Kinsch on Recent ECHR Cases Relating to PIL

Patrick Kinsch, who is a visiting professor at the University of Luxembourg and a member of the Luxembourg bar, has posted Private International Law Topics before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011) on SSRN.

> *This is a presentation of the case law of the European Court of Human Rights in cases decided in 2010 and 2011 involving questions touching on private international law. The selection includes the following themes: Choice of law rules and the right to non-discrimination. – The right to recognition of a status acquired abroad. – International child abduction and the right to family life.*
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> *As a general matter, it is worth recalling that the task of the Court is not to review domestic law in abstracto, but to determine whether the manner in which it was applied to the applicant has infringed the Convention. This means that private international law cases that come before the Court will be dealt with in a refreshingly, or irritatingly – depending on the preferences of the reader –, undogmatic manner: the most subtle rules of private international law, and the most learned judgments of the national courts on the applicant's case, will be nothing more than facts, the effects of which on the applicant's human rights are the Court's sole concern.*

The paper was published in the last volume of the *Yearbook of Private International Law*.

By Royal Appointment: No Closer

to an EU Private International Law Settlement?

Members of the British Royal Family and aristocracy have long contributed to the development of the law in England governing matters of personal privacy. As long ago as 1849, Prince Albert, the prince consort of Queen Victoria, resorted to the courts to prevent the publication of etchings and drawings by the Royal couple, including of their children (Prince Albert v Strange (1849) 2 De G & Sm 652). In a 1964 case, the Duchess of Argyll sued her formal husband, the 11th Duke, to prevent disclosure of the secrets of their marriage to national newspapers (Argyll v Argyll [1967] Ch. 302). In recent years, both Her Majesty the Queen and Prince Charles, Prince of Wales, have taken legal action in the English courts following the disclosure, or threatened disclosure, of personal information.

The recent flurry of judicial activity following the unwarranted invasion of the privacy of Her Royal Highness Princess William, Duchess of Cambridge, Countess of Strathearn and Baroness Carrickfergus (a.k.a. Mrs Mountbatten-Windsor) highlights the potential advantages for claimants of French privacy laws, both civil and criminal. No doubt, the Duchess and her husband wished to be seen to have taken prompt and effective action to protect their private lives in this high profile case *pour encourager les autres*. Their chosen avenues of recourse through the French courts would appear to have been designed to serve both as a swift, effective and public assertion of their rights (the civil injunction) and as a deterrent (the nascent criminal complaint).

As yet, the incident and its aftermath do not seem momentous from a private international law perspective. The prosecution by English nationals of a civil claim in France against a French publisher, requiring the delivery up of photographs in the publisher's possession which are said to have resulted from an invasion of the claimant's privacy on French territory, would not appear to raise significant or complex issues of jurisdiction or applicable law.

Nevertheless, the case encourages reflection as to how well EU private international law deals with situations involving (alleged) violations of personal privacy, and other contributors to this symposium have raised a variety of issues.

Two introductory points may be noted before embarking on further discussion of this topic. First, and putting to one side the need to provide an autonomous definition in an EU context (see below), one must accept that the notion of a "violation of privacy" may in common usage cover a wide variety of fact situations, which are not necessarily to be treated alike. Taking the facts of the Duchess of Cambridge case as an example, the essence of any judicial complaint could rest upon the unauthorised (i) taking, (ii) transmission, (iii) receipt or (iv) publication of photographs or other media, with any transfer or publication occurring either (a) electronically (including via the internet) or (b) by other means. In other circumstances, a violation of personal privacy may be tantamount to a physical assault, as in the case of stalking, or to theft, as in the case of the removal of papers (the Pontiff's butler) or computer hacking. The matter may also have a commercial background, in particular if the claimant intended himself to exploit the disclosed information, as in the Douglas-Zeta Jones wedding case (Douglas v Hello! Limited [2007] UKHL 21).

Secondly, if it is determined that any or all of these situations do require special treatment within EU private international law instruments, one must recognise that that this will inevitably create problems of classification, which may be thought to compromise the underlying objectives of promoting legal certainty, and harmonious decision making, that these instruments outwardly pursue.

EU law has already shown itself to be adept in creating difficulties of this kind. In the Rome II Regulation, non-contractual obligations arising out of violations of privacy (and of personality rights) are presently excluded altogether (Art. 1(2)(g)), but the task of elaborating what wrongful conduct amounts or does not amount to a "violation of privacy" for this purpose has been left to the courts, and remains incomplete. Following criticism levelled at this exception, there have been (as Professor von Hein explains) various proposals for a new, special rule covering the same ground as the current exclusion. If adopted, however, the new rule would not remove the classification problem, but merely transfer it from being one of the material scope of the Regulation to one of the material scope of a rule within the Regulation, and its separation from other rules (in particular, the general rule for tort/delict in Art. 4).

In relation to online activities, the eCommerce Directive raises many (as yet unresolved) issues as to the scope of its "country of origin" regulation, and the various exceptions and qualifications to that regime. The European Court's eDate

Advertising / Martinez decision, rather than clearing the air, has only heightened the challenges that this Directive presents in the area of civil liability.

Last but not least, the eDate decision also has a separate jurisdictional aspect, on which the remainder of this comment will focus. The effect of this part of the Court's judgment is that a distinction must now be drawn for jurisdiction purposes between "an infringement of a personality right by means of the internet" (which the CJEU has told us merits a special, claimant-friendly interpretation of Art. 5(3)) and other cases (which remain subject to well-established principles governing the operation of that Article).

At first impression, these two points may seem to pull in different directions, the first supporting a more granular approach and the second tending towards a uniform solution. Both, however, provide reasons for caution when formulating special rules, whether of jurisdiction or applicable law, which treat violations of privacy and personality rights as a single, separate category. Further, the proliferation of different fact patterns within the realm of "violations of privacy" and analogies to other categories of wrongdoing (such as those highlighted above) may itself be thought to militate in favour of maintaining general rules such as Art. 5(3) of the Brussels I Regulation in its pre-eDate form and Art. 4 of the Rome II Regulation. The latter provision, in particular, may be argued to be sufficiently well-calibrated to deal with the range of new situations that would fall within its scope if the Art. 1(2)(g) exception were simply to be removed when the Regulation is reviewed.

