Privacy and Personality Rights in the Rome II Regime – Not Again?

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Art. 1(2)(g) of the Rome II Regulation (Reg. (EC) No. 864/2007) excludes from its scope "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". In its statement on the Regulation's review clause (Article 30), the Commission undertook as follows:

> *The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.*

The comparative study, prepared for the Commission by its contractors Mainstrat and supporting cast, was published in February 2009. We should not quibble about the two month delay – these review clause deadlines are not, after all, to be taken too seriously. No doubt, the Commission needed a little extra time to take into consideration "all aspects of the situation" and to identify any measures which it thought "necessary". Should its silence on the matter in the following 18 months be taken, therefore, as a tacit acknowledgement that nothing needs be done at this point in time? Or just that the Commission has more "important" fish to fry (such as 200-years of European legal tradition in the area of contract law – a discussion for another day)?

The European Parliament, for one, seems unhappy with the present state of affairs, and this should not come as a surprise. This aspect of the review clause was all that the Parliament had to show for the considerable efforts of its rapporteur, Diana Wallis MEP, and her colleagues on the JURI Committee during the discussions leading to the Rome II Regulation to broker a compromise

provision acceptable to the Member States, the media sector and other interested groups. Those efforts proved futile, doing little more than opening what the former Vice-President of the European Commission, Franco Frattini, described with a classical nod as *la boîte de Pandore* (an expression that appears more earthily in the English translation of the Parliamentary debate as "a can of worms").

In her Working Document, Diana Wallis acknowledges that "[t]he history of failed attempts to include violations of privacy and personality rights within the scope of the Rome II Regulation shows how difficult it is to find a consensus in this area". To illustrate those difficulties, it may be noted that at a meeting of the Council's Rome II committee in January 2006, no less than 13 different options for a rule prescribing the law applicable to non-contractual obligations arising from violations of privacy and personality rights were apparently on the table. The topic, with its close link to the fundamental human rights concerning the respect for private life and freedom of expression, inevitably attracts strong and disparate reactions from the media, from civil liberties groups, from those representing celebrities and other targets of "media intrusion" and from politicians of all colours. Inevitably, any proposal to create uniform European rules in this area, however narrow their scope or limited their effect, will cause a stir, with those involved using the considerable means of influence at their disposal to secure a result (both in the rule adopted and the policy direction) which is perceived to accommodate and further their interests. If the EU does act, one or more groups will claim that a victory has been secured for their own wider objectives (whether they be "freedom of the press", or "protection from media intrusion", or some other totemic principle). Against this background, the most likely outcome (as the Rome II Regulation demonstrates) is a stalemate, with the players pushing their pieces around the board without attempting to make a decisive move.

Why should the outcome be any different on this occasion, especially given the limited time that has elapsed since Rome II was adopted? Wouldn't we all be better off focussing our efforts on more pressing business, or just getting on with our holiday packing?

Mrs Wallis' Working Paper, although admirable in the breadth of its coverage, provides little cause for optimism. If anything, the debate appears to have regressed in the three years since the Regulation was adopted. Instead of the debate being centred upon a clearly focussed proposal, such as that contained in

Art. 7 of the European Parliament's Second Reading Proposal, we are left with a tentative preference for introducing a degree of flexibility (either judicial or party oriented) coupled with some form of foreseeability clause. Other options, such as reform of the related rules of jurisdiction, minimum standards of protection for privacy and personality rights and (gulp) "a unified code of non-contractual obligations, restricted to or including those arising out of violations of privacy and personality rights" are floated, with varying degrees of enthusiasm, but without any clear picture emerging as to what the problem(s) is/are at a European level and how these options may contribute to an overall "solution". Although concrete proposals will emerge, such as those identified on these pages by Professor von Hein, the debate is lacking in focus. If the European Parliament's JURI Committee has now retreated from its former, strongly held position into the legislative outback, what hope is there for its current initiative? Wouldn't it be better to wait, at least, until the full review of the Rome II Regulation by the Commission, scheduled – at least according to the black letter of the Regulation – for next year?

As the foregoing comments may suggest, my own strong preference would be to wait, and to maintain the *status quo* for the time being, for the following reasons:

1. In terms of the law applicable to non-contractual obligations arising out of cross-border publications, there is nothing in the Working Paper to suggest that the problem is a pressing one, or that immediate legislative intervention by the European Union is "necessary". "Libel tourism" may be a cause for concern in some quarters on both sides of the Atlantic, but the focus of that debate is on rules of jurisdiction and on the English substantive law of defamation, and the difficulties do appear to have been somewhat overstated. There is also, in my view, a real risk, by hasty legislative intervention, of exacerbating existing problems or creating new ones, for example by a rule of applicable law that might subject a local publication (for example, the Manningtree and Harwich Standard) to the privacy laws of a foreign country where the subject of an article is habitually resident and where the article (in hard copy or online form) has not been read except by the subject and his lawyers.
2. We are in the middle of the review of the Brussels I Regulation, whose rules (in contrast to those of the Rome II Regulation) do apply to cross-border disputes involving privacy and personality rights. That process,

which raises issues of major commercial importance (most obviously, the effectiveness of choice of court and arbitration provisions in commercial contracts) has already been drawn out, and we should not impose a further obstacle of requiring at the same time a mutually acceptable and viable solution to the question as to which law should apply in these cases. Either the Brussels I review should be allowed to proceed first, with questions concerning the law applicable to be considered thereafter, or the present subject area should be stripped out of the Brussels I review leaving private international law (and substantive law) aspects of privacy and personality rights to be considered separately, but on a firmer footing than the present debate.

3. It must be recognised that the rules of applicable law in the Rome II Regulation are not (and should not be) rule or outcome selecting. The privacy or defamation laws of the subject's country of habitual residence, or the country where the publisher exercises editorial control, or of any other country to which a connecting factor may point may be more or less favourable to each of the parties. Further, all of the Member States are parties to the European Convention on Human Rights and obliged to respect both private life (Art. 8) and freedom of expression (Art. 10) within the margins of appreciation allowed to them. Those requirements must be observed by all Member State courts and tribunals, in accordance with their own constitutional traditions, whether they are applying their own laws or the laws of a Member or non-Member State identified by the relevant local rule of applicable law. In terms of the legislative structure of the Rome II Regulation, they are a matter of public policy (Art. 26) and not of identifying the country whose law applies. It follows that the impact of rules of applicable law on these Convention rights would appear to be more practical than legal. Might a night editor at a newspaper hesitate to run a story about a foreign footballer's private life if he cannot be sure that it will not expose him and the publisher to a claim based on a "foreign law"? Might an impecunious European aristocrat step back from bringing legal action to protect his family's privacy if it requires him to pay expensive foreign lawyers in order to determine his rights? Moreover, the temptation (as in these examples) to focus on the mass media and on "celebrities" must also be resisted – the position of the web blogger or the office worker, whose rights are equally valuable, must also be considered. Any attempt to formulate a rule of applicable that balances the interests

of both parties, and facilitates the effective enforcement of Convention rights, must take account of these and other practical issues, but (despite the Mainstrat report) a sufficient evidential basis is presently lacking.

4. In view of the constitutional sensitivity of this area (acknowledged in a declaration at the time of the Treaty of Amsterdam*, although apparently not repeated upon adoption of the Lisbon Treaty), it is vital that the debate should be properly focussed and resourced from the outset. A review of the present state of the law must open up not only the Art. 1(2)(g) exception, but also the terms and effect of the eCommerce Directive and the "country of origin" principle that it is claimed to embody, as well as the interface between private international law rules and the Convention rights. The size, importance and complexity of this undertaking should not be underestimated, and the temptation for the legislator to jump in with two feet should be strongly resisted. Laudably, Diana Wallis has not made this error, but her Working Paper demonstrates how much remains to be done to identify the problem and assess potential solutions. Significant additional resources, both within and outside the European legislative machine, will be required in order to create even the potential for a satisfactory outcome to the process. In the present climate, it may be questioned whether this is the best use of scarce resources. Sensible and sensitive, pan-European legislation regulating private international law or other aspects of civil liability for violations of privacy and personality rights may be thought "desirable", but is it really necessary and, if so, is it achievable and at what cost?

