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Conceptualizing the Relationship between International Human Rights Law and Private International Law

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In the domestic context, constitutional and private law regimes sit together in an uneasy posture. To reconcile them, domestic regimes tend to articulate some theoretical mechanism of interaction. For example, in the United States, the state action doctrine attempts to mediate the relationship, while in Canada and Germany, the theory of indirect horizontal effect plays an analogous role.

This Note explores the possibility of a corresponding tension at the international level. At least in conceit, private international law and international human rights law regimes exist side-by-side. But they lack a clear framework governing their interaction. Drawing from work analyzing the impact of the European Convention on Human Rights ("ECHR") on private international law, this essay identifies and evaluates two potential candidates for a mediating mechanism that could operate beyond the European context: the public policy exception and the concept of horizontal effect. Given the widely-perceived issue of rights underenforcement, a clearer specification of the relationship between international human rights law and private international law might offer broader avenues for rights realization.

INTRODUCTION

In 1939, in Berlin, a woman named Lilly Neubauer sold a Pissarro oil painting (*Rue Saint-Honoré, après-midi, effet de pluie*) to an art dealer.[1] However, it being 1939 and Neubauer being Jewish, the "sale" was a tragic fiction; in fact, her painting was expropriated by the German state as part of a general "Aryanization" of the property of German Jews.[2] After the war, Lilly and her descendants sought fruitlessly to locate the painting until the early 2000s, when Lilly's heir, Claude Cassirer, discovered the painting on display at the Thyssen-Bornemisza Museum in Madrid.[3] It had been acquired by the Spanish government in 1993 after a convoluted series of post-war sales and transfers. After unsuccessfully petitioning for the painting's return in 2001, the Cassirers filed a claim in a federal district court in California.[4]

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1. Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 955 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1992 (2018).

2. *Id.* (relating that the buyer "had been appointed to appraise the Painting by the Nazi government, had refused to allow Lilly to take the Painting with her out of Germany, and had demanded that she sell it to him for all of $360 in Reichsmarks").

3. Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1023 (9th Cir. 2010).

4. *Id.*

Holocaust-era restitution cases like *Cassirer* raise a number of complex legal issues.[5] But for the purposes of this Note, one aspect is of particular interest: during the litigation, the Museum invoked a defense under Spanish law, arguing it gained good title to the painting under the doctrine of *usucapio* or "acquisitive prescription"—essentially, the civil law equivalent of adverse possession.[6] That is, the Museum claimed that its open and notorious display of the painting from 1993 until 2001 barred the Cassirers' claim. Predictably, the Cassirers challenged the defendant's interpretation of the doctrine.[7] But interestingly, they also argued that applying *usucapio* here would violate Article 1 of Protocol 1 of the European Convention on Human Rights ("ECHR"), which protects the peaceful enjoyment of property.[8] Citing a declaration by Professor Carlos M. Vázquez, the plaintiffs argued that a European Court of Human Rights ("ECtHR") case had expressed sufficient doubts about certain aspects of adverse possession law that the district court should invalidate its application here.[9]

The plaintiffs' invocation of the ECHR is worth pausing over. From one point of view, it represents an unremarkable argument about the proper meaning of domestic Spanish law, which explicitly incorporates and is subordinate to the ECHR.[10] But this Note argues that there is some unrealized potential in the appeal to international human rights law in a private law context like *Cassirer*. This potential is already making itself felt in Europe, but is not necessarily limited to the European context.

The Note proceeds as follows: Part I provides working definitions of "private international law" and "international human rights law." Part II, drawing on existing case law and scholarship, explains how human rights law has influenced the development of private international law in Europe. Finally, Part III offers two different ways of conceiving the relationship between private international law and international human rights law more generally: the public policy exception and the concept of horizontal effect.

5. *See generally* BRUCE L. HAY, NAZI-LOOTED ART AND THE LAW: THE AMERICAN CASES (2017).

6. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d at 965.

7. Appellant's Brief at 17, Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 955 (9th Cir. 2017) (No. 05-cv-03549-JFW).

8. *Id.* at 31 (citing Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262).

9. *Id.* (citing J.A. Pye (Oxford) Ltd. & J.A. Pye (Oxford) Land Ltd. v. United Kingdom, 2007-III Eur. Ct. H.R. 365). The Ninth Circuit ultimately rejected Professor Vázquez's argument, but reversed the district court's grant of summary judgment on other grounds; litigation remains ongoing.

10. *Id.*; *see also* Aida Torres Pérez, *The Judicial Impact of European Law in Spain: ECHR and EU Law Compared*, 30 Y.B. EUR. L. 159, 177 (2011) ("The Constitution is no longer the supreme norm that comprehensively regulates public power within the State territory.").

I. Background and Definitions

A. Private International Law

Private international law is traditionally defined as the body of rules that "comes into operation whenever [a] court is faced with a claim that contains a foreign element."[11] In practical terms, it helps resolve the questions arising whenever private entities conduct activities (enter into contracts, commit torts, get married, and so on) implicated by the laws of different sovereign jurisdictions.[12] Classically (and narrowly) defined, private international law comprises three main topics: jurisdiction, choice-of-law, and recognition and enforcement of foreign judgments.[13] Under some definitions, private international law includes parts of "international civil procedure," like rules of service, discovery, and evidence.[14] In certain cases, it can even range beyond procedure into substance, referring to internationally uniform law established by treaty, convention, or the like.[15] Confronting the variety of possible meanings, one commentator suggests it remains "a matter of convenience whether a broad or narrow definition of private international law is adopted."[16] Except where otherwise specified, this Note uses "private international law" in its narrow, traditional sense: the laws governing jurisdiction, choice-of-law, and enforcement in cases with international elements.

11. Cheshire, North and Fawcett: Private International Law 3 (Paul Torremans & James J. Fawcett eds., 15th ed. 2017) [hereinafter Private International Law].