In his contribution, Professor von Hein supports the adoption of a special rule for violations of privacy and personality rights. As part of his proposal, he favours giving claimants who sue in the courts of their own habitual residence or of the defendant's domicile a right to elect to apply the law of the forum to the entire claim.

This element of Professor von Hein's proposal seeks to build upon the jurisdictional aspect of the CJEU's decision in eDate. This, however, is the law reform equivalent of constructing a house on swampland. The decision has strong claims to be the worst that the Court has ever delivered on the Brussels I regime, conflicting with long established principles central to the functioning of the Regulation and giving the impression either that the Court considers itself at liberty to make up new rules of jurisdiction on the spot or that there is a sacred

text in its library in which the Regulation's rules are elaborated, but to which the outside world does not yet have access.

The decision may be criticised in no less than seven respects.

First, having expressed ubiquitous remarks about the ubiquitous nature of internet publications (para, 45), the Court observed (with good reason) that this causes difficulty in applying the criterion of "damage" as a factor connecting the tort to a given legal system for the purposes of Art. 5(3) of the Regulation: "the internet reduces the usefulness of the criterion relating to distribution in so far as the scope of the distribution of content placed online is in principle universal" (para. 46). In light of these conclusions, and given that the special rules of jurisdiction are intended to secure "a close link between the court and the action" and/or "to facilitate the sound administration of justice" (Recital (12); see also para. 40 of the eDate judgment), one might have expected that the Court would conclude that the concept of "harmful event" should be given a narrow reading in cases of this kind so as to *exclude* the criterion of damage as a connecting factor for jurisdiction purposes (for an analogous approach in a contractual context, see Case C-256/00, Besix, paras 32 and following). That conclusion would have been consistent with the dominant approach in the case law to the interpretation of exceptions to the general rule in Art. 2 (e.g. Case C-103/05, Reisch Montage, paras 22 and 23). The Court, however, chose a different path.

Secondly, the Court asserted that the connecting factors used within Art. 5(3) "must therefore be adapted in such a way that a person who has suffered an infringement of a personality right by means of the internet may bring an action in one forum in respect of all the damage caused" (para 48). This argument, which the Court uses as its launching pad for its novel "centre of gravity approach", is utterly devoid of merit. As the Court had acknowledged (para. 43), the claimant in such a case already has at least one, and possibly, two options available for bringing an action in respect of all the damage caused in one Member State court. Most significantly within the framework of the Regulation, he/she may always bring an action in the Courts of the defendant's domicile (see Besix, para 50; Case C-420/97, Leathertex, para 41). Moreover, if the publication emanates from an establishment in a Member State other than that of the publisher's domicile, the claimant may bring an action in that Member State, as the place of the event giving rise to damage, (Case C-68/93, Shevill, paras 24-25; eDate, para. 42; Case C-523/10, Wintersteiger, paras 36-39). There was no need

to create a new global connecting factor.

Thirdly, having concluded that the Regulation did not present the claimant with sufficient options for pursuing his claim, the Court proposed attributing full jurisdiction to "the court of the place where the victim has his centre of interests" on the ground that the impact of material placed online might best be assessed by that court (para. 48), sitting in a place which corresponds in general to the claimant's habitual residence (para. 49). In these two sentences, and without further explanation or justification, the Court repudiates its longstanding principle of avoiding interpretations of the rules of special jurisdiction in Art. 5 which favour the courts of the claimant's domicile in such a way as to undermine to an unacceptable degree the protection which Art. 2 affords to the defendant (e.g. Case C-364/93, Marinari, para. 13; Case C-51/97, Réunion Européenne, para. 29).

Fourthly, the Court considered that its proposed new ground of jurisdiction has the benefit of predictability for both parties, and that the publisher of harmful conduct will, at the time content is placed online (being, apparently, the relevant time for this purpose†), be in a position to know the centres of interests of the persons who are the subject of that content (para. 50). It is, however, extremely difficult to reconcile this confident statement with the Court's earlier recognition that "a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State" (para. 49). If predictability were the objective, it is hard to see how the Court could have done more to remove it.

Fifthly, given that a person's private life (and reputation) may have several centres, which change over time, it does not seem possible to say more than that there *might* be a strong link between the facts of a particular case and the place where the claimant's centre of interests is held to lie. Equally, there might not. Take the case of a former Bundesliga footballer, with Polish nationality, who signs for an English club and moves to England. While visiting a German friend, he has rather too much to drink in a nightclub. The story is published, in German, on a German football website. Does the sound administration of justice support giving the English courts jurisdiction over the footballer's claim against the website publisher? In the Duchess of Cambridge's case, does the sound administration of justice support giving the English courts jurisdiction over the publication of

photographs on a French, or Italian or Irish, website, particularly as the current position is that those courts would have no jurisdiction with respect to hard-copy publications by a newspaper or magazine under the same ownership? Given that the French, Italian or Irish courts would have global jurisdiction under Art. 2, it is suggested that the answer is a resounding "no".

Sixthly, having decried the utility, in internet cases, of the criterion of damage *á la Shevill*, the Court inexplicably chose to retain it as a connecting factor for jurisdiction purposes, allowing an action "in each Member State in the territory of which content placed online is or has been accessible" (para. 51). This begs the following question: if the new connecting factor is not a substitute for the "damage" limb of the Bier formulation, what then is it? In para. 48 of its judgment, the Court had seemed to suggest that the claimant's centre of interests was "*the place* in which the damage caused in the European Union by that infringement occurred", but this cannot be taken literally given that the Court returns three paragraphs later to the view that damage may occur in each Member State. The eDate variant of "damage" would seem to be a derivative or indirect form, of the kind that the Court had in its earlier case rejected as being a sufficient foundation for jurisdiction (Marinari, para. 14). If a label is needed, perhaps "damage-lite" would do the job?

Finally, the Court's assertion that its new rule corresponds to the objective of the sound administration of justice (para. 48) is also called into question by the second part of its judgment, interpreting the eCommerce Directive in a way that gives an essential role in cases falling within its scope to the law of the service provider's (i.e. the defendant's) country of origin. Although questions of jurisdiction and applicable law are distinct, and the Brussels I Regulation and eCommerce Directive pursue different objectives, the suitability of the courts of the claimant's centre of interests is undermined by the need to take into account, in *all* cross-border cases, a foreign law. By contrast, jurisdiction and applicable law are much more likely to coincide where jurisdiction is vested in the courts of the defendant's domicile or establishment.