* *Declaration on Article 73m of the Treaty establishing the European Community*

> *Measures adopted pursuant to Article 73m of the Treaty establishing the European Community shall not prevent any Member State from applying its constitutional rules relating to freedom of the press and freedom of expression in other media.*

Brussels Convention, the Law of War and Crimes Against Humanity

Advocate General Ruiz-Jarabo Colomer has given his Opinion in Case C-292/05 Lechouritou and Others.

The case is concerned with whether claims for compensation which are brought by a number of Greek citizens against a Contracting State (Germany) as being liable under civil law for acts or omissions of its armed forces fall within the scope *ratione materiae* of the Brussels Convention. The following questions were referred to the ECJ by order of the *Efetio Patron* (Court of Appeal, Patras):

> *1. Do actions for compensation which are brought by natural persons against a Contracting State as being liable under civil law for* ***acts or omissions of its armed forces*** *fall within the scope ratione materiae of the Brussels Convention in accordance with Article 1 thereof* ***where those acts or omissions occurred during a military occupation of the plaintiffs' State of domicile following a war of aggression on the part of the defendant, are manifestly contrary to the law of war and may also be considered to be crimes against humanity****?*
>
> *2. Is it compatible with the system of the Brussels Convention for the defendant State to put forward a plea of immunity, with the result, should the answer be in the affirmative, that the very application of the Convention is neutralised, in particular in respect of acts and omissions of the defendant's armed forces which occurred before the Convention entered into force, that is to say during the years 1941-44?*

The Advocate General's answer to the first question referred to the ECJ was that, even if the term “civil and commercial matters” is not defined in the Brussels Convention, it has been held that this term has to be interpreted autonomously and does not include acts *iure imperii*. The Advocate General establishes two criteria which decide whether an act *iure imperii* – which does not fall within the scope of the Brussels Convention – has to be identified as such: Firstly, the official role of the parties involved, and secondly the origin of the claim, i.e. whether the exercise of authority by the administration is exorbitant. In the present case, the

official character of one of the parties was beyond doubt because the action is directed as against a state. Concerning the second criteria, the exercise of exorbitant authority, it has been stated that martial acts constitute a typical example of a state´s authority. Thus, claims directed at the restitution of damages which have been caused by armed forces of one of the war conducting parties are not "civil matters" for the purposes of Art. 1 of the Brussels Convention.

As – according to the Advocate General´s opinion – the first question has to be answered negatively, the second question referred to the ECJ does not have to be dealt with. However, the Advocate General points out that immunity precedes the Brussels Convention since if it is – due to immunity – not possible to file a suit, it is irrelevant which court has jurisdiction. Further, the examination of immunity and its effects on human rights was beyond the Court´s competence.

In the Advocate General's words,

> *...a claim for compensation, which is raised by natural persons against a Contracting State of the Brussels Convention, in order to attain compensation for damage caused by armed forces of another Contracting State during a military occupation, does* ***not*** *fall within the material scope of the Brussels Convention, even if those actions can be regarded as crimes against the humanity (approximate translation from the German text of the judgment, para. 79. An English translation is not available.)*

This post has been written jointly by Martin George and Veronika Gaertner. There is more coverage of the case on the EU Law Blog.

Out Now: Aristova, Tort Litigation against Transnational

Corporations. The Challenge of Jurisdiction in English Courts

Ekaterina Aristova (Bonavero Institute of Human Rights, University of Oxford) is the author of the 'Tort Litigation against Transnational Corporations: The Challenge of Jurisdiction in English Courts' (OUP 2024), which has just been published in the Oxford Private International Law series. She has kindly shared the following summary with us.

Out Now: The 50th anniversary of the first Inter-American specialized conference on private international law. The future of private international law in the Americas by Dante Mauricio Negro Alvarado

The Department of International Law (Secretariat for Legal Affairs) of the Organization of American States (OAS) has just published in essay form the lectures delivered during the 49th Course on International Law, which was held on 5 -16 August 2024. For more information, click here.

The book features the following piece: The 50th anniversary of the first Inter-American specialized conference on private international law. The future of private international law in the Americas by Dante Mauricio Negro Alvarado (in English, p. 295-335). This is a must-read for Private International Law academics and lawyers from the region and beyond.

As indicated in the publication, *Dante Mauricio Negro Alvarado* graduated from the Pontificia Universidad Católica del Perú, where he also pursued postgraduate studies in International Economic Law. He holds a master's degree in International Law and Human Rights from the University of Notre Dame, Indiana. He has worked at the OAS (Washington, D.C.) since 1995 and served as Director of the Department of International Law of that Organization since 2006. He is Technical Secretary of the Inter-American Juridical Committee.

The Validity of the Utah Zoom Wedding in Lebanon, or the Question of Locus Celebrationis in the Digital Age

Many thanks to Karim Hammami for the tip-off

I. Introduction

Once in the 20th century, the so-called "Nevada Divorces" captured the attention of private international law scholars around the world, particularly regarding their recognition abroad. Today, a similar phenomenon is emerging with the so-called "Utah Zoom Wedding." So, what exactly is this phenomenon?

This term refers to a legal and innovative practice, which gained prominence during the COVID-19 pandemic, whereby couples — *even if physically located outside the United States* — can legally marry under Utah law through a fully online ceremony, typically conducted via Zoom.

This type of marriage has become increasingly popular in countries like Israel and Lebanon (see *infra*), where only religious marriages governed by recognized personal status laws are permitted. In such systems, interfaith marriages are often not allowed or are significantly restricted, depending on the religious communities involved. Traditionally, couples seeking a civil marriage had to travel abroad in order to conclude one that could later be recognized upon their return. The Utah Zoom Wedding offers a more accessible and convenient alternative, allowing couples to contract a civil marriage remotely without leaving their home country.

The inevitable question then becomes the validity of such a marriage abroad,

particularly in the couple's home country. It is in this respect that the decision of the Beirut Civil Court dated 22 May 2025, commented below, provides a valuable case study from a comparative law perspective. It sheds light on the legal reasoning adopted by Lebanese courts when dealing with marriages concluded online under foreign law, and illustrates the broader challenges of transnational recognition of non-traditional marriage forms in plural legal systems.

II. The Case: *X v. The State of Lebanon*

1. Facts

The case concerns the registration in Lebanon of a marriage concluded online via Zoom in the State of Utah, United States. The concerned parties, X (the plaintiff) and A (his wife) appear to be Lebanese nationals domiciled in Lebanon (while parts of the factual background in the decision refer to X alone as being domiciled in Lebanon, the court's reasoning suggests that both X and A were domiciled there. Accordingly, the analysis that follows adopts the court's understanding). In March 2022, while both parties were physically present in Lebanon, they entered into a marriage remotely via videoconference, officiated by a legally authorized officiant under the laws of the State of Utah. The ceremony was conducted in the presence of two witnesses (X's brother and sister).

Following the marriage, X submitted an authenticated copy of a Utah-issued marriage certificate, along with other required documents, to the Lebanese Consulate General in Los Angeles. The Consulate registered the certificate and transmitted it through official channels to Lebanon for registration in the civil registry. However, the Lebanese authorities ultimately refused to register the marriage. The refusal was based on several grounds, including, *inter alia*, the fact that the spouses were physically present in Lebanon at the time of the ceremony, thus requiring the application of Lebanese law.

After unsuccessful attempts to have the decision reconsidered, X filed a claim before the Beirut Civil Court against the State of Lebanon, challenging the authorities' refusal to register his marriage.

2. Parties' Arguments

Before the Court, the main issue concerned the validity of the marriage. According to X, Article 25 of Legislative Decree No. 60 of 13 March 1936 provides that a civil marriage contracted abroad is valid in form if it is conducted in accordance with the legal procedures of the country in which it was concluded. X argued that the validity of a marriage concluded abroad in conformity with the formal requirements of the law of the place of celebration should be upheld, even if the spouses were residing in and physically present in Lebanon at the time of the marriage.

On the Lebanese State's side, it was argued, *inter alia*, that although, under the Lebanese law, the recognition of validity of marriages concluded abroad is permitted, such recognition remains subject to the essential formal and substantive requirements of marriage under Lebanese law. It was also contended that the principles of private international law cannot be invoked to bypass the formal requirements imposed by Lebanese law on marriage contracts, particularly when the purpose is to have the marriage registered in the Lebanese civil registry. Accordingly, since the parties were physically present in Lebanon at the time the marriage was concluded, Lebanon should be considered the place of celebration, and the marriage must therefore be governed exclusively by Lebanese law.

