its citizens. However, if the intrastate taking amounts to the commission of genocide, such a taking subjects a foreign sovereign and its instrumentalities to jurisdiction of US courts (Simon v Hungary, op.cit.).

This leads to the question of what exactly is „genocide" in this sense. The Court in Simon adopted the definition of genocide set forth in Article II lit. c of the Convention on the Prevention of the Crime of Genocide of 9 December 1948, 78 U.N.T.S. 277, (signed by the USA on 11 December 1948, ratified on 25 November 1988), i.e. „[d]eliberately inflicting" on "a national, ethnical, racial or religious group … conditions of life calculated to bring about its physical destruction in whole or in part". Thus, the Court in Philipps, as it observed, was „asked for the first time whether seizures of art may constitute 'takings of property that are themselves genocide' ". "The answer is yes" (Philipps v. Germany, op.cit.).

The Court prepared this step in Simon v. Hungary:

> „The Holocaust proceeded in a series of steps. The Nazis achieved [the "Final Solution"] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies".

Therefore, actions taken on the level of first steps towards genocide are themselves genocide if later steps result in genocide even if these first measures as such, without later steps, would not amount to genocide. To put it differently, this definition of genocide includes expropriations that later were escalated into genocide if already these expropriations were „deliberately inflicted" „to bring about … physical destruction in whole or in part" (see again Art. II lit. c Prevention of Genocide Convention).

It will be a crucial question what the measures and means of proof for such an intent should be. In this stage of the current proceedings, namely on the level of appeal against the decision of first instance not to grant immunity, the Philipps Court explained, in its very first sentence of the judgment, that the claimants' submissions of facts have to be laid down as the basis for review:

> „Because this appeal comes to us from the district court's ruling on a motion

> to dismiss, we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor."

However, the position of the US Congress on the point is clear: As the Philipps Court explains,

> "[i]n the Holocaust Expropriated Art Recovery Act (HEAR Act 2016), which extended statutes of limitation for Nazi art-looting claims, Congress 'f[ound]' that 'the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups', see Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524."

It will be another crucial question, what „expropriation" exactly means in the context of the Holocaust. It is common ground that the unlawful taking of property from persecuted persons not only took place by direct taking but also and structurally through all sorts of transactions under duress. However, the exact understanding of what constitutes such "forced sales" – and thereby "expropriation" – seems to differ substantially. Some argue that even a sale of art works at an auction in a safe third state after emigrating to that state constitutes a forced sale due to the causal link between persecution, emigration and sale for making money in the exile. Under Art. 3 of the US Military Law No. 59 of 10 November 1947 on the Restitution of Identifiable Property in Germany, there was a „presumption of confiscation" for all transfers of property by a person individually persecuted or by a person that belonged to class of persecuted persons such as in particular all Jews. This presumption could be rebutted by submission of evidence that the transferor received a fair purchase price and that the transferor could freely dispose of the price. It is not clear whether this standard or a comparable standard or another standard applies in the case at hand. Irrespective of this legal issue, the claimants submit on the level of facts that the purchase price was only 35% of the fair market value in 1935. This submission was made in the following context:

Three Jewish art dealers from Frankfurt am Main, ancestors to the claimants, acquired the Guelph Treasure in October 1929 from the dynasty of Brunswick-Lüneburg shortly before the economic crisis of that year. The agreed price was 7.5 million Reichsmark (the German currency of the time). The estimations of the

value prior to the acquisition seem to have ranged between 6 and 42 million Reichsmark. The sales contract was signed by the art dealers „J.S. Goldschmidt“, „I. Rosenbaum“ und „Z.M. Hackenbroch“. These dealers and others formed a “consortium“ with further dealers to be able to raise the money (the whereabouts of the contract for this consortium and thus the precise structure of this joint-venture is unknown up to now).

According to the sales contract, the buyers were obliged to resell the Treasure and share profits with the seller if these profits go beyond a certain limit. The contract expressly excluded the possibility for the buyers to keep the Treasure or parts of it. Rather, the buyers were to take „every effort” to achieve a resale.