Any proposed new rule in the Rome II Regulation must also face the complexity which the eCommerce Directive introduces in this area, particularly after the eDate judgment. In an ideal world, the priority between the two instruments would be reversed, with the Directive being pruned to exclude its effect upon questions of civil liability and to enable a single instrument to govern questions

of the law applicable to non-contractual obligations arising out of violations of privacy and personality rights. That, however, may be too much to hope for – once embedded, an EU legislative instrument is hard to dislodge.

Professor Muir-Watt makes the important point that, in this area, choice of law rules must yield, to a greater degree than in many other areas of civil law, to considerations of public policy and to the fundamental rights to which all Member States subscribe as parties to the European Convention (we will have to agree to disagree about the significance of the Charter of Fundamental Rights even if the Rome II Regulation were extended).

In cases such as that of the Duchess of Cambridge, there is of course a tension between (at least) two rights – that of the right to a private and family life (Art. 8) and that of freedom of expression (Art. 10). As recent cases before the European Court of Human Rights demonstrate (in particular, the two decisions involving Caroline, Princess of Monaco), the balance between them is not easy to strike, and the margin of appreciation will continue to allow different solutions to be adopted in different States. It may be questioned, however, whether this perilous balance is well served by a rule of election for applicable law which, coupled with claimant friendly rules of jurisdiction, enables the subject of a publication which is alleged to be defamatory or to violate privacy to choose to apply to the whole of his claim either the law of his country of habitual residence or the law of the defendant's domicile, whichever is the more favourable. This, unlike environmental damage (Rome II Regulation, Art. 7) is not an area where the policy factors favour an overwhelmingly pro-claimant approach.

Enough said. To offer a personal view in conclusion: the best way forward would be (1) to amend the Brussels I Regulation to reverse the eDate decision, (2) to carve civil liability out of the eCommerce Directive, and (3) to remove the exception for violations of privacy and personality rights in Art. 1(2)(g) of the Rome II Regulation, leaving the general rule for tort/delict (Art. 4) to apply to such cases. At the same time, it seems more likely that my own daughter will marry into the Royal Family than that these three reforms will come to fruition. Princess Nell anyone?

† Straying into the detail of Professor von Hein's rule of election, one

consequence of this would appear to be that the claimant's habitual residence and the defendant's domicile would be tested by reference to a different point in time (the latter being identified at the date of commencement of proceedings). This is not a reason in itself to reject the rule.

On Legal Pluralism and Multiculturality

Pluralismo y multiculturalidad: Tribunal arbitral musulmán y consejos islámicos (Sharia courts) en el Reino Unido is the title of the last paper by professor V. Camarero Suárez and professor F. Zamora Cabot, both from the University of Castellón. The paper, written in Spanish, has been published in the *Anuario de Derecho Eclesiástico del Estado*, 2012; professor Zamora will kindly send a pdf copy to those interested (just send him an email to this address: zamora@dpr.uji.es)

Here is the abstract:

> This study explores the interface between legal pluralism and multiculturality, taking as reference british muslim minority *nomoi* groups and the alternative means of solution of controversies embodied in the Sharia Councils and the Muslim Arbitral Tribunal (MAT). However, before dealing with this matter in the United Kingdom, our study makes insights from a comparative point of view both in Canada and the United States, where, in spite of no minor similitudes, the status of the aforesaid means of alternative solution of controversies is, at present time, far more different, given a deeper degree of religious pluralism and more reliance in arbitration at large in the United States. These two factors, and the widely known pragmatism and tolerance of the United Kingdom result, although there have been rounds of controversy about it, in the acceptance in that Country of the workings of the Sharia Councils and the MAT, in the twilight of British law- in the first case- or

taken under the rule of that law, covered by the Arbitration Act of 1996, in the case of the MAT. Conceived on these terms, we agree on the acceptation of these types of controversies's solutions – specially in case of the MAT- that we think are in full accordance with the modern State's duty to preserve minorities' rights and freedom of religion and beliefs as examples of a genuine commitment towards the fulfillment of Human Rights.

As for Shell…

Four Nigerian farmers, aided by the Dutch branch of Friends of the Earth, have managed to prosecute the multinational Shell for polluting the Niger Delta between 2004 and 2007. Today the case has been declared admissible by a civil court in The Hague, i.e., in a different country and continent to the alleged dumping, and could set a legal precedent. If the Dutch court indeed holds Shell responsible for not (properly) cleaning up oil pollution in Nigeria, the Anglo-Dutch company would face paying millions in compensation for victims; it should also heighten their safety standards abroad to macht those applied in Europe. What's more, the door to more transnational legal cases would be open. Victims of violations of environmental standards and human rights perpetrated by Western multinationals would be expected to seek satisfaction through a civil court in the Netherlands and possibly in other EU counties as well.

Clara Cordero on Kate Provence Pictures

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Nowadays, almost all the people around the world have already heard something about the new scandal that has arisen concerning the British royal family: the topless photos of Catherine, Duchess of Cambridge. The pictures – that were taken when she was privately sunbathing during a vacation in a chateau belonging to her husband's uncle in Provence- were initially spilled into public view by the French magazine Closer, but Kate´s private images were rapidly spread all over the world. New photos were published later by different tabloids in several Member States, such as the Italian gossip magazine Chi (owned by the same company that had previously published the pictures inFrance) and the potential harmful content was uploaded in Internet. This is another example where the violations of personality rights are connected with acts in which the alleged offender exercises the fundamental freedom of expression or information.

In this particular case, from a civil perspective, the claimants exclusively asked a French court to stop further publication of the pictures. Based on article 9 of the French Civil Code they were seeking an injunction barring any future publication – online or in print – by the French magazine of the Duchess´ topless photographs. They neither have pushed for existing copies of the magazine to be withdrawn from sales points nor for financial damages. The court has partially accepted the claimants´ request distinguising between photos published on the internet and photos published in the hard copy of the tabloide. Regarding the damages already occurred, the court has barred the defendant from assigning or forwarding all digital forms of the pictures to any third party, ordering to surrender all of them to the plaintiffs. However, no action was taken regarding the potential future publication of these images by the defendant.