12. *See* Peter H. Pfund, *General Introduction to International Unification of Private Law*, *in* Contributing to Progressive Development of Private International Law : the International Process and the United States Approach 22, 22 (1994) ("Private international law, in its classical and more limited sense, refers to the identification and setting out of rules to determine the national law that is to govern some legal transaction or relationship, or some parts thereof, between essentially private parties when legal elements and circumstances of the transaction or relationship take place or are to take place in more than one country.").

13. *See* William M. Richman & William L. Reynolds, Understanding Conflict of Laws § 1 (3d ed. 2002) ("Conflicts, like Caesar's Gaul, is generally said to be divided into three parts."). Note that in the United States and some other jurisdictions, there is a difference in terminology: private international law topics fall under the field of "conflict of laws." *See* Symeon C. Symeonides, Choice of Law 1–2 (2016); Joseph Story, Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions and Judgments (1834).

14. Kevin M. Clermont, *The Role of Private International Law in the United States: Beating the Not-Quite-Dead Horse of Jurisdiction*, *in* 2 Private Law, Private International Law, & Judicial Cooperation in the EU-US Relationship 75, 76 (Ronald A. Brand & Mark Walter eds., 2005) ("[I]t seems to me that a convenient definition would include jurisdiction, choice of law, and judgments but would also extend into international civil procedure far enough to pick up judicial cooperation on matters such as service and evidence.").

15. *See* Pfund, *supra* note 12, at 22 ("The term 'private international law' is also used in a much broader sense to encompass internationally agreed rules—in convention/treaty form or in the form of uniform rules, model laws or general principles—whether they involve unified substantive law, rules governing applicable law or internationally agreed rules of procedure, or some combination."). R

16. Gerhard Kegel, *Introduction* to 3 International Encyclopedia of Comparative Law 1, 1 (Lipstein et al. eds., 1994).

Somewhat counterintuitively, this classical kind of private international law is "neither truly international nor exclusively private."[17] For one thing, private international law rules have traditionally derived from national sources.[18] That is, whether an English court will, say, enforce a foreign judgment will generally depend on domestic English law. Additionally, even nominally private suits may arguably implicate state interests and thus assume a public dimension.[19]

Despite these incongruities, private international law remains a useful conceptual category. It may at times exist only on a high level of abstraction (for instance, as a set of principles or majority rules), lacking enforceability until implemented into national law. But despite its often theoretical or academic nature, it can be influential. This is partly because even domestic statutes establishing international private law rules will often take inspiration from international sources (like bilateral treaties or multilateral treaties under the Hague Conference on Private International Law).[20] But perhaps more fundamentally, there remains a sense among some commentators that private international law does (or at least should) contain "a common core throughout the world."[21] One academic explains:

> [T]he word "international" reflects the initial internationalist aspirations of this field. In entering this field, national lawmakers were supposed to act as surrogates of a nonexistent international legislature. They should act unselfishly, impartially, and even-handedly, treating equally foreign and forum law, as well as foreign and domestic litigants. They should aim for international harmony and uniformity by adopting only those rules that would be capable of "internationalization" through their adoption by other nations.[22]

The Hague Conference on Private International Law, for instance, has the explicit goal of "work[ing] for the progressive unification of the rules of private international law."[23] These quasi-utopian efforts to create a more

17. Clermont, *supra* note 14, at 75. R

18. *See* JAMES J. FAWCETT, MÁIRE NÍ SHÚILLEABHÁIN, & SANGEETA SHAH, HUMAN RIGHTS AND PRIVATE INTERNATIONAL LAW 36 (2016); *see also* SYMEONIDES, *supra* note 13, at 2–3 ("[P]rivate international law is essentially *national* law.").

19. SYMEONIDES, *supra* note 13, at 2. R

20. *See* Hans van Loon, *The Hague Conference on Private International Law*, 2 HAGUE JUST. J. 3, 9 (2007) (noting that "countries will often, without formally adopting a Convention, simply borrow the text or some of the rules therein and incorporate them into their internal laws.").

21. Kegel, *supra* note 16, at 4. R

22. SYMEONIDES, *supra* note 13, at 3. R

23. Statute of the Hague Conference on Private International Law art. I, July 15, 1995, *available at* https://perma.cc/5G78-EE2E. The Hague Conference is an inter-governmental organization with eighty-three members (eighty-two nation states, plus the European Union). However, non-Member States can still become parties to Hague Convention treaties. As a result, the "work of the Conference encompasses 150 countries around the world." HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, https://perma.cc/S8A9-RUQY (last visited Aug. 27, 2018).

unified and coherent system have often faltered.[24] Nonetheless, "there has been a significant movement in recent years towards the harmonization of private international law rules between groups of countries" through the Hague Conference and a growing body of international treaties, conventions, and model laws.[25] Recently, choice-of-law has been an especially fruitful area for unification, with one observer enthusiastically "celebrat[ing] an extraordinary development in the history of [private international law]—a massive codification movement around the globe in the last 50 years."[26] Unsurprisingly, harmonization is particularly advanced in Europe, where private international law is increasingly a matter of EU rather than national law.[27]

B. International Human Rights Law

According to one leading scholar, modern international human rights law primarily consists of a "mutually reinforcing network of global and regional treaties and other instruments that guarantee the enumerated human rights and set forth the corresponding obligations of states, state agents and, in some instances, non-state actors."[28] The modern treaty regime has its roots in the Universal Declaration of Human Rights ("UDHR"), adopted by the United Nations General Assembly in 1948.[29] The UDHR was later supplemented by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and a series of other multilateral treaties which, in contrast to the UDHR, possess legally binding force.[30] Parallel to the U.N. human rights treaty system, a set of regional human rights agreements have developed: the ECHR and the Charter of Fundamental Rights of the European Union ("CFREU"), the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.[31] Ultimately, thanks to a constellation of treaty bodies, commissions, agencies, and courts, "billions of persons throughout the world now have access to some form of international review procedure when their domestic governing bodies fail to comply with the

24. *See* SYMEONIDES, *supra* note 13, at 3 ("Regrettably or not, this idealism survives only in some academic writings, but not in the legislative or judicial chambers."). R

25. PRIVATE INTERNATIONAL LAW, *supra* note 11, at 8. R

26. SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 1 (2014).

27. *See, e.g.*, Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) 2012 O.J. (L351) 1.