In the following years, the consortium undertook many steps to sell the Treasure in Germany and in the USA. However, according to the German Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property (i.e. the alternative dispute resolution body established by the German government in order to implement the non-binding Washington Principles on Nazi Confiscated Art of 3 December 1998, on which 44 states, including Germany and the USA agreed), it was common ground that the economic crisis reduced means and willingness of potential buyers significantly. In 1930/1931, the dealers managed to sell 40 pieces for around 2.7 million *Reichsmark* in total. After displaying for sale in the USA, the remaining 42 items were stored in Amsterdam. In 1934, the Dresdner Bank showed interest as a buyer, acting on behalf of the State of Prussia. The bank apparently did not disclose this fact. In April of 1935, the consortium made a binding offer for 5 million Reichsmark, the bank offered 3.7 million, the parties ultimately agreed upon 4.25 million, to be paid partly in cash (3.37 million), partly by swap with other works of art to be sold abroad in order to react to foreign currency exchange restrictions. The sales contract was signed on 14 June 1935 by the dealers and the bank, acting on behalf of the State of Prussia whose Prime Minister was Hermann Göring at the time. In July 1935, (almost) the full price was paid (100.000 Reichsmark were kept as commission). The 42 objects were transferred to Berlin. The consortium seemed to have been able to freely dispose of the money that they received at that time and pay it out to the members of the consortium. Later, all but one of the dealers had to emigrate, the one remaining in Germany came to death later (apparently under dubious circumstances, as is submitted by the claimants).

On the merits, the courts will have to take a decision on the central point of this case whether these facts, as amended/modified in the further proceedings, amount to "expropriation" and, if so, whether this expropriation was intended to „deliberately inflict … conditions of life calculated to bring about … physical destruction in whole or in part" (see once more Article II lit. c of the Convention on the Prevention of the Crime of Genocide).

On a principal level, the Federal Republic of Germany argued that allowing this suit to go forward will "dramatically enlarge U.S. courts' jurisdiction over foreign countries' domestic affairs" by stripping sovereigns of their immunity for any litigation involving a "transaction from 1933–45 between" a Nazi-allied government and "an individual from a group that suffered Nazi persecution." In addition to that, the principal line of argument would certainly apply to other cases of genocide and preparatory takings of property. The Court was not impressed:

> "Our conclusion rests not on the simple proposition that this case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs' specific—and unchallenged—allegations that the Nazis took the art in this case from these Jewish collectors as part of their effort to drive [Jewish people] out of their ability to make a living."

Even then, the enlargement of jurisdiction over foreign states by widening the exceptions to state immunity under the concept of genocide by expropriation appears to be in contrast to the recent efforts by US courts to narrow down jurisdiction in foreign-cubed human rights litigations under the ATS and in general.

However, the Federal Republic of Germany does no longer need to worry: The Court held that the second requirement of the expropriation exception is not fulfilled because the Guelph Treasure is not present in the United States in connection with a commercial activity carried on by the foreign state in the United States. In fact, it is not present in the USA at all but still in Berlin.

Yet, in respect to the Stiftung Preussischer Kulturbesitz, the suit will continue: For a state agency it seems sufficient that the property in question is owned or operated by that agency or instrumentality of the foreign state if that agency or instrumentality is engaged in a commercial activity (not necessarily in connection

with the property in question) in the United States. The ratio of this rule is difficult to understand for outsiders and appears not to be in line with the overall developments of (personal) jurisdictional law in the USA, and if at the end of the day there is a judgment against the Stiftung to return the Treasure there will of course be the issue of recognition and enforcement of that judgment in Germany – including all political implications and considerations of public policy.

The parties may want to think about arbitration at some point. That was the way out from lengthy court proceedings and delicate questions on all sorts of conflicts of laws in the famous case of Maria Altmann v. Republic of Austria that likewise turned, inter alia, on issues of state immunity for foreign states and their agencies or instrumentalities. In general, it seems that arbitration could play a larger role in art-related disputes (see e.g. the German Institution for Arbitration's Autumn Conference on 26 September 2018 in Berlin).

Islamic Marriage and English Divorce – a new Decision from the English High Court

In England, almost all married Muslim women have had a nikah, a religious celebration. By contrast, more than half of them have not also gone through a separate civil ceremony, as required under UK law. The often unwelcome consequence is that, under UK law, they are not validly married and therefore insufficiently protected under UK law: they cannot claim maintenance, and they cannot get a divorce as long as the marriage is viewed, in the eyes of the law, as a nullity.