3. The Ruling (relevant parts only)

After giving a constitutional dimension to the issue and recalling the applicable legal texts, notably Legislative Decree No. 60 of 13 March 1936, the court ruled as follows:

> *"The Legislative Decree No. 60 mentioned above [……] recognizes the validity of marriages contracted abroad in any form, as Article 25 thereof provides that "a marriage contracted abroad is deemed valid in terms of form if it complies with the formal legal requirements in force in the country where it was concluded." This made it possible for Lebanese citizens to contract civil marriages abroad and to have all their legal effects recognized, provided that the marriage was celebrated in accordance with the legal formalities of the country where it was contracted and therefore subjected to civil law [……].*

Based on the foregoing, it is necessary to examine the conditions set out in Article 25 and what it intended by "a marriage contracted abroad," particularly in light of the Lebanese State's claim that the Lebanese national must travel abroad and be physically present outside Lebanon and that the marriage must be celebrated in a foreign country [……].

In order to answer this question, several preliminary considerations must be addressed, which form the basis for determining the appropriate legal response in this context. These include:

- *The principle of party autonomy in contracts and the freedom to choose the applicable law is a cornerstone of international contracts. This principle stems from the right of individuals to govern their legal relationships under a law they freely and expressly choose. This equally applies to the possibility for the couple to choose the most appropriate law governing their marital relationship, when they choose to marry civilly under the laws of a country that recognizes civil marriage.*
- *Lebanese case law has consistently recognized the validity of civil marriages contracted abroad, subjecting such marriages, both as to form and substance, to the civil law of the country of celebration, regardless of the spouses' other connections to that country [……]. This implies an implicit recognition that Lebanese law leaves room for the spouses' autonomy in choosing the form of their marriage and the law governing their marriage.*
- *Legal provisions are general and abstract, and cannot be interpreted in a way that creates discrimination or inequality among citizens [……]. Therefore, adopting a literal interpretation of the term "abroad" to require the physical presence of the spouses outside Lebanese territory at the time of the marriage, as advocated by the State of Lebanon, would result in unequal treatment among Lebanese citizens. This is because, under such an interpretation, civil marriage would only be practically available to those with the financial means to travel abroad. Such a result would fail to provide a genuine solution to the issue of denying certain citizens the right to civil marriage.*
- *Subjecting a civil marriage contract to a law chosen by the parties does not contravene Lebanese public policy in personal status matters. This is because, once the marriage is celebrated in accordance with the*

> *formalities admitted in the chosen country, it does not affect the laws and rights of Lebanon's religious communities or alter them. On the contrary, it constitutes recognition of a constitutionally protected right [right to marriage] that deserves safeguarding, and that the recognition of this right serves public policy. Furthermore, the multiplicity of personal status regimes in Lebanon due to the existence of various religious communities practically broadens the scope for accepting foreign laws chosen by the parties. However, Lebanese courts retain the power to review the chosen law to ensure that it does not contain provisions that violate Lebanese public policy, and this without considering the principle of party autonomy, in and of itself, to be contrary to public policy.[…]*

Based on the foregoing [……], the key issue is whether the marriage contract between X and A, which was entered into in accordance with the law of the State of Utah via online videoconference while both were actually and physically present in Lebanon, can be executed in Lebanon.

[……]

Utah law [……] expressly allows the celebration of marriage between two persons not physically present in the state. [……]

[U.S. law] clearly provides that the marriage is deemed to have taken place in Utah, even if both parties are physically located abroad, as long as the officiant is in Utah and the permission to conclude the marriage was issued there. Accordingly, under [Utah State's] law, de jure, the locus celebrationis of marriage is Utah. This means that the marriage's formal validity shall be governed by Utah law, not Lebanese law, in accordance with the principle locus regit actum. [……]

Therefore, based on all of the above, X and A concluded a civil marriage abroad pursuant to Article 25 of the Legislative Decree No. 60. The fact that they were physically located in Lebanon at the time of celebration does not alter the fact that the locus celebrationis of the marriage was de jure the State of Utah, based on the spouses' clear, explicit and informed choice of the law of marriage in the State of Utah. Accordingly, the marriage contract at issue in this dispute satisfies the formal requirements of the jurisdiction in which it was concluded

(Utah), and must therefore be deemed valid under Article 25 of the Legislative Decree No. 60. [.....]

Consequently, the administration's refusal to register the marriage contract at issue is legally unfounded, as the contract satisfies both the formal and substantive requirements of the law of the state in which it was concluded.

III. Comments

1. Implication of the Marriage Legal Framework on the Law applicable to marriage in Lebanon

In Lebanon, the only form of marriage currently available for couples is a religious marriage conducted before one of the officially recognized religious communities. However, couples who wish to avoid a religious marriage are allowed to travel abroad—typically to countries like Cyprus or Turkey—to have a civil marriage, and later have it recognized in Lebanon. This is a consequence of the judicial and administrative interpretation of the law applicable to marriage in Lebanon, according to which, a marriage concluded abroad is recognized in Lebanon if it had been concluded in any of the forms recognized by the foreign legal system (Art. 25 of the Legislative Decree No. 60 of 13 March 1936. See Marie-Claude Najm Kobeh, "Lebanon" in J Basedow et al. (eds.), *Encyclopedia of Private International Law – Vol. III* (Edward Elgar, 2017) 2271). The marriage thus concluded will be governed by the foreign civil law of the country of celebration, *irrespective of any connection between the spouses and the foreign country in question, such as domicile or residence*. In this sense, Lebanese citizens enjoy a real freedom to opt for a civil marriage recognized under foreign law. The only exception, however, is when both parties are Muslims, in which the relevant rules of Islamic law apply (Najm, *op. cit.*, 2271-72).

2. "Remote Marriage" in Lebanon

According to one commentator (Nizar Saghia, "Hukm qada'i yuqirr bi-sihhat al-

zawaj al-madani "'an bu'd" [A Judicial Ruling Recognizes the Validity of a "Remote" Civil Marriage]), the "remote marriage" issue began in 2021 when a couple took advantage of a provision in Utah law allowing online marriages—an option made attractive by COVID-19 travel restrictions, financial hardship, and passport renewal delays. Their success in registering the marriage in Lebanon inspired others, with around 70 such marriages recorded in 2022. In response, the Directorate General of Personal Status began refusing to register these marriages, citing public policy concerns. Faced with this, many couples opted for a second marriage, either abroad (e.g., Cyprus or Turkey) or through a religious ceremony before a recognized sect in Lebanon. Some couples, however, – like in the present case – decided to challenge the refusal of the Lebanese authorities in court, seeking recognition of their marriage.

3. Significance of the Decision

The significance of this decision lies in the court's readiness to broaden the already wide freedom couples have to choose the law governing their marriage. Already under the established legal practice in Lebanon, it was admitted that Lebanese private international law adopts a broad subjectivist view of party autonomy in civil marriage, allowing spouses to choose a foreign law without any requirement of connection to it (Pierre Gannagé, "La pénétration de l'autonomie de la volonté dans le droit international privé de la famille" *Rev. crit.* 1992, 439). The decision commented on here pushes that principle further: the court goes beyond the literal reading of Article 25 and applies it to remote marriages conducted under foreign law before foreign officials, even when the spouses remain physically in Lebanon.

This extension is striking. First, it should be noted that, under Lebanese private international law, it is generally admitted that "[t]he *locus regis actum* rule governing the formal conditions of marriage is ……extended to cover the consequences of marriage", including filiation, parental authority, maintenance, custody and even divorce and separation (Najm, *op. cit.*, 2272). Now, it suffices for a simple click online, and the payment of minimal fees to have the marital relationship of the spouses governed by the law of foreign State, despite the absence of any connection, whatsoever, with the foreign legal system in question (except for internet connection).