28. Dinah Shelton, *Introduction* to THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 1, 1 (2013).

29. *See* Ed Bates, *History*, *in* INTERNATIONAL HUMAN RIGHTS LAW 15, 31 (Daniel Moeckli et al. eds., 2d ed. 2014).

30. *See id.*

31. Christine Chinkin, *Sources*, *in* INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 29, at 75, 79. R

applicable international guarantees and afford no redress for the violations that occur."[32]

Alongside the multilevel treaty system, customary international law exists as an independent source of human rights law. Classically, customary international law emerges from (1) "an extensive and virtually uniform and consistent state practice" and (2) "the belief that the practice is required by law (*opinio juris*)."[33] While often difficult to define in practice, customary international law theoretically transcends treaty-based obligations, namely because "[a] claim of obligation under custom may be made against a state that has not become a party to a particular treaty, or which has made a reservation to a treaty provision as a state cannot reserve out of customary international law."[34] Additionally, while some so-called dualist states require that international treaties be incorporated into national law through legislation before becoming operative in national courts, at least some scholars believe "customary international law may be accepted as the law of the land without any such act of incorporation."[35] As a result, customary international law offers a vague but potentially powerful reservoir of legal authority.

Historically, human rights law has concentrated on protecting the rights of individuals from being violated by governments and public actors.[36] But, as one scholar argues, "[h]uman rights law's traditional focus on states as violators and individuals as victims insufficiently addressed the major impact that non-state actors have on the protection of human rights—both positively and negatively."[37] Increasingly, new kinds of human rights obligations have been enforced against non-governmental organizations, businesses, and armed terrorist and opposition groups, with varying levels of success.[38] Depending on the way such obligations are imposed, holding private actors accountable for rights violations may entail satisfying something akin to the state action requirement in U.S. constitutional law.[39]

32. Shelton, *supra* note 28, at 1. R

33. Chinkin, *supra* note 31, at 83. R

34. *Id.* at 81.

35. *Id.* at 83. The "may" is important. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Customary International as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

36. *See generally* David Weissbrodt, *The Role and Responsibility of Non-State Actors*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 28, at 719; ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993). Even this was arguably a major achievement. *See, e.g.*, LASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE § 292 (1905 ("[The so-called rights of mankind] do not in fact enjoy any guarantee whatever from the Law of Nations, and they cannot enjoy such guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this law."). R

37. Weissbrodt, *supra* note 36, at 719. R

38. *Id.* at 720.

39. *See generally* Stephen Gardbaum, *Where the (State) Action Is*, 4 INT'L J. CONST. L. 760 (2006); Curtis A. Bradley, *State Action and Corporate Human Rights Liability*, 85 NOTRE DAME L. REV. 1823 (2010).

II. Human Rights and Private International Law in Europe

Europe has witnessed a rich interplay between private international law and international human rights law.[40] There are at least two reasons for this.

First, as suggested above, a great deal of private international law is now a matter of European Union law, thanks to the adoption of a complex set of EU instruments and regulations. For instance, jurisdiction and the enforcement of judgments in civil and commercial cases are addressed by the Recast Brussels I Regulation, while jurisdiction in marital and parental rights cases is covered by the Brussels II *bis* Regulation.[41] Similarly, choice of law questions in contract cases are dealt with by the Rome I Regulation.[42] For present purposes, this Europeanization has significant consequences: because the provisions of the CFREU apply to member states "when implementing Union law," these EU-wide private law rules must be interpreted and applied consistently with the Charter.[43]

In practical terms, the influence of the CFREU on private international law is illustrated by the *Hypoteèní banka* case.[44] Simplifying slightly, the case involved a suit in a Czech court brought by a Czech bank against Lindner, a German national, for repayment on a defaulted mortgage.[45] By the time of suit, however, Linder was no longer living at the Czech address listed in the mortgage contract, and indeed, could not be located at all.[46] As a result, the local Czech court was confronted with the question of whether the EU's regulations on jurisdiction allowed proceedings against individuals whose domicile is unknown.[47] The Czech court system ultimately referred the case to the European Court of Justice ("ECJ"), which decided that, under the regulations and given the facts of the case, "the courts of the Member State in which the consumer had his last known domicile have jurisdiction."[48] For our purposes, their reasoning was interesting: to reach its plaintiff-friendly result, the ECJ invoked Article 47 of the CFREU, which, in part, guarantees "the right to an effective remedy before a tribunal."[49]

Second, the ECHR itself contains a broad jurisdictional grant that seems to place positive obligations on its signatories: Article 1 provides that "[t]he High Contracting parties shall secure to everyone within their jurisdiction

40. *See generally* Louwrens R. Kiestra, The Impact of the European Convention on Human Rights on Private International Law (2014); Fawcett et al., supra note 18. R

41. Fawcett et al., *supra* note 18, at 36–37. R

42. *Id.* at 41.

43. *Id.* at 36 (citing Charter of Fundamental Rights of the European Union art. 51, 2010 O.J. (C83) 389).

44. Case C-327/10, Hypoteèní banka a.s. v. Udo Mike Lindner, 2011 E.C.R. I-11543.

45. *Id.*

46. *Id.* at para. 25.

47. *Id.* at para. 36.

48. *Id.* at para. 2.