The government has tried for some time to remedy this, under suspicious gazes from conservative Muslims on the one hand, secularists on the other. A 2014 report (the 'Aurat report'), which demonstrated, by example of 50 cases, the hardships that could follow from the fact that nikahs are not recognized, found

attention in the government party. An independent review into the application of sharia law in England and law, instigated by Theresa May (then the Home Secretary) in 2016 and published earlier this year, recommended to ensure that all Islamic marriages would also be registered; it also recommended campaigns for increased awareness.

Such steps do not help where the wedding already took place and has not been registered. A new decision by the High Court brings partial relief. Nasreen Akhter (who is a solicitor and thus certainly not an uneducated woman ignorant of the law) asked to be divorced from her husband of twenty years, Mohammed Shabaz Khan. Khan's defense was that the marriage, which had been celebrated as a nikah in west London, existed only under Islamic, not under UK law, and therefore divorce under UK law was not possible. Indeed, up until now, the nikah had been considered a non-marriage which the law could ignore, because it did not even purport to comply with the requirements of English law. The High Court was unwilling to presume the lived marriage as valid. However, drawing at length on Human Rights Law, it declared the marriage void under sec 11 of the Matrimonial Causes Act 1973 and granted the wife a decree of nullity. This has important consequences: Unlike a non-marriage, a void marriage allows a petitioner to obtain financial remedies.

The decision represents a huge step towards the protection of women whose Islamic marriages are not registered. It makes it harder for men to escape their obligations under civil law. At the same time, the decision is not unproblematic: it refuses recognition of an Islamic marriage as such, while at the same time, under certain conditions, treating it like a recognized marriage. In all likelihood, only registration will create the needed certainty.

The decision is here.

The “Coman” Case (C-673/16): Some reflections from the point of view of private international law

Written by Dr. iur. Baiba Rudevska (Latvia)

On 5 June 2018, the ECJ rendered a judgment in the *Coman* case (C-673/16). For the first time the ECJ had the opportunity to rule, on the concept of ‘*spouse*’ within the meaning of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38) in the context of a same-sex marriage. Even if the Directive only covers questions related to the entry and residence in the European Union (EU), this judgment could be of interest for Private International lawyers as well.

Main Facts:

Mr Coman (a Romanian and American citizen), and Mr Hamilton (an American citizen) met in the United States and lived there together. Mr Coman later took up residence in Belgium while Mr Hamilton continued to live in the US. In 2010 they got married in Belgium. In 2012 they contacted the competent Romanian authority to request information on the conditions under which Mr Hamilton, a non-EU citizen, could obtain the right to reside in Romania for more than three months. The Romanian authority replied that Mr Hamilton had only a right of residence for three months because, according to the Romanian Civil Code,

marriage between two persons of same sex was not recognised. The case went up to the Constitutional Court, which decided to make the request for a preliminary ruling. One of the questions referred to the ECJ was as follows:

Does the term "spouse" in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?

Only this question is of interest for private international law (hereinafter referred to as "PIL"). Let us take a look at the decision and at the reasoning of the ECJ.

Decision of the ECJ:

The ECJ decided that:

1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38 in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

As we can see from the operative part, the ECJ does *not* impose the recognition of

same-sex marriages in all the Member States.

Main Reasoning of the ECJ:

The first important thing to be noted is that the ECJ only uses the term "recognition of marriage" (paras. 36, 40, 42, 45, 46 of the judgment) whereas the Advocate General only referred to the term "autonomous interpretation" (paras. 33-58 of the opinion). And *vice versa*– the ECJ does not directly mention the term "autonomous interpretation" and the Advocate General does not analyse the "recognition of marriage". This raises an interesting question: what exactly was the method used by the ECJ in this case? Autonomous interpretation and recognition are two different methods; the former is widely used both in EU law (in general) and in international human rights law, whereas the latter is typical of PIL. Only in the second case (if we recognise that the ECJ has applied the recognition method) will this judgment be important and have a considerable impact in the field of PIL.

Here is my opinion on how this judgment should be construed:

1. The ECJ starts its reasoning by *de facto* using the method of autonomous interpretation:

(a) The term 'spouse' refers to a person joined to another person by the bonds of marriage (para. 34 of the judgment).

(b) The term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned (para. 35 of the judgment).

(c) Article 2(2)(a) of that directive, applicable by analogy in the present case, does not contain any reference with regard to the concept of 'spouse' within the meaning of the Directive. It follows that a Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment).

However, after that, the ECJ switches to the term 'recognition of marriage'

(paras. 35 et seq.). Does the ECJ switch to recognition or is it still using autonomous interpretation with different words?