Although injunctions to halt or prevent damages are subject to Private Int´l Law general rules on non-contractual obligations, their specific notes in this field must be highlighted. The spatial scope of injunctions to halt or prevent

damages –contained either in a provisional measure or in a final judgment on the merits- is linked to the basis on which the jurisdiction of the court of origin is founded. In this case, an unlimited jurisdiction based on the defendant's domicile -article 2BrusselsI Regulation- or on the place of origin –the establishment of the publisher, in accordance with article 5.3- (both of them available in this case), allows obtaining injunctions to halt or prevent damage in any Member State where these damages could be suffered. Nevertheless, in this case the ruling is limited to French jurisdiction. If the court had resorted to this possibility the main problem would be the eventual recognition and enforcement of the French judgment in each EU Member State in which the publication had been distributed and where the victim was known (for example, Italy, Ireland or Denmark where several tabloids have already published the controversial photos), apart from the potential circulation of these photos on the Internet.

The freedoms of speech and information tend to prevail in most legal systems over rights related to the protection of privacy provided that certain conditions are met. Notwithstanding this finding, the different balance between these fundamental rights determines that their respective scopes –and the consideration of certain acts as illegitimate- vary deeply from oneMemberStateto another. In this field, public policy plays a decisive role not only in the application of the provisions on choice of law but also on the recognition and enforcement of judgments. In particular, the recognition and enforcement of decisions–especially in international defamation cases- public policy has a particular relevance as the main cause to deny recognition and enforcement of a judgment (art. 34.1 Brussels I Regulation). Although within the EU the use of public policy not to recognise a decision originating in another Member State should be exceptional in practice, since all Member States belong to the European Convention on Human Rights and they are all bound by the Charter of Fundamental Rights, such a possibility is still available. In fact, the Italian newspaper that published recently the new photographies has already expressed that, in accordance with the Italian law, the publication of these photographies does not imply a violation of the Duchess right to privacy and that they are protected by the freedom of press. This only an example, since the number of countries –Member and not Member of the EU- in which the photographies could be distributed using Internet, is potentially numerous.

This scenario would not improve if a European uniform rule of conflict of

laws in this field is finally established (Rome II Regulation) without a parallel revision of the recognition and enforcement provisions of the Brussels I Regulation. Looking at the Proposal of December 2010 for the review of the Brussels I Regulation, the recognition and enforcement provisions establish that the judgments arising out of disputes concerning violations of privacy and rights relating to personality will be excluded from the abolition of exequatur and subject to a specific procedure of enforcement (public policy being kept as reason for the refusal of recognition). Hence, in the current circumstances, victims could only ensure the success of their actions in multiple States by bringing their claims before each national jurisdiction where damages occurred (*locus damni*) with limited jurisdiction (*Shevill*, latter confirmed by *eDate)*.

In conclusion, as long as the unification of conflict of laws rules in personal rights within the EU is pursued –in search for a common balance between the interests in conflict-, the exclusion of recognition and enforcement of the decisions in this field from Brussels I would seem clearly detrimental for victims. For the time being, the Duchess will therefore would have to require a large number of courts intervention to achieve a complete and effective protection.

Ubertazzi on Kate Provence Pictures

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The publication of topless photographs of Britain's likely future queen Catherine Elizabeth Middleton, the Duchess of Cambridge (hereinafter: Kate Middleton or the Duchess), by certain newspapers in several EU countries – such as France, Italy, Sweden, Denmark and Ireland – demonstrates once more the need to strike a fair balance between the protection of the right to respect for private life

guaranteed by Art. 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the right to freedom of expression granted under Art. 10 of the same Convention.

The Kate Middleton photo case is reminiscent of the very recent and famous judgments of the European Court of Human Rights (hereafter: ECtHR) in the cases von Hannover v. Germany of February the 7th 2012 (Grand Chamber, applications nos. 40660/08 and 60641/08: hereinafter: von Hannover judgment 2) and of June the 24th 2004 respectively (Third Section, application no. 59320/00: hereinafter: von Hannover judgment 1). In both these cases, the elder daughter of the late Prince Rainier III of Monaco, Princess Caroline von Hannover, lodged applications before the ECtHR against the Federal Republic of Germany alleging that the refusal by the German courts to grant injunctions to prevent further publications of different sets of photos of her infringed her right to respect for her private life as guaranteed by Article 8 ECHR.

The ECtHR maintained that under Articles 8 and 10 ECHR States are obliged to balance the protection of the fundamental human right to respect for private life, which comprises the right to control the use of one's image, on the one hand, and the fundamental human right of freedom of expression respectively, which extends to the publication of the relevant photos by the press under a commercial interest, on the other hand. To strike this balance member States typically insert specific domestic provisions in their copyright acts, prohibiting the dissemination of an image without the express approval of the person concerned, except where this image portrays an aspect of contemporary society, on the condition that its publication does not interfere with a legitimate interest of the person concerned (see Sections 22(1) and 23(1) of the German Copyright Arts Domain under which the German courts refused to grant the injunction required by Princess Caroline). These provisions are interpreted so as to distinguish between private individuals unknown to the public and public or political figures, affording the former a wider right to control the use of their images, whereas the latter a very limited protection of their right to respect for private life: then, public figures have to accept that they "might be photographed at almost any time, systematically, and that the photos are then widely disseminated even if […] the photos and accompanying articles relate exclusively to details of their private life" [para 74 Hannover I]. However, under this interpretation the balance between the right to respect for private life and the right to freedom of expression struck by the

provisions at stake is too much in favour of the latter, but insufficient to effectively protect the private life of public figures, since even where a person is known to the general public he or she may rely on a legitimate expectation of protection of and respect for his/her private life. Thus, these provisions should preferably be understood narrowly, namely as allowing the publication of the pictures not merely when the interested person is a public figure, but rather when the published photos contribute to a debate of general interest.

To establish if the relevant pictures satisfy this last requirement, according to the ECtHR regard must be given to different factors (von Hannover judgment 2, para 109-113): whether the person at stake is not only well known to the public, but also exercises official functions; whether the pictures relate exclusively to details of his/her private life and have the sole scope of satisfying public curiosity in that respect, or rather concern facts capable of contributing to a general debate in a democratic society; whether the pictures have been taken in a secluded and isolated place out of the public eyes or even in a public place but by subterfuge or other illicit means, or rather in a public place in conditions not unfavourable to the interested person; whether the publication of the photos constitutes a serious intrusion with grave consequences for the person concerned, or rather has no such effects; and whether the pictures are disseminated to a broad section of the public around the word, or rather are published in a national and local newspaper with limited circulation.