49. *Id.*; Charter of Fundamental Rights of the European Union art. 47, 2010 O.J. (C83) 389).

the rights and freedoms defined in Section I of this Convention."[50] Debates continue over the scope of applicability of the ECHR and the degree to which it possesses so-called extra-territorial effect.[51] But at least as applied to private international law, one commentator understands Article 1 to mean that

> if a court of one of the Contracting Parties has jurisdiction in the private international law sense to hear a case, then this automatically implies that the subjects in that case come within the jurisdiction of the Contracting Party and that the ECHR is applicable to such cases, even if the persons involved come from a non-Contracting Party and regardless even of whether the relevant facts took place within the jurisdiction of another state.[52]

Another scholar agrees: "[W]hen applying its private international law and deciding a case based on foreign law, the forum judge is still bound by the Convention because of Article 1 ECHR."[53]

The impact of the ECHR on the private international law is illustrated by the case of *Pellegrini v. Italy*, which concerned the enforcement of a foreign judgment.[54] The specific issue raised was whether an Italian civil court should have recognized a Vatican ecclesiastical court's decision to annul a marriage.[55] In her appeal to the European Court of Human Rights (ECtHR), the applicant claimed that the Vatican proceedings were unfair; among other things, she alleged that she had not been informed about the details of the case or the possibility of securing counsel before being subjected to intimidating questioning by the ecclesiastical court.[56] In its opinion, the Court made clear it was not evaluating the fairness of the Vatican proceedings as such; after all, the Vatican is not a Contracting Party to the ECHR.[57] Rather, the Court saw its task as examining "whether the Italian courts, before authorizing enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the {fair trial} guarantees of Article 6."[58] Ultimately, the Court concluded that the Italian courts had breached their duty; as a result, there was a violation of Article 6.[59]

50. Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1950, 213 U.N.T.S. 221.

51. *See, e.g.*, Cedric Ryngaert, *Clarifying the Extraterritorial Application of the European Convention on Human Rights*, 28 UTRECHT J. INT'L & EUR. L. 57, 58 (2012) (discussing "the contentious concept of jurisdiction laid down in Article 1 ECHR").

52. KIESTRA, *supra* note 40, at 64. R

53. Jan Oster, *Public Policy and Human Rights*, 11 J. PRIV. INT'L L. 542, 566 (2015).

54. Pellegrini v. Italy, 2001-VIII Eur. Ct. H.R. 369.

55. *Id.* at 378.

56. *Id.* at 378–79.

57. *Id.* at 379–80.

58. *Id.* at 380.

59. *Id.* at 381.

The ECHR has also affected the topic of jurisdiction. To choose one example, a number of European states (including the Netherlands) have enacted a version of the *forum necessitatis* rule into domestic law in order to comply with Article 6(1) of the ECHR.[60] These provisions grant jurisdiction to otherwise unavailable national courts when bringing the proceedings abroad would be "unreasonable" or "unacceptable" (for example, due to war or natural disasters).[61] While no ECtHR decision has held so squarely, the implication is that a state denying jurisdiction—even if doing so was in full accordance with domestic law—could nonetheless be held responsible for a violation of Article 6.

Surveying a range of national court and ECtHR decisions, one scholar concludes: "[T]he impact of the rights guaranteed in the ECHR on private international law is considerable . . . The Court's decisions have been more detailed and forthcoming in some areas than in other areas of private international law, but one may nevertheless distinguish a clear pattern."[62] Another observer agrees that human rights law has influenced private international law in Europe, but cautions that "the evidence of impact is patchy and depends very much on the human right and private international law issue in question."[63] The bottom-line: despite some inconsistency and lack of doctrinal clarity, the European human rights law and private international law regimes interact in meaningful ways.

III. Two Possible Conceptions

As the previous Part illustrated, the CFREU and the ECHR have both shaped private international law in Europe. At the same time, certain interesting theoretical questions remain unanswered, because the applicability of both human rights instruments is, in a sense, overdetermined. While Contracting Parties are free to fulfill their obligations under Article 1 in any matter they see fit,[64] the ECHR has been "received" into national legal orders to a striking extent.[65] Additionally, Article I of the ECHR, as we have seen, contains a broad jurisdiction grant that has been interpreted expansively.[66] For its part, the CFREU automatically applies whenever an EU

60. Fawcett et al., *supra* note 18, at 296. R

61. *Id.*

62. Kiestra, *supra* note 40, at 289. R

63. Fawcett et al., *supra* note 18, at 2. R

64. *See* Swedish Engine Drivers' Union v. Sweden, App. No. 5614/72, 20 Eur. Comm'n H.R. Dec. & Rep (ser. A) (1976).

65. *See* Hellen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, *in* A Europe of Rights: The Impact of the ECHR on National Legal Systems 677 (Hellen Keller & Alec Stone Sweet eds., 2008) ("[N]ational systems are increasingly porous to the influence of the ECHR and the case law of its Court. European States no longer embody insular, autonomous, self-defined legal systems, if ever they did.").

66. *See supra* note 50 and accompanying text.

member state applies EU law.[67] As a result, when a national court is asked, say, to refuse to recognize a foreign judgment due to Article 6 of the ECHR or Article 47 of the CFREU, the national court is applying conventional and authoritative legal sources. In doing so, of course, the court might need to resolve some substantive conflict between the domestic rules of private international law and the demands of international human rights law ("IHRL"), but even then, the nature of the court's task is theoretically straightforward.