2. It seems that the ECJ continues to applyautonomous interpretation of the term ‘spouse’, as the Advocate General did in his observations. In fact, the use of the words ‘recognition of marriage’ must be understood within the context of Romanian domestic law (Civil Code) according to which marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners are not recognised in Romania (paras. 8, 36 of the judgment). From the point of view of PIL, it is important to point out that this Romanian legal provision already contains the Romanian public policy clause; in other words, the public policy exception is already integrated in this legal norm.

Why Autonomous Interpretation?

Both the Advocate General and the ECJ stressed that Article 2(2)(b) of the Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside, but Article 2(2)(a) of that Directive, applicable by analogy in the present case, does not contain any such reference with regard to the concept of ‘spouse’ within the meaning of the Directive. Consequently, the Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment; paras. 33, 34 of the opinion).

The Advocate General points out that the terms of a provision of EU law without express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU (para. 34 of the opinion). The method of autonomous interpretation (qualification *lege communae*) is the only alternative to a reference to domestic law (qualification *lege fori*or *lege causae*). There are no other alternatives, even if in practice the ECJ does not clearly emphasise the application of this method [Audit M. L’interpretation autonome du droit international privé communautaire // *Journal du droit international*, 2004, n° 3, p. 799].

The use of the Advocate General's opinion in the reasoning of the ECJ leads to the conclusion that the ECJ has applied the method of autonomous interpretation (rather than recognition) of a precise term to construe, namely 'spouse' (Article 2(2)(a) of the Directive).

Why Not Recognition?

The method of recognition is one of the methods used within the framework of PIL. However, as Professor Lagarde has shown, this method can be applied in primary EU law and not in secondary law (like directives or regulations) [Lagarde P. La reconnaisance. Methode d'emploi. In: Vers de nouveaux équilibres entre ordres juridiques. *Mélanges en l'honneur de H.Gaudemet-Tallon*. Paris: Dalloz, 2008, p. 483].

Therefore, in cases like *Grunkin Paul*(C-353/06) and *Bogendorff von Wolffersdorff*(C-438/14) we see the application of this method to names, according to provisions of TFEU (see operative parts of both judgments). The application of recognition also implies some changes in the civil registers of the Member States. On the other hand, what had been requested in the *Coman*case was the interpretation of Article 2(2)(a) of the Directive and not a ruling on the recognition of same-sex marriages within the EU. The sole context of the word 'recognition' can be found in the relevant provision of Romanian law, excluding the recognition of foreign same-sex marriages. One can only guess, but it seems that the confusion of two methods – "autonomous interpretation" and "recognition" – has been ultimately inspired by the wording of the Romanian legal provision.

Conclusions:

The interpretation and application of the judgment in the *Coman* case is narrower than it seems at the first glance. In reality, the ECJ has applied the method of autonomous interpretation of the term 'spouse' used in Article 2(2)(a) of the Directive 2004/38. According to the ECJ, this term is gender-neutral and must be understood as encompassing same-sex spouses – but only in the context of the Directive.

Therefore, this judgment does not impose the recognition of foreign same-sex marriages within the EU. It only means that Romania must grant entry and residence permits to same-sex spouses too. In such situations Romania must apply

the autonomous interpretation of the term ‘spouse’ instead of a domestic legal norm prohibiting the recognition of foreign same-sex marriages in Romania. In other words, Article 21(1) TFEU must be seen as precluding a Member State from applying its domestic law on this particular point, and the domestic public policy exception cannot be applied either. However, this interpretation relates only to the Directive. The qualification *lege communae* of the term ‘spouse’ shall prevail over its qualification *lege fori*. No more and no less.

An additional remark: see the new Regulation (EU) 2016/1191 of the European Parliament and of the Council on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [OJ L 200, 26.7.2016, pp. 1-136]. Article 2(4) of this Regulation states that it does not apply to the recognition, in a Member State, of legal effects relating to the content of public documents (including public documents establishing the fact of marriage, capacity to marry, and marital status; Article 2(1)(e)), issued by the authorities of another Member State.