Under these conditions, in the von Hannover judgment 1 the ECtHR held that the German courts refusal to grant injunctions against the further publications of certain photos of Princess Caroline von Hannover had infringed her right to respect for private life ex Art. 8 ECHR: in fact, despite the applicant being well known to the public, she exercised no official function within or on behalf of the State of Monaco or any of its institutions, but rather limited herself to represent the Prince’s Monaco family as a member of it; furthermore, the photos related exclusively to details of her private life and as such aimed at satisfying a mere public curiosity; finally these photos where shot in isolated places or in public places but by subterfuge. In contrast, in the von Hannover judgment 2 the ECtHR reached the opposite conclusion, namely holding that there had been no violation of Article 8 of the ECHR: in fact, despite Princess Caroline exercising no official functions, she was undeniably well known to the public and could therefore not be considered an ordinary private individual; furthermore, some of the photos at

stake supported and illustrated the information on the illness affecting Prince Rainer III that was being conveyed – reporting on how the Prince's children, including Princess Caroline, reconciled their obligation of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday – and as such were related to an event of contemporary society; moreover, despite the photos having been shot without the applicant's knowledge, they were taken in the middle of a street in St. Moritz in winter not surreptitiously or in conditions unfavourable to the applicant.

In light of these conclusions, if the courts of the EU States where the topless pictures are being published refused to grant injunctions to prevent further publications, at least in their respective territories, Kate Middleton -after having exhausted the internal procedural remedies in the States at stake – could lodge applications against these same States before the ECtHR for the infringement of their positive obligations to protect her private life guaranteed by Article 8 ECHR. In such circumstances, the ECtHR would most probably conclude that there have been violations of this Article by the States involved.

In fact, despite the Duchess exercising official functions by performing senior Royal duties since her first trip to Canada and US in July 2011 (see The Telegraph), the pictures at stake relate exclusively to details of her private life and have the sole scope of satisfying public curiosity in that respect, but do not concern facts capable of contributing to a general debate over Kate Middleton's official role. Furthermore, the pictures were taken by subterfuge while the couple were on a private property at a luxury holiday chateau owned by the Queen of England's nephew – who promised absolute privacy to the Duchess -, by means of a photographer equipped with a high powered lens from a distance of over half a mile away from the chateau (see The Daily Mail ; P A Clarke). Also, the publication of the photos constitutes a serious intrusion with grave consequences for the couple, evinced by their official statement, according to which "the Royal Highnesses have been hugely saddened to learn that" the publication of the pictures at stake has "invaded their privacy in such a grotesque and totally unjustifiable manner. […] The incident is reminiscent of the worst excesses of the press and paparazzi during the life of Diana, Princess of Wales, and all the more upsetting to the Duke and Duchess for being so" (see The Huffington Post). Finally, despite the pictures having been disseminated by local newspapers with apparently limited national circulation, the original publications have initiated the

immediate distribution of the images “over the internet like wild-fire”, with the result of reaching a broad section of the public around the world (see SeeClouds).

Muir Watt on Kate Provence Pictures

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*Cachez ce sein…*It seems to me that this case – which is perhaps less intrinsically interesting, even from a conflict of laws perspective, than other recent instances in which the cross-border exercise of the freedom of press is challenged in the name of competing values, such as *Charlie Hebdo* and the satirical caricatures of Mahomet, or *The Guardian* and the *Trasfigura* super-injunction – serves to illustrate the relative indifference of the content of the relevant choice of law rules when fundamental rights are in balance. As so much has already been written about possible additions to Rome II in privacy or defamation cases, I shall concentrate on what could be called the *Duchess of Cambridge hypothesis:* whatever the applicable rules, the only real constraint on adjudication in such an instance, and the only real arbiter of outcomes, is the duty of the court (assumed to be bound, whatever its constitutional duties, by the European Convention on Human Rights, or indeed the Charter if Rome II were in the end to cover censorship issues) to carry out a proportionality test in context.

One might start with a few thoughts about the balance of equities in this case. Back at the *café du commerce* (or the ranch, or the street, or indeed anywhere where conventional wisdom takes shape), the debate is usually framed in moral terms, but remains inconclusive, neither side inspiring unmitigated sympathy. On the one hand, invasion of privacy of public figures by the gutter press (however glossy) can on no account be condoned. If the royal couple were stalked in a private place by prying *paparazzi*, then the immediate judicial confiscation of the pictures by the *juge des référés* was more than justified. Of course, there is clearly a regrettable voyeur-ism among the general public that supports a market

for pictures of intimate royal doings. The real responsibility may lie therefore with those governments which have failed adequately to regulate journalistic practices. On the other hand (so the debate goes), the main source of legitimacy of devoting large amounts of public resources to fund the essentially decorative or representational activities of national figures abroad (whether royals, ambassadors or others) lies in the reassuring, inspiring or otherwise positive image thus projected, which in turn serves to divert attention from domestic difficulties, to smooth angles in foreign policy etc. Surely the Duchess of Cambridge, who appears to have been driven from the start by a compelling desire to enter into this role, should have taken particular care to refrain from endangering the public image of niceness of which the British royal family places its hope for survival? Moreover, she can hardly claim not to be accustomed to the prying of the gutter press at home – although of course, in England, the medias may be more easily gagged (see *Trasfigura*), and have apparently agreed in this instance to remain sober, in the wake of last year's hacking scandals and in the shadow of pending regulation. And so on…