Abstracted from the European context, though, the theoretical relationship between private international law and international human rights law is less clear. Of course, if private international law is just defined as a particular subset of national law rules, the whole question might be nonsensical. In that case, the interaction would be mediated by whatever obligations the state had assumed in order to comply with the relevant human rights instruments. Similarly, if IHRL and private international law are simply treated as parallel sets of treaty obligations, then venerable conflicts rules (for example, *lex specialis derogat legi generali*, *lex posterior derogat legi priori*, and so on) could come into play whenever there are incompatible obligations.[68] A conflicts analysis might also regard human rights norms as hierarchically superior, particularly (and perhaps only) if they are accorded the status of *jus cogens*.[69] But as two scholars conclude, "[t]here is some ambiguity as to exactly which norms have acquired peremptory character."[70] And simply elevating a certain norm or set of norms does not solve everything:

> One Latin phrase (obligations *erga omnes*) was launched alongside another (*jus cogens*) and the result has been confusion.
>
> Part of the problem has been the mistaken belief that the invocation of a norm as hierarchically superior or more fundamental avoids the need to deal with issues of its scope and application . . . . Even fundamental norms have to be applied in the context of the legal system as a whole.[71]

Thus, assuming that (1) private international law will continue to harmonize around a core set of shared principles and mature into a truly international body of treaty-based rules and (2) human rights are superior to "ordinary" treaty obligations (but in complicated ways requiring nuanced resolution), the need to articulate the relationship between private international law and international human rights will grow more acute. To put it more contentiously, if private international law will ever exist unmoored

67. *See supra* note 43 and accompanying text.

68. *See generally* SEYED ALI SADAT-AKHAVI, METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES (2003).

69. *See* Erika De Wet & Jure Vidmar, *Introduction* to HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS (Erika De Wet & Jure Vidmar eds., 2003), 2–3.

70. *Id.* at 3.

71. JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 103 (2d ed. 2006).

from any particular *domestic* context, it will arguably require *international* sources of normative guidance beyond naïve preemption. International human rights law lies ready to serve that function.

At this early stage, two possible ways of ordering the relationship between private international law and international human rights law are seemingly available: one is relatively firmly rooted in existing private international law doctrine, while the other is far more speculative and modeled on efforts to define public-private relationship in domestic legal orders.

A. The Public Policy Exception

One established method of integrating human rights considerations into private international law is the so-called public policy or *ordre public* exception.[72] It is sometimes referred to as the "safety valve, or the escape hatch, of private international law."[73] One reference summarizes the English version of the rule as follows:

> It is a well-established principle that any action brought in this country is subject to the English doctrine of public policy. Certain heads of the domestic doctrine of public policy command such respect, and certain foreign laws seem so repugnant to English notions and ideals, that the English view must prevail in proceedings in this country, for SCARMAN J has said that "an English court will refuse to apply a law which outrages its sense of justice and decency."[74]

Similarly, most U.S. jurisdictions have traditionally recognized an exception against enforcing judgments that violate public policy (though the Constitution's Full Faith and Credit Clause restricts its domestic interstate application).[75] Many multilateral private international law treaties (as well as EU private law regulations) contain analogous public policy clauses or provisions.[76] Generally speaking, "the public policy exception is present in virtu-

72. FAWCETT ET AL., *supra* note 18, at 866 ("The flexibility of the public policy doctrine has often been used to produce a result that deals with human rights concerns."). R

73. KIESTRA, *supra* note 40, at 21. R

74. PRIVATE INTERNATIONAL LAW, *supra* note 11, at 139.

75. *See generally* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Law*, 56 COLUM. L. REV. 969 (1956); *see also* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 (AM. LAW INST. 1934) ("No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum."); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (AM. LAW INST. 1971) ("Judgments rendered in foreign nations are not entitled to the protection of full faith and credit. A State of the United States is therefore free to refuse enforcement to such a judgment on the ground that the original claim on which the judgment is based is contrary to its public policy.").

76. *See, e.g.*, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The New York Convention") art. V(2), June 7, 1959, 330 U.N.T.S. Ser. 38 ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country."); Hague Convention on the Civil Aspects of

ally all systems of private international law and can be found in statutes, codes, and international conventions."[77]

Of course, a vague standard like "public policy," if interpreted broadly, could result in widespread displacements of foreign law and invalidations of foreign judgments, undermining private international law's goals of comity and mutual respect. As an English case famously put it: "Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you."[78] Given this open-endedness, the doctrine is usually understood to apply only to cases of manifest incompatibility: "A transaction valid by its foreign governing law should not be nullified on [the public policy] ground unless its enforcement would offend some moral, social, or economic principle so sacrosanct in English eyes as to require its maintenance at all costs and without exceptions."[79] Or in the words of then-Judge Cardozo: "The courts are not free to refuse to enforce a foreign right at the pleasures of the judges . . . They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common-weal."[80] Of course, these attempts at precision are only so helpful—there is an inherent vagueness in the concept, and it remains "no easy matter to classify those cases in which the English court will refuse to enforce a foreign acquired right, on grounds it will affront some moral principle that the maintenance of which admits of no possible compromise."[81] But some cases are clear: in *Oppenheimer v. Cattermole*, the English courts refused to recognize a 1941 law from Nazi Germany that deprived Jewish émigrés of their nationality and confiscated their property.[82] A more recent case from the House of Lords approvingly cited *Oppenheimer*, reaffirming the public policy doctrine despite its limitations: "[Its] imprecision, even vagueness, does not invalidate the [public policy] principle. Indeed, a similar principle is a common feature of all systems of conflicts of laws."[83]

International Child Abduction art. 20, Oct. 25, 1980, 1343 U.N.T.S. 49 ("The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."); Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) art. 45(1), 2012 O.J. (L351) 1 ("On the application of any interested party, the recognition of a judgment shall be refused: (a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed.").

77. KIESTRA, *supra* note 40, at 21. **R**

78. Richardson v. Mellish (1824) 130 Eng. Rep. 294, 303; *see also* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) ("To read the public policy defense as a parochial device protective of national political interests would seriously undermine the [New York Convention's] utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'").

79. PRIVATE INTERNATIONAL LAW, *supra* note 11, at 140. **R**

80. Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y. 1918).