Tort Litigation against TNCs in the English Courts

Ekaterina Aristova, a PhD in Law Candidate at the University of Cambridge, has made available on SSRN her article “Tort Litigation against TNCs in the English Courts: The Challenge of Jurisdiction”. Published earlier this month in the Utrecht Law Review the article discusses a recent trend of private claims alleging direct liability of parent companies for overseas human rights abuses (‘Tort Liability Claims’) focusing on the rules of civil jurisdiction applied by the English courts. It demonstrates how jurisdictional issues arising in Tort Liability Claims challenge the traditional value-neutralism paradigm of private international law as an abstract and technical disciplineby necessitating increasing involvement of domestic courts in the regulation of transnational corporations (‘TNCs’).

The author has kindly provided us with a brief summary of her key findings:

1) Tort Liability Claims are typically initiated in England by private partiesaffected by the activities of TNCs in the host (foreign) state.These arecivil liability cases in which the cause of actionagainst English-domiciled parent companiesis framed through the tort law concept of duty of carerather than the corporate law doctrine of piercing the corporate veil or customary international law on human rights. The allegations are based on the common law principles which provide that in certain circumstances the parent company may be found to have assumed a duty of care, owed to the claimants, to ensure their safety.The article explainsthat duty of care is invoked by the claimants in order to: (1) attribute liability for the overseas abuse to the parent company; (2) establish the necessaryterritorialconnection between the alleged tort and England; and (3) weaken the extraterritoriality concerns raised by the judgment of the English courtswith respect to the events occurred on the territory of the host(foreign)state.

2) To date, the application of Brussels I and English common law by English courts to Tort Liability Claims has resulted in the development of a jurisdictional solution for claims brought against English-domiciled parent companies and their foreign subsidiaries as co-defendants. The concept of duty of care allows claimants to bring claims against English-domiciled parent companies as anchor defendants so as to allow the joinder of the foreign subsidiary as a necessary or proper party under common law. Following the CJEU's decision in Owusu, the general rule of domicile under Article 4 of Brussels I has a mandatory effect in the proceedings against English-domiciled parent company and claimants cannot rely onthe doctrine of forum non conveniens under English traditional rules. As a result, claims brought against foreign subsidiaries are also likely to survive the forum convenienscontrol. The overall analysis of the rules of jurisdiction in this article suggests that: (1) claims against the English-domiciled parent company in relation to the overseas operations of its foreign subsidiary can be heard in the English courts; and (2) the existence of an arguable claim against an English-domiciled parent company also establishes jurisdiction of the English courts over the connected claims against the subsidiary even if the factual basis of the case occur almost exclusively in the foreign state.

3) One of the most recent successful attempts of foreign citizens to establish

English jurisdiction over legal entities of TNC is litigation against English-based mining corporation Vedanta Resources Plc ('Vedanta') and its Zambian subsidiary Konkola Copper Mines ('KCM') in relation to the environmental pollution in Zambia resulting from the KCM's operations. Both the High Court *(discussed by the author earlier on* this blog*) and the* Court of Appeal *(also refer to author's* earlier post*) confirmed that Zambian citizens can pursue in England claims against Vedanta and KCM. Decisions of the English courts inVedanta allow making few important observations. Firstly, if the parent company merely held shares in the capital of a foreign subsidiary this would not lead to the establishment of a duty of care and additional circumstances are required to conclude whether the parent company could be held responsible. Second, the parent's direct and substantial oversight of the subsidiary's operations in question, including specific environmental and technical deficiencies of the infrastructure in the host state, is likely to give rise to the duty of care. Third, engagement in a mini-trial on the substantive liability issues is not appropriate at the early jurisdictional stage of proceedings, before full disclosure of the relevant documents. Fourth, in the context of applying the 'necessary or proper party' gateway, the practical objectives of avoiding two trials on similar facts and events in different parts of the world outweigh the need for the existence of a territorial connection between England and the claim against a foreign subsidiary of the English-domiciled parent company.*

4) Unlike in Vedanta, the foreign claimants in Okpabi v Shellfailed to establish jurisdiction of the English courts over claims against Royal Dutch Shell, an English-domiciled parent company ('RDS'), and its Nigerian operating subsidiary Shell Petroleum Development Company of Nigeria Ltd ('SPDC') for the ongoing pollution and environmental damage caused by the oil spills in Nigeria. In 2018, the Court of Appeal *in a split decision concluded that the claimants had not established an arguable duty of care assumed by RDS in relation to SPDC's operations and that, hence, there was no real issue to be tried by RDS and the claimants. As a result, claims against RDS and SPDC were dismissed. The article criticises the Court of Appeal decision for two major shortcomings. First of all, it is submitted that the court took a highly restrictive approach for the imposition of the duty of care on English-domiciled parent companies in relation to the overseas activities of their subsidiaries. The second serious shortcoming of the Court of Appeal's majority decision in Okpabiis an unreasonably high burden on the claimants to establish an arguable case on the*

duty of care at the jurisdictional stage of proceedings. Arguably, such approach blurs the boundary between jurisdictional inquiry and resolution of the case on the merits.