Second, and more interesting, such an excessively broad view of party autonomy does not seem to be always accepted, particularly, in the field of contracts (Gannagé, *op. cit.*). For instance, it is not clear whether a genuine choice of law in purely domestic civil or commercial contracts would be permitted at all (see, however, Marie-Claude Najm Kobeh, "Lebanon", in D. Girsberger et al. (eds.), *Choice of Law in International Commercial Contracts* (OUP 2021) 579, referring to the possibility of incorporation by way of reference).

The classical justification of such a "liberalism" is often explained by the Lebanese state's failure to introduce even an optional civil marriage law. As a result, Lebanese citizens are effectively granted a genuine right to choose a foreign civil status of their choice (Gannagé, *op. cit.*, 438), and, now this choice can be exercised without ever leaving the comfort of their own homes.

Finally, it worth indicating that the court's decision has been widely welcomed by proponents of civil marriage in Lebanon, as well as by human rights and individual freedom advocates (see e.g., the position of EuroMed Rights, describing the decision as opening up "an unprecedented space for individuals not affiliated with any religion"). However, it remains to be seen how this decision will affect the general principles of private international law, both in Lebanon and beyond, particularly when the validity of such Zoom Weddings, concluded without any connection to the place of celebration, is challenged abroad.

Rethinking Private International Law Through the Lens of Colonialism

Last week (7 June 2025), I had this extraordinary opportunity to give a presentation at the 138th Annual Conference of the Japanese Association of Private International Law, which took place at Seinan Gakuin Daigaku, Fukuoka – Japan. The theme of my presentation was “Private International Law and Colonialism.” In this talk, I shared some preliminary thoughts on a topic that is both extraordinarily rich and complex. The following note offers some initial reflections based on that presentation (with a few adjustments) with the aim of contributing to ongoing discussion and encouraging deeper reflection.

Introduction

The relationship between colonialism and law has been the subject of active debate across various fields, including legal anthropology and comparative law. Key themes include the impact of colonial rule on legal systems in colonized regions, the inherently violent nature of colonialism, and the possibilities for decolonization. This relationship has also received particular attention in the field of international law. Numerous studies have examined how colonialism shaped the very structure of the international legal order, as well as the theoretical justifications for its expansion into regions regarded as “non-Western” or “uncivilized.” In contrast, the field of private international law (PIL) has, until now, rarely engaged directly with the theme of colonialism (see however the

various previous posts on this blog). To be sure, some studies on the development of PIL in the 19th century or on the asymmetrical treatment of cross-border legal relationships do touch upon issues linked to colonialism. However, these works do not place the relationship between PIL and colonialism at the center of their analysis.

This note proposes to revisit PIL in light of its historical relationship with colonialism. It aims to explore the ways in which PIL was developed in a context shaped by deep legal and political inequalities, and to consider how this context informed both the theory and practice of the field. It also aims to highlight the complex role that PIL has played historically, not only as a framework that contributed to the stabilization of unequal relations, but also as an instrument that certain states used to affirm their legal and political autonomy.

I. Why Colonialism Matters to PIL

To begin with, it is important to understand why examining PIL in light of colonialism is both relevant and necessary.

1. Explanatory Value

First, studying the historical links between PIL and colonialism allows us to better understand how the field developed. As is commonly known, PIL claims to rest on the principles of equal sovereignty and neutral legal reasoning. However, this conventional understanding of PIL is incomplete. In reality, PIL particularly developed during a period when global relations were anything but equal. The nineteenth century, which saw the rapid expansion of colonial powers across Asia, Africa, and the Middle East, was also the period during which many of the foundational premises and principles of PIL took shape. Accordingly, while PIL may appear neutral and universal in theory, its development was deeply embedded in a historical context shaped by colonial expansion and domination. This context was characterized, both in law and in practice, by profound asymmetries in power that underpinned the very structures of colonial rule. Understanding this historical backdrop sheds light on how PIL has developed to become the discipline that we know today.

2. Inclusiveness and Diversity in Legal Scholarship

Second, analyzing PIL through the lens of colonial history encourages a broader and more inclusive understanding of the field. Traditional narratives have privileged European (Western) legal thought, focusing on figures such as Huber, Story, Savigny, and many others. However, other regions also experienced legal developments that shaped their approaches to cross-border legal issues. It must be admitted that these developments have been often largely overlooked or simply dismissed. Paying attention to these neglected histories can open the way for a richer and more diverse understanding of what PIL is and can be.

3. Relevance for Contemporary Practice

Third, reflecting on these issues helps illuminate the traces of these historical patterns that may persist in current legal practices often in a hidden form under "universal" and/or "neutral" approaches. Even today, some assumptions embedded in PIL may reflect older hierarchies. For example, recent tendencies towards lex forism to the detriment of the law that is most closely connected to the case, or the expansive use of public policy or overriding mandatory rules may reproduce asymmetries that have long histories. In some areas, such as the regulation of transnational business and human rights, rules that appear neutral may obscure power relations rooted in earlier eras or based on old-fashioned conceptions. Rather than undermining PIL's relevance, recognizing the background of such dynamics enables a better adaptation of this field to present realities.

II. Scope of Analyses

The focus here is on the traditional form of conflict-of-law issues that arise between "sovereign" states, even though these relations were often marked by legal inequality, as reflected in the structure of colonial domination. It does not deal with the classical question of "colonial conflict of laws" in the strict sense, that is, legal conflicts arising from the coexistence of multiple legal orders within

a single political entity composed of the metropole and its colonized territories. Such a "conflict" arose as a result of annexation (such as the annexation of Algeria by France or the acquisition of Taiwan and Korea by Japan) or direct occupation (such as the French occupation of Indochina, or the Dutch occupation of Indonesia). This type of conflicts, despite the similarity they may have with the classical conflict of laws, are more appropriately understood as belonging to the domain of "interpersonal law" or "internal (quasi-)private international law", or what was sometimes referred to as "inter-racial conflict of laws".

III. The Paradox: Legal Equality vs. Colonial Hierarchy

To understand the relationship between PIL and colonialism, we need to briefly consider their respective characteristics and foundational premises.

PIL, as a legal discipline, is concerned with cross-border private legal relations. It deals with matters such as the jurisdiction of courts, the applicable law in transnational disputes, and the recognition and enforcement of foreign judgments. Its theoretical foundation lies in the idea of sovereign equality and legal neutrality. In this respect, PIL has long been regarded as a technical and neutral discipline providing the rules and mechanisms for resolving private legal disputes involving foreign elements. For much of its development, PIL has maintained an image of formal objectivity and universality, seemingly detached from the political considerations and ideological battles that have shaped other areas of legal thought, although contemporary developments show that this has not always been the case.

Colonialism, on the other hand, rests on the very denial of sovereign equality. Colonialism, broadly defined, refers to systemic domination by one power over another, encompassing political, legal, economic, and cultural dimensions. It creates and institutionalizes structural inequalities between dominating and dominated societies. Colonialism comes in many forms: annexation (e.g., Algeria by France), protectorates (e.g., Tunisia), or semi-colonial arrangements (e.g., Japan, Thailand, Ottman Empire or China under unequal treaties). In this sense, at its core, colonialism was a system of unilateral domination through discourses of civilizational superiority in which one power imposed its authority over another.

Therefore, the fact that PIL, which rests on the idea of sovereign equality, was particularly developed in a colonial context marked inequality and domination, gives rise to a key question: How did PIL, which is premised on equality, coexist with, and arguably help sustain, a global colonial world order defined by legal inequality?

IV. The Pre-Colonial Period – From Personality of Law to Legal Hierarchy:

As mentioned above, PIL was shaped and disseminated during the height of colonial expansion in the 19th century. However, before this colonial period, it is worth noting that, in societies with limited external legal interaction (e.g., Tokugawa Japan), PIL was largely absent. In contrast, regions like China or the Ottoman Empire, and even in Europe had systems based on personality of law, where legal norms were tied to an individual's religion or ethnicity, and disputes involving foreign subjects (usually foreign merchants) administered through forms of consular jurisdiction.

