

REFGOV

Reflexive Governance in the Public Interest

Fundamental Rights

The Promotion of Fundamental Rights by the Union as a Contribution to the European Legal Space (III): the Role of European Private International Law.

V. Van den Eeckhout
Universiteit Leiden, 2006.

Working paper series : REFGOV-FR-4

The Promotion of Fundamental Rights by the Union as a contribution to the European legal space: the Role of European Private International Law

By Veerle Van Den Eeckhout

(associate professor Private International Law, Leiden University, the Netherlands)

I. Introduction

I.A. The position of PIL in the project: an exotic wallflower or a well-integrated participant?

For a long time, the discipline of private international law ('PIL') appealed to a limited number of lawyers only. Essentially, this may also be the case in 2006, even though the tide has been turning for some years now.

In recent years, this field has been given a new impetus mainly by Europe and PIL is now in full swing. On closer inspection, it turns out that the tide is turning in two ways: on the one hand, PIL itself is undergoing an internal metamorphosis, both formally and substantively, but on the other hand, the relationship between PIL and other fields is changing fundamentally as well. Due to this repositioning of PIL, it is conceivable that PIL issues will appeal to an increasing number of lawyers. In a recent contribution¹, I described recent developments in PIL, specifically European PIL, even as a 'metamorphosis from an exotic wallflower into a well-integrated participant in a variety of companies.' For example, PIL has seen an increasing focus on European integration considerations.

Since PIL now keeps company with specialists in the fields of human rights, non-discrimination law, comparative law, European law and the like, who work together in the project concerning the Open Method of Coordination ('OMC')² in the field of human rights, constituted within the 'Reflexive Governance Research Project' ('the project'), the question arises what the position of PIL in this kind of company should be. Can PIL be ignored in this kind of company and in this kind of project, or should the discipline be integrated into the debates and questions, and could it even play a prominent role in this kind of company? This contribution seeks to answer this very question.

¹ V. Van Den Eeckhout, 'Tien jaar Europees internationaal privaatrecht. Een verrassende metamorfose van exotisch muurbloempje tot goed geïntegreerde deelnemer in diverse gezelschappen' ['Ten Years of European Private International Law. A Surprising Metamorphosis from an Exotic Wallflower into a Well-Integrated Participant in a Variety of Companies'], *Nederlands Tijdschrift voor Europees Recht* 2005, pp. 289-303.

² OMC can be briefly defined as follows (see, for example, O. De Schutter and S. Deakin 'Introduction: reflexive governance and the dilemmas of social regulation', in O. De Schutter and S. Deakin (eds.), *Social Rights and Market Forces. Is the Open coordination of employment and social policies the future of social Europe?* Bruxelles, Bruylant 2005, p.1): 'The open method of coordination is one of a number of new governance mechanisms which, from a theoretical point of view, are understood as performing a range of functions. These include fostering mutual learning between the Member States and avoiding or limiting the phenomenon of competitive deregulation in the internal market, while at the same time respecting the diversity of national practices and the existing division of powers between the European Community and the Member States.'

I.B. The limitations and scope of the Paper

It should be emphasized that this search for an answer will be of only an explorative nature for the time being. This is merely an explorative study³. Another limitation of this Paper lies in the selective nature of the analysis. Aspects that could be quite interesting as such – for example, in relation to ownerships rights, the law of evidence, criminal-law aspects etc. – will not be explicitly included in the analysis for the time being.

Nevertheless, the scope of this contribution may be wider than its title suggests in some areas: for example, the following issues will be addressed: classical PIL questions (questions relating to jurisdiction, applicable law, recognition and enforcement), *and* the doctrine of the ‘internationally mandatory rules’ (also known as the ‘*règles d’application immédiate*’); both family-law and non-family-law aspects of PIL; both pure PIL issues and PIL issues connected with developments outside the strict PIL domain – such as developments relating to unification and harmonisation of substantive law; migration law developments...; likewise, the paper is not confined to issues explicitly involving ‘human rights’ – rights currently regarded as such, for example the right of privacy, the freedom of expression etc. – but it also deals with discussions that encompass concerns like the ‘protection of the weak party’ – for example, concerns in relation to employee protection in international labour law.

II. PIL: Relevant to the project in at least three ways

Let me begin by emphasizing, in quite general terms, that the importance of PIL for this project should not be overestimated, in my opinion. But even if PIL lawyers should be modest about their input in this context, I believe that PIL may certainly be crucially important in some respects and in a variety of manners. For example, PIL could sometimes act as a catalyst in promoting human rights, as an injection mechanism and incentive for triggering a chain reaction, furthering the cause of human rights. In this way, PIL could be a driving force. And a focus on PIL may sometimes cause people to be more alert to potential dynamics that are by no means conducive to promoting human rights, and warn them against counterproductive effects of specific PIL rules as well as against the counterproductive effects of specific rules on PIL rules.

Let me be more concrete now: anyone who tries to define the role of PIL in this project – as I have done in recent months – will soon tend to distinguish three functions, even if, on closer inspection, these functions are closely connected with each other.