The circularity of this imagined exchange is not unlinked to the well-known difficulties encountered in the thinner air of legal argument. The conflict involving the invasion of privacy of public figures (including those who otherwise capitalize on publicity), and claims to journalistic freedom of expression (albeit by paparazzi whose profits rise in direct proportion to the extent to which they expose the intimacy of the rich and famous), is both a *hard case* (in terms of adjudication of rights) and a *true conflict* (in terms of the conflict of laws). As to the former, of course, there is no more an easy answer in this particular case than an adequate way of formulating general legal principle. If these unfortunate photographs do not provide a convincing enough example, the (less trivial?) *Charlie Hebdo* case reveals a conflict of values and rights which is equally divisive and ultimately insoluble from "above", that is, in terms of an overarching, impartial determination of rights and duties. Take Duncan Kennedy's *A Semiotics of Legal Argument* (Academy of European Law (ed.),?*Collected Courses of the Academy of European Law*, Volume Ill. Book 2, 309-365): all the oppositional pairs of conventional argument-bites can be found here, within the common clusters of substantive or systemic legal arguments (morality, rights, utility or expectations, on the one hand; administrability and institutional competence, in the other), as well as all the various "operations" which they instantiate. Thus, when challenged with invasion of privacy, *Closer* responds, predictably, by denial ("no, we did not

cross the bounds, the royals were visible through a telescopic lense"); counter-argument ("well, we merely made use of our fundamental freedom in the public interest"); the formulation of an exception to an otherwise accepted principle ("yes, we admit that the pictures were unauthorized, but these were public figures whose deeds are traditionally of public interest"); then finally by "shifting levels" from the fault/not fault to the terrain of the reality of injury. How could anyone possibly complain about pictures which were both esthetic and modern, and which will undeniably contribute to bring glamour to the somewhat fuddy-duddy, or goody-goody, royal style?

What does all this tell us about the conflict of laws issue? Potentially, the choice of connecting factor entails significant distributional consequences in such a case. At present, outside the sway of Rome II, each forum makes its own policy choices in respect of conflict of law outcomes, and these probably balance each other out across the board in terms of winners and losers – at the price of transnational havoc on the way (through the risk of parallel proceedings and conflicting decisions, which Brussels I has encouraged with *Fiona Shevill*, although *Martinez* may be a significant improvement in this respect). If it were to be decided at some point that Rome II should cover privacy and personality issues, whatever consequences result from the choice of any given connecting factor would obviously be amplified through generalization; the risk of one-sidedness would then have to be dealt with. However, as illustrated by the continued failures of attempts to design an adequate regime in Rome II, any such scheme is highly complex. One might initially assume, say, that editors generally choose to set up in more permissive jurisdictions, whereas victims of alleged violations might more frequently issue from more protective cultures, which encourage higher expectations as to the protection of privacy or personality rights. Any clear-cut rule would therefore be likely to favor either the freedom of the press (country of origin principle, constantly lobbied by the medias from the outset), or conversely the right to privacy (place of harm or victim's habitual residence). However (and allowing for the switch from privacy to defamation), while the *Charlie Hebdo* case may conform to this pattern, the *Duchess of Cambridge* affair turns out to be (more or less) the reverse. To establish a better balance, therefore, exceptions must be carved out, whichever principle is chosen as a starting point. The place of injury might be said to be paramount, unless there are good reasons to derogate from it under, say, a foreseeability exception in the interest of the defendant newspaper. Alternatively, the country of origin principle may carry the day (as in

the E-commerce directive and *Edate Advertising*), but then the public policy of the (more protective) forum may interfere to trump all. In terms of the semiotics of legal argument, this endless to-and-fro illustrates the phenomenon of "nesting" (Kennedy *op cit*, p357). Each argument carries with it its own oppositional twin. Chase a contrary principle out of the door in a hard case and inevitably, at some point in the course of implementation of its opposite, it will reappear through the window.

Of course, even if one settles for the inevitable impact of public policy as a matter of private international law, this is not the end of the story. Because the public policy exception itself will have to mirror the balance of fundamental rights to which the Member States are ultimately held (under the ECHR or, if Rome II is extended to cover such issues, under the Charter). Consider the case of unauthorized pictures of Caroline of Hannover, which had given rise to judicial division within Germany over the respective weight to be given to freedom of press and privacy of the royal couple. In 2004, the ECtHR observed (Grand Chamber, case of VON HANNOVER v. GERMANY (no. 2), Applications nos. 40660/08 and 60641/08):

> *§124. … the national courts carefully balanced the right of the publishing companies to freedom of expression against the right of the applicants to respect for their private life. In doing so, they attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken…§126. In those circumstances, and having regard to the margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the latter have not failed to comply with their positive obligations under Article 8 of the Convention. Accordingly, there has not been a violation of that provision.*

Outside the German domestic context, whatever the legal basis supporting the competing interests here, it would be difficult to imagine a very different outcome. My point, therefore, is merely that given the conflict of values involved, the choice of conflict rule – national or European, general principle or special rule, bright-line or flexible, with foreseeability clause or public policy – is for a significant part, indifferent in the end. The forum will be bound ultimately to

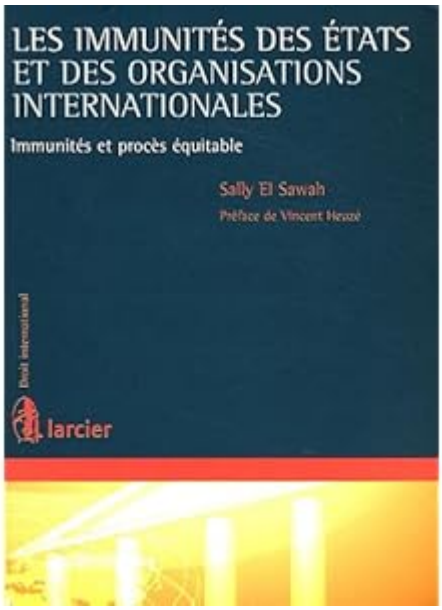
a proportionality test, whatever the starting point. And in the end, no doubt, the way in which it implements such a test will depend on its own view of the equities in a specific case. Human rights law indubitably places constraints on adjudication, but it is of course largely context-sensitive and does not mandate one right answer. The economy of any choice of law rule, along with its exceptions, special refinements or escape clauses, is likely to reflect similar constraints – no more, no less.