Later, while European countries succeeded in replacing this system with one based on PIL mechanism, the dynamics were quite different under colonial conditions. In places like Japan, the old system of personality of law based on the idea of "extraterritoriality" and "consular jurisdiction" was introduced under foreign pressure, when Japan was effectively forced to abandon its policy of isolation and open up to international commerce within the framework or unequal treaties imposed by Western powers. In regions like the Ottoman Empire and China, this system was not only preserved but exacerbated leading to serious encroachments on legal sovereignty and increasing the dominance of foreign powers over domestic legal and commercial affairs. In all regions, this system was institutionalized by the conclusion of the so-called "capitulations" or "unequal treaties" giving extraterritorial legal and jurisdictional privileges to Western colonial powers, which in some countries has developed to the introduction of foreign courts (e.g. French courts in Tunisia) or mixed courts (e.g. Egypt).

Such an evolution raises an important question: why did European countries, having replaced the system of consular jurisdiction with a PIL-based system among themselves, choose not to apply the same model in their legal dealings with "non-European" countries?

V. The “Civilized vs. Uncivilized” Divide

1. The Role of PIL in the Formation of the Modern International Order – Asymmetrical treatment based on the notion of “civilization”

In the 19th century, as colonial powers expanded their reach, they also laid the foundations of what became the modern system of international law. Within this framework, the concept of the “family of civilized nations” was used to determine which states could participate in international legal relations on an equal footing, including the application of “private” international law. Legal systems that were seen as having met the standard of “civilization” were granted full recognition under the newly emerged international system. Other states were either excluded or subjected to hierarchical arrangements.

This legal stratification had practical effects. Among “civilized” nations, the principles of PIL (including the applicability of foreign law) applied. But with regard to other nations, these principles were either weakened or suspended. Courts in Europe often refused to recognize laws from countries deemed “non-civilized,” sometimes on grounds such as the rules applicable in the “non-civilized” country could not be categorized as “law” for the purpose of PIL, or its incompatibility with public policy. In this way, PIL developed a dual structure: one that applied fully among recognized sovereigns, and another – if any at all – that applied toward others.

2. Extraterritoriality in Practice in “non-Civilized” Countries and the Exclusion of PIL

Outside Europe, one notable feature of legal practice in so-called “non-civilized” countries during the colonial period was the system of extraterritoriality. In these jurisdictions, Western powers maintained consular jurisdiction, which allowed their nationals to be governed not by local law but by their own national legal systems. This arrangement was grounded in the principle of the personality of law and institutionalized through the capitulations in the Middle East and North

Africa (MENA) region, and through unequal treaties in Asia.

While the precise structure and operation of these regimes varied from one country to another, they shared a fundamental feature: legal disputes involving Western nationals were handled, entirely or partially, under Western laws. Rules of PIL were effectively bypassed.

Moreover, originally, consular jurisdiction was limited to citizens and nationals of Western countries. However, over time, it was extended to cover *protégés* (local individuals granted protection by foreign powers) as well as *assimilés* (non-European nationals who were treated as European for the purpose of legal protection). This extension further curtailed the jurisdiction of local courts, such as religious, customary, or national courts of the colonized states, which became confined to resolving disputes between locals with no international dimension. By contrast, cases involving Western nationals or their protégés were routinely referred to consular courts, or where existed, to foreign courts (e.g. French courts in Tunisia) and mixed courts (such as those in Egypt).

The inequality embedded in this system was particularly evident in the enforcement of judgments: rulings issued by local courts required exequatur in order to have effect before consular or foreign courts. Meanwhile, judgments rendered by foreign courts, notably those of the colonizing power, were typically recognized and enforced without the need for any such procedure.

VI. PIL as a tool for emancipation from colonial chains

Interestingly, in the 20th century, as formerly colonized countries sought to assert their sovereignty, PIL became a means to achieve legal and political recognition. To be accepted as equal members of the international community, these states had to show that their legal systems conformed to the standards expected of "civilized" nations. This included establishing reliable legal institutions, codifying laws, and—crucially—adopting PIL statutes.

Japan's experience in the late nineteenth century is illustrative. Faced with unequal treaties that limited its sovereignty and imposed extraterritoriality, Japan undertook a sweeping legal reform. In 1898, it adopted a modern PIL statute (the *Horei*), which played a key role in demonstrating its legal capacity and led to the

renegotiation of those treaties. A comparable process took place in Egypt, where the Treaty of Montreux (1937) marked the beginning of a twelve-year transitional period leading to the abolition of consular and mixed jurisdictions. During this time (1937–1949), Egypt undertook major legal reforms aimed at restoring full judicial sovereignty. It was in this context that both the Egyptian Civil Code and the Code of Civil and Commercial Procedure were drafted and promulgated in 1949. These codifications included not only substantive and procedural rules, but also incorporated provisions on choice of law, international jurisdiction, and the enforcement of foreign judgments.

Conclusion: A Dual Legacy

As the foregoing demonstrates, PIL played a complex and at times contradictory role. It was shaped in a context of inequality, and it often served to justify and perpetuate hierarchical legal relations. Yet it also provided a framework through which some states could engage with and eventually reshape the global legal order. In this dual capacity, PIL reflects both the challenges and possibilities of legal systems operating in a world marked by deep historical asymmetries.

Today, PIL is regarded as a universal framework, taught and applied in jurisdictions around the world. But its history reminds us that legal universality often rests on specific historical and political conditions. By examining how these conditions influenced the formation and application of PIL, we gain a clearer understanding of the discipline and can begin to identify paths toward a more genuinely inclusive and balanced legal system.

Understanding this past is not about assigning blame, but about gaining clarity. By exploring how PIL has operated across different times and contexts, we equip ourselves to improve its capacity to serve all legal systems and individuals fairly. That, in the end, is what will make PIL truly universal.

Seminar: Child marriage: root causes and questions of recognition, 5 June

At the occasion on 5 June of the PhD Defence of Leontine Bruijnen on *How can Private International Law bridge the Gap between the Recognition of Unknown Family Relations such as Kafala and Child Marriage for Family Law and Migration Law Purposes?* , we are organising an expert seminar at the University of Antwerp and online:

Child marriage: root causes and questions of recognition:

11.00: Welcome and introduction by Thalia Kruger, University of Antwerp

11.10: The Role of Customs and Traditions in Addressing Child Marriages in Tanzania: A Human Rights-Based Approach, by Esther Kayamba, Mzumbe University and University of Antwerp

11.25: The link between climate change and child marriage in Tanzania, by Agripina Mbilinyi, Mzumbe University and University of Antwerp

11.40: Socio-cultural factors that Sustain Child Marriage at Quarit Wereda, Amhara Region, Ethiopia by Yitaktu Tibetu, Human Rights Lawyer, Senior Gender Adviser and councillor psychologist

12.00: Perspective from Europe by Bettina Heiderhoff, University of Münster and Trui Daem, PhD researcher Ghent University

12.20: Debate and Q&A

12.50: End

To register, please contact Thalia Kruger

Foreign Sovereign Immunity and Historical Justice: Inside the US Supreme Court's Restrictive Turn in Holocaust-Related Cases

By Livia Solaro, PhD candidate at Maastricht University, working on the transnational restitution of Nazi-looted art

On 21 February 2025, the US Supreme Court issued a ruling in *Republic of Hungary v. Simon*,[1] a Holocaust restitution case with a lengthy procedural history. Delivering this unanimous decision, Justice Sotomayor confirmed the restrictive approach to cases involving foreign states inaugurated in 2021 by *Federal Republic of Germany v. Philipp*.[2] In light of the importance of US practice for the development of customary law around sovereign immunity,[3] and its impact on questions of historical justice and transnational accountability, the *Simon* development deserves particular attention.

The Jurisdictional Treatment of Foreign States as an "American Anomaly"[4]

In 2010, a group of Holocaust survivors filed a suit before the US District Court for the District of Columbia against the Republic of Hungary, the Hungarian

State-owned national railway (Magyar Államvasutak Zrt., or MÁV) and its successor-in-interest Rail Cargo Hungaria Zrt. (RCH), seeking compensation for the Hungarian government's treatment of its Jewish population during World War II.[5] The survivors claimed that, in connection to their deportation, their properties had been expropriated and subsequently liquidated by defendants.

As the case repeatedly moved through federal courts (in fact, this was not the first time it reached the Supreme Court),[6] the possibility for the US judge to extend its adjudicative jurisdiction over the Hungarian State remained controversial. Claimants based their action on the so-called "expropriation exception" to sovereign immunity, codified by §1605(a)(3) of the 1976 Foreign Sovereign Immunities Act (FSIA).[7] This provision excludes immunity in all cases revolving around rights in property taken in violation of international law, at the condition that that property, or any property exchanged for such property: 1) is present in the US in connection with a commercial activity carried on in the US by the foreign state, or 2) 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 US.