81. PRIVATE INTERNATIONAL LAW, *supra* note 11, at 142. **R**

82. Oppenheimer v. Cattermole [1976] AC 249, 277–78.

83. Kuwait Airways Corp v. Iraqi Airways Co. (Nos 4 and 5) [2002] 2 AC 833 (HL).

For our purposes, the nuances of the public policy exception are less important than the conceptual move it permits. In essence, it allows an easy answer to the question of how human rights law and private international law relate: human rights are just part of the normative universe to which the public policy exception refers. After all, if one is trying to determine the basic principles of justice and morality that constitute public policy, then surely "the respect for human rights ranks among those fundamental principles."[84] If that is the case, we don't need to confront deeper questions about the private-public law relationship, because the private law—in its own terms—already incorporates the appropriate public-normative considerations. For supporters of a robust interpretation of the public policy exception in private international law, the task then shifts to identifying or developing a specific and coherent set of human rights on which private international law can draw. As one scholar argues: "In the long run, the significance of private international law in human rights-sensitive cases in general, and the application of public policy clauses in particular, may only be limited by global harmonisation of substantive human rights protection."[85]

At the same time, reducing human rights to an exception has its limitations. Most obviously, its very name suggests that it is to be used sparingly, on a case-by-case basis, which suggests it is an inappropriate vehicle for shaping rules and encouraging broader human rights compliance. Additionally, an important dimension of the public policy exception has traditionally been its relative nature.[86] That is,

> the operation of the public policy exception is related to the proximity between the issue and the forum. If a case has little or no connection to the forum, the public policy exception cannot be invoked—with the exception of certain extreme cases, in which the applicable law is so fundamentally against the values of the forum that the application of that law would never be permitted in the forum. If a case has more connections or links with the forum, the threshold for the application of the public policy exception is lower.[87]

This sliding-scale aspect is in considerable tension with the idea of "rights as trumps."[88]

Further muddling the relationship, certain applications of the public policy exception have *themselves* been interpreted as inconsistent with human rights obligations. For example, in the case of *Negrepontis-Giannisis v. Greece*, a Greek monk had adopted his nephew while both were living in the United

84. Oster, *supra* note 53, at 546. R

85. *Id.* at 567.

86. *See* Ioanna Thoma, *Public Policy (Ordre Public)*, in ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1453, 1457 (Jürgen Basedow et al. eds., 2017).

87. KIESTRA, *supra* note 40, at 23. R

88. Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

States, but the Greek courts subsequently refused to recognize the adoption order on public policy grounds.[89] Specifically, the Greek Court of Cassation found that "monks cannot adopt children, because adoption requires them to take charge of temporal affairs, which is expressly prohibited by [various canons of the Greek Orthodox Church]."[90] It continued: "[T]he apostolic and synodal canons, as well as the traditions which forbid monks and ordained clerics from assuming temporal affairs, constitute, according to the religious and moral conceptions of the religion of the Eastern Orthodox Church of Christ, rules of public order."[91] As a result, recognizing the judgment would violate Greek law. On review, the ECtHR held that there had been a violation of Article 6(1), because the Greek court's interpretation of public policy did not respect the "principle of proportionality."[92] At least in the ECHR context, then, human rights seemingly operate as hierarchically superior normative rules, trumping even application of the public policy exception: a safety valve for the safety valve.[93]

A different but related challenge arises when the applicable law (for example, international treaty or domestic statute) does not contain a public policy exception. For instance, the 1902 Hague Convention on the validity and recognition of marriages "provided that all the impediments to marriage under the national law of one of the parties shall be given effect regardless of the place of marriage and that no party shall refuse to recognize such impediments except in cases expressly provided for by the treaty."[94] As one scholar has explained, "[R]acial impediments were not on the list, which became a problem in many countries party to this convention during the years leading up to World War II."[95] In cases like these, a solution might involve: (1) reading in an "implied" public policy exception to any private international law instrument; or (2) conceiving of the relationship between

89. Negrepontis-Giannisis v. Greece, no. 56759/08, 2011 Eur. Ct. H.R.

90. *Id.*

91. *Id.* Specifically, as the ECtHR opinion noted, Art. 33 of the Greek Civil Code prohibits enforcement of judgments contrary to the *ordre public international*. *Id.*

92. *Id.* The decision disclaimed any anti-religious animus, claiming "[t]he Court attaches great importance to the nature of the rules on which the [Greek Court of Cassation] relied to declare that the adoption by a monk was contrary to the *ordre public*." *Id.* But on the other hand, the Court crisply noted that "these rules are all of an ecclesiastical nature and date back to the seventh and ninth centuries." *Id.* The Court also referenced "strong disagreement" within the Greek legal community (noting, for example, that the Court of Cassation's majority decision provoked a dissent), which weighed against finding the issue one of "major fundamental importance and reflecting a firm social and religious conviction in Greece." *Id.*

93. *See* Patrick Kinsch, *Recognition in the Forum of a State Acquired Abroad—Private International Law Rules and European Human Rights Law*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW 259, 273 (Katharina Boele-Woelki et al. eds., 2010) ("The rule, or the methodology, thus formulated, is that a rule of the law of human rights that becomes relevant *if* the forum's rules of private international law would not recognize the [validly acquired foreign] status. In that case, the role of human rights law, and ultimately of a reviewing court such as the European Court of Human Rights, is to correct the application of the forum's conflict rules.").

94. Hersch Lauterpacht, 1 INTERNATIONAL LAW: COLLECTED PAPERS 40 (Elihu Lauterpacht ed., 1970).

95. KIESTRA, *supra* note 40, at 21. R

human rights and private international law in a more integrated way. The latter possibility is discussed in the next Section.

B. Horizontal Effect

The other approach would go beyond the public policy exception and draw an analogy to the concept of horizontal effect in domestic regimes. Generally speaking, horizontal effect refers to the degree to which constitutional law can impact relationships between private individuals. It contrasts with vertical effect, which refers to a constitution's impact on the relationship between private individuals and the state. In its strongest form, horizontal effect means that "[c]onstitutional rights provisions impose constitutional duties on private actors as well as on government, thereby regulating interpersonal relations, and private actors may sue each other for violations of these duties. The horizontal position expressly rejects a public-private division in constitutional law."[96]

An illustration of strong-form (or direct) horizontal effect is offered by Ireland, whose Constitution has been interpreted to confer, for instance, a cause of action for the breach of the right of due process by a private party.[97] There are also less extreme versions: in Canada, for instance, courts have adopted what is generally referred to as indirect horizontal effect.[98] In explaining the concept, the Supreme Court of Canada first rejected the strong-form view that, under the Canadian Charter of Rights and Freedoms, "one private party owes a constitutional duty to another."[99] In other words, "[when] private party 'A' sues private party 'B' relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply."[100] However, speaking for the Court, Justice McIntyre went on to say:

> I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative.[101]

Similar to the Canadian concept is the notion of *mittelbare Drittwirkung*, which is generally used to describe the relationship between fundamental

96. Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 395 (2003).