It may be that the unfortunate saga of the Duchess of Cambridge's topless pictures will begin and end on a purely jurisdictional note, with the interim measures already obtained. These gave the claimants partial satisfaction, at least on French soil and for the existing digital versions of the pictures. At the time of writing, we do not know if further legal action is to be taken with a view to monetary compensation (nor where), and whether the issue of applicable law will arise. We know that the French provisional measures have not entirely prevented copies from circulating on the Internet, nor the medias in other countries (including of course some which would not be bound by Rome II in any event) from publishing or intending to publish them. This raises the additional and much discussed issue (or "can of worms" to borrow Andrew Dickinson's term) of the adequate treatment of cross-border cyber-torts (whether or not linked to the invasion of personality rights). As apparent already in the Duchess of Cambridge case, cyber-privacy conflicts will usually comprise a significant jurisdictional dimension, frequently debated in terms of the lack of effectiveness of traditional measures (such as seizure of the unauthorized pictures), which are usually territorial in scope (not cross-border), and merely geographical (no effect in virtual space). The first deficiency might be overcome through injunctive relief, but the second requires specifically regulatory technology (as opposed to merely legal or normative: see for example, on the regulatory tools available, Roger Brownsword's excellent *Rights, Regulation and the Technological Revolution*, Oxford, OUP, 2008). However, given the inevitable conflicts of values in all cases and the variable balance of equities as between any given instances, it is not necessarily desirable that any such measure should actually achieve universal water-tightness. Look at the *Trafigura* case, after all (a saga involving the silencing of journalists relating to a case involving the international dumping of toxic waste: see, on the extraordinary judicial journey of the *Probo Koala*, *Revue critique DIP 2010.495*). Was it not lucky that the super-injunction which purported to gag *The Guardian* newspaper to the extent allowed by the most

sophisticated judicial technology, did not succeed in preventing an unauthorized twit (but that's also a sore point in French politics at the moment!)?

El Sawah on Immunities and the Right to a Fair Trial

Sally El Sawah, who practices at the French arbitration boutique Leboulanger, has published a monograph in French on Immunities of States and International Organizations (*Les immunités des Etats et des organisations internationales – Immunités et procès équitable*).



The book, which is more than 800 page long, is based on the doctoral dissertation of Ms El Sawah. The main project of the author is to confront the law of sovereign immunities with human rights, and more specifically the Right to a Fair Trial.

The most provocative idea of Ms El Sawah is that the existence of rules of customary international law on sovereign immunities is a myth, and that the wide divergences of the national laws on the topic clearly show that there is no superior rule binding on national states.

After arguing that customary international law is essentially silent on the matter, the author makes her central claim. States should be considered as being essentially constrained by fundamentals rights when unilaterally adopting rules on sovereign immunities. As a consequence, and contrary to the case law of the European Court of Human Rights, the laws of sovereign immunities should not be

considered immune from an assessment from a human rights perspective.

Ms El Sawah concludes that the French law of sovereign immunities should be significantly amended, in particular insofar as it distinguishes between immunity to be sued in court and immunity from measures of constraint (enforcement).

More details can be found on the publisher's website.

The French abstract is available after the jump.

> *Le débat sur le conflit entre les immunités et le droit au procès équitable a pris toute son ampleur après les décisions décevantes de la CEDH, jugeant que les immunités constituent une limitation légitime et proportionnée au droit d'accès au juge. Or, il résulte de l'étude des fondements, sources et régimes des immunités et du droit au procès équitable que leur conflit dépasse leur antinomie étymologique : les immunités portent atteinte au droit d'accès au juge dans sa substance même.*
>
> *L'imprécision et l'incohérence du régime des immunités étatiques aussi bien que l'absence de voie de recours alternative aux immunités des organisations internationales portent atteinte au droit d'accès concret et effectif au tribunal. Néanmoins, le conflit entre les immunités étatiques et le droit au procès équitable est moins problématique que le conflit entre ce dernier et les immunités des organisations internationales. Contrairement aux immunités étatiques qui n'ont qu'une source nationale, il existe un véritable conflit de normes de valeur égale entre le droit au procès équitable, droit fondamental en droit interne et international, et les immunités des organisations internationales, régies par des conventions internationales. La résolution du conflit entre le droit des immunités et le droit au procès équitable, qui ne mérite pas de se réaliser par le sacrifice de l'un au profit de l'autre et inversement, requiert l'intervention du législateur, compte tenu de la fonction politique des immunités et des principes de l'état de droit.*
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> *Une conciliation qui prend en compte les intérêts légitimes poursuivis par les droits en conflit est possible. Le droit au procès équitable ne doit plus constituer un motif d'exclusion des immunités. Il doit désormais servir à définir le régime des immunités des états et des organisations internationales. Si un déni de justice subsiste, le justiciable ne sera pas pour autant désarmé. Son droit de recours au juge sera préservé ; il pourra agir contre l'état du for pour*

rupture de l'égalité devant les charges publiques.

Yearbook of Private International Law, Vol. XIII (2011)

The latest issue of the Yearbook of Private International Law (Volume XIII – 2011) has recently been published. Edited by *Andrea Bonomi,* Professor at the University of Lausanne, and *Gian Paolo Romano*, Professor at the University of Geneva, the volume focuses, among others, on recent developments in European private international law.

The official announcement reads as follows:

> *The current volume of the "Yearbook of Private International Law" includes three special sections: The first one is devoted to the recent European developments in the area of family law like the proposal on the matrimonial property régimes in its relation with other EU instruments, such as Brussels IIbis or Rome III. Another special section deals with the very hotly debated question of the treatment of and access to foreign law. The third one presents some recent reforms of national Private International Law systems. National reports and court decisions complete the book.*
>
> *Recent highlights include:*
>
> - *multiple nationalities in EU Private International Law*
> - *the European Court of Human Rights and Private International Law*

- *parallel litigation in Europe and the US*
- *arbitration and the powers of English courts*
- *conflict of laws in emission trading*
- *res judicata effects of arbitral awards*

The *Yearbook* includes the following contributions:

Doctrine

- Stefania Bariatti, Multiple Nationalities and EU Private International Law – Many Questions and Some Tentative Answers
- George A. Bermann, Parallel Litigation: Is Convergence Possible?
- Patrick Kinsch, Private International Law Topics Before the European Court of Human Rights – Selected Judgments and Decisions (2010-2011)
- Jonathan Hill, The Powers of the English Court to Support an Arbitration in "Foreign Seat" and "No Seat" Cases
- Christa Roodt, Border Skirmishes between Courts and Arbitral Tribunals in the EU: Finality in Conflicts of Competence
- Koji Takahashi, Conflict of Laws in Emissions Trading
- Thomas Kadner Graziano, The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law as You Find It

European Family Private International Law

- Cristina González Beilfuss, The Proposal for a Council Regulation on the Property Consequences of Registered Partnerships
- Ilaria Viarengo, The EU Proposal on Matrimonial Property Regimes – Some General Remarks
- Andrea Bonomi, The Interaction among the Future EU Instruments on Matrimonial Property, Registered Partnerships and Successions
- Beatriz Campuzano Díaz, The Coordination of the EU Regulations on Divorce and Legal Separation with the Proposal on Matrimonial Property Regimes
- Simone Marinai, Matrimonial Matters and the Harmonization of Conflict of Laws: A Way to Reduce the Role of Public Policy as a Ground for Non-Recognition of Judgments