This exception represents an *unicum* within the law of sovereign immunity, as it allows courts to extend their jurisdiction over a state's acta iure imperii (expropriations are indeed quintessential sovereign acts).[8] In recent years, this provision has often been invoked in claims of restitution of Nazi-looted art owned by European states (see, for example, Altmann v. Republic of Austria,[9] Toren v. Federal Republic of Germany,[10] Berg v. Kingdom of Netherlands,[11] Cassirer v. Kingdom of Spain).[12] Crucially, this exception also requires a commercial nexus between the initial expropriation and the US. In its *Simon* decision, the US Supreme Court addressed the standard that plaintiffs need to meet to establish this commercial nexus in cases where the expropriated property was subsequently liquidated. The Court read a "tracing requirement" in the text of the provision, thus establishing a very high threshold.

Property Taken in Violation of International Law

The Court had recently addressed the interpretation of §1605(a)(3 in *Federal Republic of Germany* v. *Philipp,* where the heirs of German Jewish art dealers sought the restitution of a collection of medieval reliquaries known as the Guelph Treasure (*Welfenschatz*), In that case, the Supreme Court focused on the opening

line of the expropriation exception, which requires that the rights in property at issue were "taken in violation of international law". By explicitly recognizing that this language incorporates the domestic takings rule,[13] the Court set in motion a trend of increasingly restrictive interpretations of the expropriation exception that is still developing today.

To reach this result, the Supreme Court interpreted the expropriation exception as referring specifically to the international law *of expropriation*. This narrow reading of §1605(a)(3) allowed the Court to assert that the domestic takings rule had "survived the advent of modern human rights law", as the two remained insulated from one another. Accordingly, even if the Nazi plunder were considered as an act of genocide, in violation of human rights law and the Genocide Convention,[14] it would not fall under §1605(a)(3), as this provision only applies to property takings against aliens (reflecting the traditional opinion that international law is concerned solely with the relations between states). From this perspective, the *Philipp* decision adhered to the International Court of Justice's highly criticized conclusion in Jurisdictional Immunities of the State (Germany v. Italy) that immunity is not excluded by serious violations of ius cogens.[15]

The impact of this restrictive turn has already emerged in a couple of cases adjudicated after *Philipp*. In order to circumvent the domestic takings rule, claimants have tried to argue that the persecutory treatment of Jewish individuals by several states during the Holocaust deprived them of their nationality, rendering them either *de iure* or *de facto* stateless. In the wake of *Philipp*, courts have been sceptical of this statelessness theory – although they appear to have left the door ajar for stronger arguments in its support.[16] A recent decision by the District Court for the District of Columbia has gone so far as to exclude the expropriation exception in cases involving a states' taking of property from nationals of an enemy state in times of war.[17] The District Court followed the same reasoning as in *Philipp*: if §1605(a)(3) refers to the international law of expropriation, not only human rights law but also international humanitarian law are excluded by its scope of application. As I noted elsewhere,[18] post-*Philipp* court practice now excludes the expropriation exception in the vast majority of takings by sovereign actors, regardless of whether they targeted their own nationals, the nationals of an enemy state or stateless individuals.

The Commercial Nexus and the Commingling Theory

The recent *Simon* decision adopts the same restrictive approach as *Philipp,* but shifts focus to the expropriation exception's second requirement: the commercial nexus with the US. Under §1605(a)(3), the property that was taken in violation of international law, or *any* property exchanged for such property (emphasis added), needs to have a connection with a commercial activity carried by the foreign state, or one of its agencies or instrumentalities, in the US. Crucially, the Hungarian government liquidated the assets allegedly expropriated from defendants. The Supreme Court was asked to decide whether the claimants' allegation that Hungary used the proceedings to issue bonds in the US met the commercial nexus requirement. Complicating matters further, the proceeds were absorbed into the national treasury where, over the years, they had mingled with billions in other revenues.

The *Simon* question concerns an important portion of expropriation cases, since property is often taken for its monetary rather than intrinsic value. Therefore, with some specific exceptions (such as takings of artworks or land), expropriated properties are likely going to be liquidated, and the proceeds are bound to be commingled with other funds. Years after the initial liquidation, proving the location of the money originally exchanged for those properties is extremely challenging, if not impossible. In 2023, the Circuit Court had indeed concluded that "[r]equiring plaintiffs whose property was liquidated to allege and prove that they have traced funds in the foreign state's or instrumentality's possession to proceeds of the sale of their property would render the FSIA's expropriation exception a nullity for virtually all claims involving liquidation".[19]

The *Simon* claimants thus proposed a "commingling theory", arguing that instead of tracing the initial proceeds, it is enough to show that they eventually mixed with funds later used in commercial activity in the US. Delivering the opinion of the Court, Justice Sotomayor rejected this theory, reading a specific tracing requirement into the wording of the expropriation exception. In order to meet this requirement, claimants can identify a US account holding proceeds from expropriated property, or allege that a foreign sovereign spent *all* funds from a commingled account in the United States. As clarified by the Justice, these are but some examples of how a claimant might chose to proceed. Rather than examining various common law tracing principles, however, the Court here simply ruled that alleging that a foreign sovereign liquidated the expropriated property, commingled the proceeds with general funds, and later used *some*

portion of those funds for commercial activities in the US does not establish a plausible commercial nexus. Although this ruling imposes a high bar for claimants seeking to invoke the expropriation exception, the Court found this outcome less detrimental to the FSIA's rationale than accepting the "attenuated fiction" that commingled accounts still contain funds from the original property's liquidation. In *Simon*, for example, while the initial commingling of funds occurred in the 1940s, the suit was only brought in the 2010s, after "several institutional collapses and regime changes".

A Restrictive Parable

The Supreme Court based its *Simon* decision on a textual interpretation of the expropriation exception, which identifies "*that* property or *any* property exchanged for such property", without providing a specific alternative criterion for property exchanged for money. The Court also looked at the legislative history of the FSIA, rooted in the 1964 B*anco Nacional de Cuba v. Sabbatino* decision.[20] *The Sabbatino* case prompted US Congress to pass the FSIA's predecessor, the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964, "to permit adjudication of claims the Sabbatino decision had avoided".[21] In *Simon*, the Court read its *Sabbatino* precedent as part of the FSIA's history, and as such relevant to its interpretation – especially considering that *Sabbatino* also revolved around property that had been liquidated. Crucially in *Sabbatino* "the proceeds . . . in controversy" could be clearly traced to a New York account, aligning the case with the tracing requirement identified in *Simon*.

The *Simon* Court also echoed the foreign relations concerns that it already discussed in *Philipp*, justifying its restrictive interpretation of the FSIA on the Act's potential to cause international friction, and trigger reciprocity among other states' courts. In this regard, the *Philipp* and *Simon* decisions seem particularly keen to do some "damage control" on the effects of the expropriation exception, reducing its scope from a "radical" to a "limited" departure from the restrictive theory of foreign sovereign immunity.

This restrictive turn mirrors the trajectory of human rights litigation under the Alien Tort Statute (ATS).[22] Starting with the Second Circuit's decision in *Filártiga v. Peña-Irala*,[23] the 1789 ATS was used by US courts to extend their jurisdiction on human rights claims brought by aliens. In 2004 (the same year as the seminal Altmann decision on the FSIA's retroactive application),[24] the

Supreme Court rejected the interpretation of the ATS as a gateway for "foreign-cubed" human rights cases.[25] Warning against the risk of "adverse foreign policy consequences", the Court provided a narrow interpretation of the ATS. This conservative approach has been framed as part of the shift in attitudes that marked the passage from the Third to the Fourth Restatement of the Foreign Relations Law of the United States.[26] The decision to restrict the reach of the ATS was in fact rooted in political considerations, as testified by the pressure exercised by the Bush administration to hear the case.[27] The new geopolitical landscape had diminished the strategic importance of vindicating international human rights law, and the use of domestic courts to advance public rights agendas had faced severe criticism, with US courts being accused of acting as judges of world history.[28] The *Philipp* and *Simon* interpretations of the FSIA reproduce this passage from an offensive to a defensive approach within the law of foreign sovereign immunity.