97. *See* Glover v. B.L.N., Ltd., [1973] 1 I.R. 388 (Ir. H. Ct.) (allowing plaintiff to sue employer for damages based on a violation of the constitutional right to fair procedures implied by a just-cause provision in an employment contract).

98. *See* Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79, 82 (2003).

99. Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 (Can.).

100. *Id.*

101. *Id.*

rights and private law in Germany.[102] Under this view, "basic-rights clauses affect private law relations indirectly, the values that they express being brought to bear in 'interpreting' provisions of the private law, rather than directly, as higher private law norms."[103]

In the United States, in contrast, the extension of constitutional rights into the private realm is limited by the state action doctrine, which "make[s] clear that with respect to its individual rights provisions, the Constitution binds only governmental actors and not private individuals."[104] Of course, the state action doctrine has its exceptions and ambiguities; Charles Black famously called it "a conceptual disaster area."[105] While general rules are elusive, we know that certain private contracts so offend constitutional values that an American court will decline to enforce them,[106] and sometimes private tort plaintiffs will lose their otherwise meritorious suits due to the Constitution.[107] Stephen Gardbaum, attempting to reconcile the cases, argues the American legal system actually embodies a kind of horizontal effect: "Although to be sure, the state action doctrine forecloses the most direct way in which a constitution might regulate private actors—by imposing constitutional duties on them—it does not rule out other, indirect ways . . . [T]he U.S. position is in fact far more horizontal than supposed."[108]

The objective here is not to provide a comparative overview of the various state action and horizontal effect doctrines.[109] Rather, it is to suggest that, if private international law continues to develop into a freestanding, unified body of law, domestic theories of horizontal effect provide ready tools for conceptualizing its relationship with international human rights law. In essence, national regimes have already productively wrestled with the scope of applicability of fundamental rights; private international law should not start from square one—or be constrained by the limitations of the public policy exception.

Indeed, along this line, some scholars have suggested *Drittwurkung* as an organizing concept for the applicability of the ECHR, arguing that "fundamental rights not only create subjective rights against interference by public authorities, but also contain *values which penetrate the entire legal order*."[110] The

102. *See* Gardbaum, *supra* note 96, at 401. R

103. Kenneth M. Lewan, *The Significance of Constitutional Rights for Private Law: Theory and Practice in West Germany*, 17 INT. & COMP. L. Q. 571, 599 (1968).

104. Gardbaum, *supra* note 96, at 388. R

105. Charles Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967).

106. Shelley v. Kraemer, 334 U.S. 1 (1948).

107. New York Times v. Sullivan, 376 U.S. 254 (1964).

108. Gardbaum, *supra* note 96, at 389. R

109. For a fuller discussion, see Tushnet, *supra* note 98 and JUD MATHEWS, EXTENDING RIGHTS' REACH: CONSTITUTIONS, PRIVATE LAW, AND JUDICIAL POWER (2018). R

110. Evert Albert Alkema, *The Third-Party Applicability or "Drittwirkung" of the European Convention on Human Rights*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 33, 34 (Franz Matscher & Herbert Petzold eds., 1988) (emphasis added). However, Lech Garlicki, a Judge of the ECtHR, makes clear that the Court has never officially endorsed a horizontal effect theory of the ECHR; he instead

question, again, is whether this conceptual move is viable outside of the European context or not. There may ultimately be something unique about the ECHR, thanks to its reception into both EU and national private international law regimes. Regardless, the European example offers some intriguing possibilities of how courts would approach a private international law issue in a world where IHRL had horizontal effect. As we saw in *Hypoteèní banka* and *Negrepontis-Giannisis*, the ECJ and ECtHR have not understood themselves as interpreting freestanding private international law regimes and then invoking human rights considerations via a public policy exception as needed. Rather, both courts have operated with the understanding that private international law rules ought to be interpreted consistently with (and shaped by) a broader human rights framework.

CONCLUSION

Enforcement is a perennial challenge in human rights debates.[111] In the United States, the debate often revolves around the Alien Tort Statute,[112] which, under certain circumstances, allows foreign plaintiffs to sue in American courts for violations of international law.[113] But, as this Note suggests, international human rights law can be influential even outside of the context of a direct suit. As examples from the European context show, human rights law can address harms and improve outcomes—albeit in less direct ways—through private international law. For instance, it can mandate the provision of jurisdiction where it would otherwise be lacking, or require the nonrecognition of a fundamentally unfair judgment. In this fashion, human rights law might help address "the governance gap left by the insufficiencies of an overly technical, market-driven, or dogmatic private international law."[114] Ideally, private international law and international human rights

suggests that the ECHR affects private relationships by imposing affirmative duties on the state. *See* Lech Garlicki, *Relations between Private Actors and the European Convention on Human Rights*, *in* THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 129, 143 (Andras Sajo & Renata Uitz eds., 2005) ("[T]he concept of 'positive obligations' resembles, to some extent, the concept of the 'indirect third party effect,' but the Court has never been willing to adhere clearly to the *Drittwirkung* approach."). Despite the official position, another scholar believes that "the premises of *Drittwirkung* itself are to be found already transposed in the very structure of the Convention." Siobhán McInerney, *The European Convention on Human Rights and the Evolution of Fundamental Rights in the 'Private Domain*,' *in* RENEGOTIATING WESTPHALIA 277, 314 (Christopher Harding ed., 1999). For discussion of the horizontal effect of EU law, see HORIZONTAL EFFECT OF FUNDAMENTAL RIGHTS IN EU LAW (Sonya Walkila ed., 2015).