5) Finally, the article also discusses the Anglo American Group litigation*, where the South African claimants contended that they had suffered from silicosis and silico-tuberculosis in the course of their employment by AASA, the South African company. The claimants argued that the central administration of AASA was in London, since this was the location of Anglo American plc, its English-based parent company, and that it followed that AASA was domiciled in England under the meaning of Brussels I. The Court of Appeal, who defined 'central administration' as the place 'where the company concerned, through its relevant organs according to its own constitutional provisions, takes the decisions that are essential for that company's operations', declined to find that decisions of the English-domiciled parent company with respect to the operations of the group had any relevance in determining the domicile of the foreign subsidiary. As a result, it is challenging for the claimants in the Tort Liability Claims, if not impossible, to assert jurisdiction over a foreign subsidiary directly without also commencing proceedings against an English-domiciled parent company. The article further criticised Court of Appeal decision for the lack of jurisdictional analysis of the integrated nature of TNCs and their managerial organisation.*

6) The overall conclusion of the article is that Tort Liability Claims offer the discipline an opportunity to reconsider its role of the neutral mediator in international litigation and contribute to the debate on international corporate accountability. Itis notargued that private international law should close the gap in group liability through unilateral transformation of judges into agents of justice by substituting the norms of public international law and substantive domestic law governing overseas operations of business actors. Rather,the disciplinemay engage where appropriate and the uniform rules of jurisdiction are capable of balancing the regulatory impact of these jurisdictional rules with its potential to cause inter-state jurisdictional conflicts.

Extraterritoriality: Outstanding Aspects (Contribution to a Collective Book)

Prof. Zamora Cabot has just made available on SSRN his contribution to the collective book *Implementing the UN Principles on Business and Human Rights. Private International Law Perspectives* (F. Zamora, L. Heckendorn, S. de Dycker, eds.), Shulthess Verlag, Zurich, 2017. The abstract reads as follows:

"For some time, the changing concept of extraterritoriality has been associated in a variety of ways with the international protection of Human Rights. It is, for example, linked to efforts to make the reparation mechanisms of the UN's Guiding Principles accessible. Similarly, the notion is relevant to the States' formal Extraterritorial Obligations (ETOS), which pressure States to fulfil the framework established in the International Covenant on Economic, Social and Cultural Rights. In both cases, the volume and quality of the technical contributions that have been produced are remarkable and worth taking into consideration.

In the context of this contribution and its focus on private international law, I will however limit my remarks to this particular field. In Section I, I will address questions that are arising in the United States following the US Supreme Court's decision in the Kiobel case. Following that, in Section II, I will introduce a cross section of extraterritorial laws that particularly impact the fields under consideration here – corporations and human rights – before summing up with some concluding remarks."

(You can access to the ToC of the book itself here)

What protection for unaccompanied minors ? Colloquium in Paris on June 21

Thanks to Héloïse Meur, Lilia Aït Ahmed and Estelle Gallant for this post.

On June 21, 2018 a full-day colloquium will take place in Paris on the protection of unaccompanied minors at the former Courthouse. The colloquium will see the participation of prestigious speakers from institutions dealing with the issue of unaccompanied minors :

• French public authorities (French authority to protect human rights and civil liberties, French national consultative committee on human rights),
• French Supreme Court,
• The Paris Bar,
• Major civil associations (GISTI, ECPAT, La Cabane juridique),
• French and Belgian professors and Phd candidates in law and geography.

The speakers will discuss the root causes of the migration flows of unaccompanied minors, the limits of their treatment by French authorities, the difficulties to coordinate with other EU member States, and envisage the possible room for improvements, notably vis-à-vis what is done abroad, and especially in Belgium.

The program is available here. For registration send an email to colloquemna@gmail.com.