Conclusion

Since *Philipp*, the expropriation exception has been limited to property takings by foreign sovereigns against aliens during peacetime. This development has arguably returned the FSIA to its original intent: to protect the property of US citizens abroad, as an expression of "America's free enterprise system". With *Simon*, this provision's application has been further restricted where the expropriated property was liquidated. This approach explicitly aims at aligning US law with international law. In this process, however, the US judiciary's controversial yet proactive contribution to human rights litigation, with its potential to influence the development of customary law, is taking a more conservative and isolationist stance.

[1] *Republic of Hungary v. Simon,* 604 U. S. ___ (2025).

[2] *Federal Republic of Germany* v. *Philipp,* 592 U. S. 169 (2021).

[3] Thomas Giegerich, 'The Holy See, a Former Somalian Prime Minister, and a Confiscated Pissarro Painting: Recent Us Case Law on Foreign Sovereign Immunity' in Anne Peters and others (eds), *Immunities in the Age of Global Constitutionalism* (Brill | Nijhoff 2014) 52. <https://brill.com/view/book/edcoll/9789004251632/B9789004251632_006.xml> accessed 11 December 2024. An important conference on the state of the art on

the international law of foreign sovereign immunity recently took place at Villa Vigoni (Italy), under the auspices of the Max Planck Institute for Comparative Public Law and International Law. The full program of the event can be found here: https://www.mpil.de/en/pub/news/conferences-workshops/the-future-of-remedies-against.cfm.

[4] As described by Riccardo Pavoni, 'An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State' (2011) 21 *The Italian Yearbook of International Law Online* 143.

[5] For an historical contextualization, see Szabolcs Szita, 'It Happened Seventy Years Ago, in Hungary' [2014] Témoigner. Entre histoire et mémoire. Revue pluridisciplinaire de la Fondation Auschwitz 146.

[6] See *Republic of Hungary v. Simon*, 592 U. S. 207 (2021) (per curiam) (Supreme Court of the United States).

[7] The FSIA, enacted through Public Law 94-583 on October 21 on 1976, is codified in Title 28 of the U.S. Code, Chapter 97, Part IV – Jurisdictional Immunities of Foreign States.

[8] Charlene Sun and Aloysius Llamzon, 'Acta Iure Gestionis and Acta Iure Imperii' (*Oxford Constitutions – Max Planck Encyclopedia of Comparative Constitutional Law [MPECCoL]*) <https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e188> accessed 30 April 2025.

[9] *Altmann v Republic of Austria* [2001] 142 F. Supp. 2d 1187 (United States District Court, CD California).

[10] *Toren v Federal Republic of Germany* 2023 WL 7103263 (United States Court of Appeals, District of Columbia Circuit) (unreported).

[11] *Berg v Kingdom of the Netherlands* 2020 WL 2829757 (United States District Court, D. South Carolina, Charleston Division) (unreported).

[12] *Cassirer v Kingdom of Spain* [2006] 461 F.Supp.2d 1157 (United States District Court, CD California).

[13] Mayer Brown, '"Domestic Takings" Rule Bars Suit Against Foreign Nations in U.S. Court' (*Lexology*, 3 February 2021) <https://www.lexology.com/library/detail.aspx?g=1d4af991-a497-47be-80f2-dd78c184baa1> accessed 30 April 2025.

[14] UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, United Nations, Treaty Series, vol. 78, p. 277, 9 December 1948, https://www.refworld.org/legal/agreements/unga/1948/en/13495 [accessed 29 April 2025].

[15] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012. For a critical discussion of this judgment, see Benedetto Conforti, 'The Judgment of the International Court of Justice on the Immunity of Foreign States: A Missed Opportunity' (2011) 21 *The Italian Yearbook of International Law Online* 133.

[16] See *Simon v Republic of Hungary* [2023] 77 F4th 1077 (United States Court of Appeals, District of Columbia Circuit). The court here clarified that its decision did not "foreclose the possibility that such support exists in sources of international law not before us in this case or based on arguments not advanced here"> Ibid, para 1098.

[17] *de Csepel v Republic of Hungary* 2024 WL 4345811 (United States District Court, District of Columbia).

[18] Livia Solaro, 'US Case Further Restricts Holocaust-Related Art Claims' (*The Institute of Art & Law*, 11 November 2024) <https://ial.uk.com/author/livia-solaro/> accessed 30 April 2025.

[19] *Simon v Republic of Hungary* (n 16) para 1118.

[20] *Banco Nacional de Cuba v. Sabbatino,* 376 U. S. 398 (1964) (Supreme Court of the United States).This case revolved around the expropriation of sugar by Cuba against a private company in protest for the reduction of the US sugar quota for this country. After the sugar in question was delivered to a customer in Morocco, both the Cuban state and the private company claimed the payment of the price, which in the meantime had been transferred to a New York commodity broker. The case eventually was adjudicated in favour of the National Bank of Cuba, based on the Act of State doctrine.

[21] As noted by the Court in *Republic of Hungary* v. *Simon,* 604 U. S. ___ (2025) (Supreme Court of the United States) 15–16.

[22] 28 U.S. Code § 1350.

[23] *Filartiga v Pena-Irala* [1980] 630 F.2d 876 (United States Court of Appeals, Second Circuit).

[24] *Republic of Austria v. Altmann,* 541 U. S. 677 (2004) (Supreme Court of the United States).

[25] *Sosa v. Alvarez-Machain,* 542 U. S. 692 (2004) (Supreme Court of the United States); for a definition of 'foreign-cubed' claims, see Robert S Wiener, 'Foreign Jurisdictional Algebra and Kiobel v. Royal Dutch Petroleum: Foreign Cubed And Foreign Squared Cases' (2014) 32 *North East Journal of Legal Studies* 156, 157.

[26] See Thomas H Lee, 'Customary International Law and U.S. Judicial Power: From the Third to the Fourth Restatements', *SSRN Electronic Journal* (2020) <https://www.ssrn.com/abstract=3629791> accessed 14 March 2025.

[27] Naomi Norberg, 'The US Supreme Court Affirms the Filartiga Paradigm' (2006) 4 *Journal of International Criminal Justice* 387, 390.

[28] Ugo Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' (2003) 10 *Indiana Journal of Global Legal Indiana Journal of Global Legal Studies* 67, 420.

1st Issue of Journal of Private International Law for 2025

The first issue of the Journal of Private International Law for 2025 was published today. It contains the following articles:

Pietro Franzina, Cristina González Beilfuss, Jan von Hein, Katja

Karjalainen & Thalia Kruger, “Cross-border protection of adults: what could the EU do better?†”

On 31 May 2023 the European Commission published two proposals on the protection of adults. The first proposal is for a Council Decision to authorise Member States to become or remain parties to the Hague Adults Convention “in the interest of the European Union.” The second is a proposal for a Regulation of the European Parliament and the Council which would supplement (and depart from, in some respects) the Convention’s rules. The aim of the proposals is to ensure that the protection of adults is maintained in cross-border cases, and that their right to individual autonomy, including the freedom to make their own choices as regards their person and property is respected when they move from one State to another or, more generally, when their interests are at stake in two or more jurisdictions. This paper analyses these EU proposals, in particular as regards the Regulation, and suggests potential improvements.

Máire Ní Shúilleabháin, “Adult habitual residence in EU private international law: an interpretative odyssey begins”

This article examines the first three CJEU cases on adult habitual residence in EU private international law, against the background of the pre-existing (and much more developed) CJEU jurisprudence on child habitual residence. While the new trilogy of judgments provides some important insights, many questions remain, in particular, as to the scope for contextual variability, and on the role of intention. In this article, the CJEU’s treatment of dual or concurrent habitual residence is analysed in detail, and an attempt is made to anticipate the future development of what is now the main connecting factor in EU private international law.