111. *See, e.g.*, Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999).

112. 28 U.S.C. § 1350 (2007) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

113. John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 2 (2009).

114. Horatia Muir Watt, *Introduction* to PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 2 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2015).

law would be mutually reinforcing, each compensating for the limits of the other.

To achieve international consistency and spread these potential benefits beyond the European context, though, the relationship between private international law and international human rights law must be more carefully defined. As this Note suggested, there are at least two conceptually viable ways of doing so: the public policy exception and the idea of horizontal effect. The public policy exception approach has one key advantage: it is already well-established within private international law regimes, even those traditionally unfriendly to international or foreign sources of law (such as the United States). However, the relative nature of the public policy exception—along with its fundamental emphasis on the particular principles and morals of the forum—makes it an imperfect vehicle for realizing universal human rights. As a result, assuming private international law continues to become a distinct, freestanding body of law, it may be more conceptually satisfactory to develop the idea of the "horizontal effect" of international human rights law. Or, to borrow phrasing from debates about the public/private distinction in domestic law, a "constitutionalization" of private international law may be in order.[115] Indeed, it may have been a colossal misperception to think private international law was ever private in the first place.[116]

Beyond conceptual neatness, though, there are lingering questions about whether such a constitutionalization of private international law would be desirable. While it would expand possibilities for rights enforcement in some sense, it could have unexpected consequences. For instance, a court compelled to recognize jurisdiction due to human rights law might begin to construe the substantive norms more restrictively or limit the related remedies (perhaps due to practical concerns, like interfering with the executive's control over foreign policy).[117] Additionally, it is at least debatable whether human rights, as currently constituted, are specific enough to provide use-

115. *See* Jan M. Smits, *Private Law and Fundamental Rights: A Skeptical View*, *in* CONSTITUTIONALIZATION OF PRIVATE LAW 9 (Tom Barkhuysen & Siewert Lindenbergh eds., 2006) (questioning the benefits of the "constitutionalization" of private law); Jacco Bomhoff, *The Constitution of the Conflict of Laws*, in PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 262, 262 (suggesting that "[t]he appeal to constitutionalist ideas . . . is one attempt to restoratively invoke some form of 'the public' in the face of increasing threats of private hegemony . . . It is not immediately obvious, however, what invoking constitutionalism specifically might mean in relation to a highly fragmented, pluralist, transnational private sphere.").

116. *See* Watt, *supra* note 114, at 2 (arguing that, thanks to its name, "private international law had been irrevocably and dogmatically linked to the domain of private law (within the civilian understanding of the category) where, like procedural law and in opposition to domestic policy, it was supposedly neutral or apolitical, and could not transgress the 'public law taboo'"); *cf.* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982). R

117. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 637 (2006) (theorizing "that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies").

fully concrete guidance to courts. Consider again *Hypoteèní*, the ECJ case that found that, in order to protect the plaintiff-bank's rights, the courts of the Member State in which the defendant-consumer had most recently established domicile have jurisdiction.[118] Of course, balanced against the plaintiff's right to a remedy, the Court had to ensure that the rights of the defense were being observed.[119] If integrating human rights into private international law will simply open the door to such highly subjective balancing or proportionality approaches, is it worth the additional uncertainties and complexities?[120] Such an accommodation of human rights concerns certainly comes at a cost, disrupting carefully constructed systems that have functioned for centuries.[121] More fundamentally, human rights in general may not be an unalloyed good, or even a good.[122]

These questions may ultimately stem from a fundamental point of tension between private international law and international human rights law. Private international law is premised on the existence of diversity; it provides a set of tools for navigating differences (such as comity[123]) and permits national parochialism only in rare cases (such as the public policy exception). Human rights law, in contrast, holds out hopes for global normative convergence, likewise with limited exceptions (for example, the margin of appreciation). In a sense, both regimes are premised on very different worlds—and if international human rights law succeeds in promoting a universal set of rights standards that are robustly enforced, the need for private international law concepts will be correspondingly diminished.

Despite these reservations, there is clear potential for human rights law and private international law to interact productively in some fashion, as the European experience shows. At the same time, though, there can be reasonable disagreement about whether a broader, more systematized interaction is possible or desirable. A better understanding of *how* the two regimes could interact might at least clarify the debate.

118. Case C-327/10, Hypoteèní banka a.s. v. Udo Mike Lindner, 2011 E.C.R. I-11543.

119. *Id.*

120. Human rights law itself might not benefit from a closer relationship with technicalities of private international law. *See generally* Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468 (2009).

121. *See* Kinsch, *supra* note 93, at 260 ("[T]he [Strasbourg] Court uses quasi-constitutional public law concepts to address what are at root private law problems; its judges certainly are not routineers of the conflict of laws; and it is perhaps by reason of that conflict of laws naïveté that the human rights approach to classical problems of private international law is sometimes more innovative, and more forceful, than the traditional approaches.").

122. *Cf.* SAMUEL MOYN, THE LAST UTOPIA 177 (2012) ("Debates swirl around whether the injection of human rights law into international affairs genuinely improves them.").

123. *See* Joel R. Paul, *The Transformation of International Comity*, 71 L. & CONTEMP. PROBS. 19, 20 (2008) ("Originally, international comity was a discretionary doctrine that empowered courts to decide when to defer to foreign law out of respect for foreign sovereigns."); John Kuhn Bleimaier, *The Doctrine of Comity in Private International Law*, 24 CATH. LAW. 327, 327 (1979) ("Although rooted in the Middle Ages, comity continues to be a viable doctrine, because it facilitates the achievement of a primary objective of law—the orderly, consistent and final resolution of disputes.").