Private-Public Divide in

International Dispute Resolution. A 2017 Hague Lecture, Out Now

The 2017 Hague Lecture of Prof. Burkhard Hess, just published in the *Recueil des Cours*, addresses dispute resolution in international cases from the classical perspective of the private-public divide. This distinction is known in almost all legal systems of the world, and it operates in both domestic and in international settings. The main focus of the Lecture relates to overlapping remedies available under private international and public international law; it maps out the growing landscape of modern dispute resolution, where a multitude of courts and arbitral tribunals operating at different levels (domestic, international and transnational) is accessible to litigants in cross-border settings. Today, a comprehensive study of these developments is still missing. This Lecture does not aim to provide the whole picture, but focusses instead on some basic structures, revealing three main areas where the distinction between private and public disputes remains applicable today:

First, the divide delimitates the jurisdiction of domestic courts in cases against foreign states and international organisations (immunities); it equally limits the possibilities of foreign and international public entities to enforce public law claims in cross-border settings. As a matter of principle, public law claims cannot be brought before civil domestic courts of other states. However, this rule has been challenged by recent developments, especially by the private enforcement of (public) claims and by the cross-border cooperation of public authorities. Moreover, the protection of human rights and the implementation of the rule of law in cross-border constellations entail a growing need for a judicial control of *acta iure imperii* – even if only by the courts of the defendant state.

The second area of application of the divide relates to the delineation between domestic and international remedies. In this field, the distinction has lost much of its previous significance because nowadays individual commercial actors may bring their claims directly (often assisted by experienced actors like litigation funders) before international arbitral tribunals, claims commissions and human rights courts. In this area of law, individuals' access to international dispute resolution mechanisms has been considerably reinforced. Here, Prof. Hess argues that it would be misleading to qualify parts of the current dispute resolution

system as purely “commercial” and other parts as purely “public or administrative”. There are revolving doors between the systems and the same procedures are often applied; what really matters is the proper delineation of different remedies which functionally protect the same interests and rights.

The third area relates to the privatization of dispute settlement, especially in the context of private ordering. At present, powerful stakeholders often regulate their activities *vis à vis* third parties (including public actors) by globalized standard terms. Pertinent examples in this respect are financial law (i.e. ISDA), the organization of the internet (i.e. ICANN) and sports law (i.e. CAS). In this context, there is a considerable danger that the privatization of law-making and of the corresponding dispute settlement schemes does not sufficiently respect general interests and the rights of third parties. A residual judicial control by independent (state) courts is therefore needed. Data protection in cyberspace is an interesting example where the European Union and other state actors are regaining control in order to protect the interests of affected individuals.

Finally, the Lecture argues that the private-public divide still exists today and – contrary to some scholarly opinions – cannot be given up. At the same time, one must be aware that private and public international law have complementary functions in order to address adequately the multitude of disputes at both the cross-border and the international level. In this context the private-public divide should be understood as an appropriate tool to explain the complementarity of private and public international law in the modern multilevel legal structure of a globalized world.

The Lecture has been published in vol. 388 of the *Recueil*, pg. 49-266. A pocket book will be available in the coming months.

Meanwhile, on the other side of

the Atlantic…

Delaware's governor *John Carney* signed a bill prohibiting marriage before age 18, making it the first US state to ban all child marriage, on May 9, 2018. *Heather Barr* from Human Rights Watch has more on that topic here.

Towards an EU external strategy against early and forced marriages

The *Committee on Women's Rights and Gender Equality* of the European Parliament has, on 18 April 2018, adopted an opinion entitled "Towards an EU external strategy against early and forced marriages – next steps" (2017/2275(INI), PE616.622v03-00).

The Committee stresses that "child, early and forced marriage is a violation of the human rights enshrined in international standards such as the Beijing Declaration and Platform of Action, the International Conference on Population and Development Programme of Action and the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages and which form part of the core principles embodied in the European Union as an area of security, freedom, justice and human rights, including women's and girls' rights". Although "child marriage is ingrained in some traditions and cultures, […] no culture or religion can justify such a practice, particularly when human rights and the rights of children are at stake." The Committee "[n]otes that many parents living in distress and extreme poverty in refugee camps feel the need to protect their daughters from the threat of sexual violence by marrying them to older men; stresses however that the EU and its Member States should be united and consistent in their dismissal of the requests of refugees for legal recognition of marriages where one of the alleged spouses is a child or teenager; underlines that refugee status cannot be used as a legal backdoor to recognition of child marriages in Europe".

The full text of the opinion is available here. For a more detailed report, see here.