Felix Berner, “Characterisation in context – a comparative evaluation of EU law, English law and the laws of southern Africa”

Academic speculation on characterisation has produced a highly theorised body of literature. In particular, the question of the governing law is the subject of fierce disagreement: Whether the lex fori, the lex causae or an “autonomous approach” governs characterisation is hotly debated. Such discussions suggest that a decision on the governing law is important when lawyers decide questions of

characterisation. Contrary to this assumption, the essay shows that the theoretical discussion about the governing law is unhelpful. Rather, courts should focus on two questions: First, courts should assess whether the normative context in which the choice-of-law rule is embedded informs or even determines the question of characterisation. Insofar as the question is not determined by the specific normative context, the court may take into account any information it considers helpful, whether that information comes from the lex fori, the potential lex causae or from comparative assessments. This approach does not require a general decision on the applicable law to characterisation, but focuses on the normative context and the needs of the case. To defend this thesis, the essay offers comparative insights and analyses the EU approach of legislative solutions, the interpretation of assimilated EU law in England post-Brexit and the reception of the via media approach in southern Africa.

Filip Vlcek, "The existence of a *genuine* international element as a pre-requisite for the application of the Brussels Ia Regulation: a matter of EU competence?"

Under Article 25(1) of the Brussels Ia Regulation, parties, regardless of their domicile, may agree on a jurisdiction of a court or the courts of an EU Member State to settle any disputes between them. The problem with this provision is that it remains silent on the question of whether it may be applicable in a materially domestic dispute, in which the sole international element is a jurisdictional clause in favour of foreign courts. Having been debated in the literature for years, the ultimate solution to this problem has finally been found in the recent judgment of the ECJ in Inkreal (C-566/22). This article argues that the ECJ should have insisted on the existence of a material international element in order for Article 25 of the Regulation to apply. This, however, does not necessarily stem from the interpretation of the provision in question, as Advocate General de la Tour seemed to propose in his opinion in Inkreal. Instead, this article focuses on the principle of conferral, as the European Union does not have a legal base to regulate choice-of-court clauses in purely internal disputes. Accordingly, with the Regulation applying to legal relationships whose sole cross-border element is a prorogation clause, the Union legislature goes beyond the competence conferred on it by Article 81 TFEU. Such an extensive interpretation of the Regulation's scope, which is, in reality, contrary to the objective of judicial cooperation in civil matters, is moreover prevented by the principle of subsidiarity as well as the

principle of proportionality. Finally, this approach cannot be called into question by the parallel applicability of the Rome I and II Regulations in virtually analogous situations as those Regulations become inherently self-limiting once the international element concerned proves to be artificial.

Adrian Hemler, "Deconstructing blocking statutes: why extraterritorial legislation cannot violate the sovereignty of other states"

Blocking statutes are national provisions that aim to combat the legal consequences of foreign, extraterritorial legislation. They are often justified by an alleged necessity to protect domestic sovereignty. This article challenges this assumption based on an in-depth discussion of the sovereignty principle and its interplay with the exercise of state power regarding foreign facts. In particular, it shows why a distinction between the law's territorial scope of sovereign validity and its potentially extraterritorial scope of application is warranted and why, based on these foundations, extraterritorial legislation cannot violate foreign sovereignty. Since Blocking Statutes cannot be understood to protect domestic sovereignty, the article also discusses how they serve to enforce international principles on extraterritorial legislation instead.

Michiel Poesen, "A Scots perspective on *forum non conveniens* in business and human rights litigation: *Hugh Campbell KC v James Finlay (Kenya) Ltd*"

In Hugh Campbell KC v James Finlay (Kenya) Ltd the Inner House of the Court of Session, the highest civil court in Scotland subject only to appeal to the UK Supreme Court, stayed class action proceedings brought by a group of Kenyan employees who claimed damages from their Scottish employer for injuries suffered due to poor labour conditions. Applying the forum non conveniens doctrine, the Court held that Kenya was the clearly more appropriate forum, and that there were no indications that the pursuers will suffer substantial injustice in Kenya. Campbell is the first modern-day litigation in Scotland against a Scottish transnational corporation for wrongs allegedly committed in its overseas activities. This article first observes that the decision of the Inner House offers valuable insight into the application of forum non conveniens to business and human rights litigation in Scotland. Moreover, it argues that the decision

would have benefitted from a more rigorous application of the jurisdictional privilege in employment contract matters contained in section 15C of the Civil Jurisdiction and Judgments Act 1982

Hasan Muhammad Mansour Alrashid, "Appraising party autonomy in conflict-of-laws rules in international consumer and employment contracts: a critical analysis of the Kuwaiti legal framework"

Party autonomy plays a vital role in international contracts in avoiding legal uncertainty and ensuring predictability. However, its application in international employment and consumer contracts remains a subject of debate. Consumers and employees are typically the weaker parties in these contracts and often lack the expertise of the other party, raising questions about their autonomy to choose the applicable law. Globally, legal systems differ on this point with some permitting full party autonomy, others rejecting it outrightly and some allowing a qualified autonomy with domestic courts empowered to apply a different law in deserving cases to protect the employee or consumer. Kuwaiti law allows full autonomy only in international consumer contracts but prohibits it in international employment contracts. This paper critically analyses Kuwait's legal approach to find an appropriate balance between the principle of party autonomy in the choice of law and the protection of employees and consumers.

Alexander A. Kostin, "Recognition and enforcement of foreign judgments in bankruptcy and insolvency matters under Russian law"

This article addresses the role of certain Russian Federal Law "On Insolvency (Bankruptcy)" provisions (eg Article 1(6)) for resolving bankruptcy and insolvency matters under Russian law. The author argues that the "foreign judgment on the insolvency matters" term covers not only the judgments on initiation of bankruptcy/insolvency, but also other related judgments like those on vicarious liability, avoidance of transactions and settlement agreements. The issues associated with enforcing foreign judgments on the grounds of reciprocity under Article 1(6) of the Federal Law "On Insolvency (Bankruptcy)" are being explored and valid arguments in favour of recognition simpliciter (recognition of foreign judgments without extra exequatur proceedings at the national level) are

provided. The legal effects of foreign judgments on the initiation of bankruptcy/insolvency proceedings recognition are analysed as well as the interconnection between relevant provisions of the Russian legislation on lex societatis of a legal entity and the rules for recognising foreign judgments on the initiation of bankruptcy/insolvency proceedings.

Call for Papers: The Role of Judicial Actors in Shaping Private International Law. A Comparative Perspective

On the occasion of the 150th anniversary of the Swiss Federal Tribunal, the Swiss Institute of Comparative Law (SICD) is pleased to announce its 35th **Conference on Private International Law, to be held on 19–20 November 2025 in Lausanne**.

The conference addresses how courts, lawyers, and litigants have shaped—and how they continue to shape—private international law. Special emphasis will be placed on how legal practice drives the development of private international law at both the national and supranational levels. Judges, through landmark rulings, have clarified conflicts of laws rules, set precedents on the recognition of foreign judgments, and adapted legal frameworks to globalization and digital commerce. Lawyers, by crafting novel arguments, have influenced judicial reasoning and contributed to evolving legal doctrines. Finally, strategic litigation, led by litigants and advocacy groups, has driven major jurisprudential shifts, particularly in fundamental rights, corporate liability, and cross-border regulation. The conference will analyse these actors' distinct but interconnected roles in shaping contemporary private international law.

We invite scholars (both established and early-career researchers), legal

practitioners, and policymakers to submit papers addressing these issues.

Possible topics include:

- The role of national and supranational courts in shaping private international law
- The impact of key judicial decisions on cross-border legal relationships
- The influence of legal practitioners in driving jurisprudential change
- Strategic litigation as a tool for legal evolution in private international law
- Comparative approaches to judicial reasoning in international private law cases
- Judicial responses to global challenges such as migration, digital commerce, corporate responsibility, and human rights protection

Paper Submission
Please submit an abstract (up to 500 words) of your proposed paper by **11 May 2025** to Ms. Marie-Laure Lauria (marie-laure.lauria@isdc-dfjp.unil.ch), with the subject line "*ISDC 35th PIL Conference Submission*". Abstracts may be submitted in English, German, or French.

All submissions will undergo a double-blind peer review and decisions will be communicated by **3 June 2025**. Accepted papers will be considered for publication in an edited volume or a special journal issue.

Organization
The conference will be hosted by the Swiss Institute of Comparative Law.

Funding
The Swiss Institute of Comparative Law will provide funding for the travel costs and accommodation of all presenters.