Application of Foreign Law

- Carlos Esplugues Mota, Harmonization of Private International Law in Europe and Application of Foreign Law: The “Madrid Principles” of 2010
- Shaheeza Lalani, A Proposed Model to Facilitate Access to Foreign Law

News from Brussels

- Mel Kenny / Lorna Gillies / James Devenney, The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law

News from Rome

- Alessandra Zanobetti, UNIDROIT’s Recent Work: An Appraisal

National Reports

- Yasuhiro Okuda, New Provisions on International Jurisdiction of Japanese Courts
- Tomasz Pajor†, Introduction to the New Polish Act on Private International Law of 4 February 2011
- Mathijs H. ten Wolde, Codification and Consolidation of Dutch Private International Law: The Book 10 Civil Code of the Netherlands
- Seyed N. Ebrahimi, An Overview of the Private International Law of Iran: Theory and Practice (Part Two)
- Nikolay Natov / Boriana Musseva / Teodora Tsenova / Dafina Sarbinova / Zahari Yanakiev / Vasil Pandov, Application of the EU Private International Law
  Instruments in Bulgaria
- William Easun / Géraldine Gazo, Trusts and the Principality of Monaco

Court Decisions

- Michael Bogdan, Defamation on the Internet, *forum delicti* and the E-Commerce Directive:
  Some Comments on the ECJ Judgment in the *eDate* Case
- Michel Reymond, The ECJ *eDate* Decision: A Case Comment

- Matthias Lehmann, Exclusive Jurisdiction under Art. 22(2) of the Brussels I Regulation:
  The ECJ Decision *Berliner Verkehrsbetriebe v JPMorgan Chase Bank* (C-144/10)
- Jan von Hein, Medical Malpractice and Conflict of Laws: Two Recent Judgments by the German Federal Court of Justice
- Kun Fan, The Risks of Apparent Bias when an Arbitrator Acts as a Mediator – Remarks on Hong Kong Court's Decision in *Gao Haiyan*

Forum

- Jeremy Heymann, The Relationship between EU Law and Private International Law Revisited: Of Diagonal Conflicts and the Means to Resolve Them
- Ilaria Pretelli, Cross-Border Credit Protection against Fraudulent Transfers of Assets – *Actio pauliana* in the Conflict of Laws

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ICC and Civil Reparations

Many thanks to Assistant Professor Nicolás Zambrana (University of Navarra, Spain), author of this comment on the ICC decisions against Lubanga.

First Decision on Civil Reparations by the International Criminal Court

Last 14 of March, the International Criminal Court (ICC) issued its first judicial decision ever, declaring Thomas Lubanga guilty of the crime of conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities in the Democratic Republic of Congo. The following 10 of July, another decision, sentencing Lubanga to 14 years in prison, was issued by the same tribunal. Finally, last 7 of August a decision on reparations for the victims has been issued by the ICC. The first thing to be observed is that there does not seem to be a declaration by the tribunal concerning the **civil liability** of Lubanga in any of the three decisions, even if art 75 of the Rome Statute foresees that the ICC may make an order directly against a convicted person specifying

appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Furthermore, Lubanga is believed by the court to have no known assets, so no monetary fines have been imposed and no monetary reparations will be exacted from him, although the tribunal foresees that he should provide an apology to the victims as part of the reparations. If the person condemned by the ICC has assets with which to satisfy the fines imposed or the amounts of the reparations decided by the court, the Rome Statute foresees, in article 109.1, that **State Parties** (i.e. parties to the Rome Statute) **shall give effect to those fines or forfeitures** ordered by the Court without prejudice to the rights of *bona fide* third parties, and in accordance with the procedure of their national law. This article can be complemented by article 93 of the Statute, which declares the obligation by countries to abide by orders of the ICC requesting seizures of property under the law of the country. This procedure seems, at least as regards its goals, rather similar to a common ***exequatur* system of recognition and enforcement of foreign judgements**, only this time there is no foreign country where the judicial decision originates but an international tribunal. Nevertheless, it could be anticipated that, as it happens with the **enforcement of decisions issued by human rights courts** such as the European Court of Human Rights, even if the international obligation to abide by the decision of the international tribunal is clear, nothing is foreseen in case the enforcing State delays or altogether refuses to comply with the decision. This may be easily done since the compliance with the ICC's decision on fines and seizures of property of the person condemned has to be carried out in accordance with the law of the country and few countries may have already adapted their legislation on enforcement of foreign judgments to the Rome Statute. It is also peculiar that, even if the person condemned has no assets with which to satisfy his or her civil liability, the Rome Statute foresees (art. 75.2) that the reparations can still be made "through" a **Trust Fund** funded by the States. This Trust Fund operates in such a way that the ICC only needs to find somebody guilty of one of the crimes established by its Statute in order to set in motion an elaborated machinery that will try to repair all kind of damages, individual or communitarian, physical or psychological, caused by the crimes (art. 97 of the Rules of the Rules of Procedure and Evidence of the ICC). However, the most interesting part of the 7 August decision is the set of principles elaborated by the ICC in order to "calculate", design and distribute the reparations. It is worth noting that these principles are only valid for the Lubanga case, as the Rome Statute foresees that in every case the ICC will establish the principles needed to establish the

reparations. Even if this almost one hundred pages decision sets out those principles, **it does not quantify the reparations** or even determine their exact nature, leaving that for the Trust Fund, which will have great discretion for this task, being only monitored by a Chamber of the ICC. One interesting feature of these principles is that they do not limit the reparations to victims present at the trial but to any person, community or entity that is found to have suffered from the crimes adjudicated. Therefore, the principles choose to make the victims a "class", as in the **US class action system**. Another interesting feature is that the ICC Lubanga principles state that victims may obtain reparations also under other mechanisms, according to national or international law. Another one of the principles will sound familiar to civil and common lawyers because it says that Restitution should, as far as possible, restore the victim to his or her circumstances before the crime was committed. This is certainly a landmark decision because it opens the way to non punitive redress for the victims of egregious international crimes.