II.A. PIL as a likely ‘target’ when debating the outcomes of the use of OMC: a reason to anticipate this outcome, and to include PIL aspects in the project at this moment already? (mainly about the impact of human rights on PIL)

First and foremost, PIL may be regarded as a rather evident target of the outcome of the project, in the sense that it is quite conceivable that in due course, during or at the end of the project, suggestions will be defined in relation to the issue of PIL regulations, PIL directives, the inclusion or clarification of PIL rules in certain areas,

³ Incidentally, this contribution has drawn heavily on Dutch-language sources. Unfortunately for the non-Dutch reader interested in this subject, a number of works that are highly relevant to this project (such as publications by Van Hoek and Houwerzijl) are written in Dutch.

or in relation to the manner in which the Court of Justice had best exercise a check on national PIL legislation, or in relation to the approximation of PIL rules by the European Member States themselves.⁴

In other words, one of the project 'outcomes' will probably be that PIL is to be designated as one of the 'target' disciplines. If this point is recognised, it is valid to argue that it would be fertile and efficient to anticipate this outcome by focussing attention on PIL issues right from the beginning. I will explain this in further detail below.

II.A.1. OMC will sooner or later appeal to PIL (= 'direct' impact of human rights on PIL)

II.A.1.a. Point of departure: about the functions of OMC

When we try to relate PIL to the project in this respect, a quotation taken from De Schutter may serve as a point of departure, because the latter discusses the functions of the OMC and argues in this context⁵ that one of its functions could be the following: 'In fields where the competences are shared between the Member States and the Union, the Open Method of Coordination may be seen as a searching mechanism 'to identify where an initiative of the Union may be required *because of the externalities* [*italics vvde*], both positive and negative, which the action of each Member State produces on all the other States, with which they share a common area of freedom, security and justice, and area in which, in particular, the free movement of persons and the free provision of services are guaranteed and in which competition is to be free and undistorted'. Accordingly, if we keep this observation by De Schutter in the back of our minds, in particular where he refers to 'externalities', it is quite evident that the project will sooner or later rely on PIL.

II.A.1.b. Two reasons why PIL is a likely target

As a matter of fact, it is quite straightforward that PIL should be one of the 'targets', and there are two reasons for that.

⁴ Incidentally, it is also conceivable that, taking account of all positive and negative effects of unification or harmonisation of PIL rules, the suggestion will be made that PIL rules in their present state should be left intact, allowing the Member States to continue to be able to draft and use their own PIL rules as they see fit: this suggestion could be made, for example, as a 'second-best' solution if it turns out that it is not possible to harmonise PIL at the highest possible and desirable level. This is because it cannot be right to trigger or support a downward trend or a 'race to the bottom'. It is also conceivable that specific PIL rules and aspects will be unified but that the regulation of other PIL aspects will be left to the Member States (for example, unification of recognition rules and no unification of the rules concerning applicable law; or unification of internationally mandatory rules, but no unification or other PIL aspects) – perhaps in the hope that by using a kind of 'OMC model', the Member States will at the end of the day be inclined to take over each other's best practices. On this subject, see also *infra*, under II.A.2.a.1. and under II.A.2.a.2. Cf. also O. De Schutter, 'Monitoring Human rights in the Union as a Learning Process' (published on <http://refgov.cpdr.ucl.ac.be>), p. 17, where he discusses a 'generous interpretation/restrictive concerning the principle of subsidiarity', if it is found that leaving it to the Member States may involve the risk of reducing the level of human rights protection.

⁵ O. de Schutter, 'The implementation of the EU Charter of Human rights through the Open Method of Coordination', Jean Monnet Working Paper 2004 07/04 (published on <http://www.jeanmonnetprogram.org/papers/papers04.html>), p. 2. Compare also O. De Schutter, 'Monitoring Human rights in the Union as a Learning Process', p. 22, where he states that 'The question is which forms of jurisdiction should be created between regulators from different jurisdictions, to the extent that each jurisdiction is not an 'island' and that certain interdependencies exist between jurisdictions which cannot be ignored.'

II.A.1.b.1 PIL is a discipline dealing with externalities in private law issues

First, PIL has traditionally been the very discipline ‘dealing with externalities in issues of private law’. The existence of ‘externalities’ is indeed one of the prerequisites to PIL. PIL seeks to regulate the externalities by issuing rules concerning jurisdiction, applicable law, recognition and enforcement. And in regulating ‘externalities’ in this way, PIL is inevitably confronted with human rights – and, in a broader sense, with concerns relating to the protection of weak parties etc. In short, PIL provides a way of dealing with externalities, including the confrontation with human rights issues. In this context, it should be underlined, however, that PIL is essentially national law⁶. Admittedly, there are areas where supranational sources are available, and these are sometimes even European sources. But some other areas are still regulated purely at the national level. It is also conceivable that even though supranational PIL rules are available, the latter are not applicable in all EU Member States. ‘Problems’ could arise either because of the contents of the PIL rules or because PIL rules are sometimes national-level rules, as stated above, which is emphasized to an increasing extent at this juncture: this is said to be the case mainly where PIL rules themselves do not satisfy the requirements occasioned by internal market considerations, or where people within the European Area are confronted with problems because countries use different PIL rules, because they do not apply the same legal rules, or because they use different standards when it comes to recognising decisions taken elsewhere, such that people lose rights or are confronted with legal uncertainty if they move to another country; harmonisation could well improve the extent to which rules are predictable and strengthen mutual trust. For this reason, the project may, sooner or later, address the contents of PIL rules and differences between PIL rules of various countries, which pose ‘problems’ for citizens. In that event, the project may address the extent to which it is desirable in a EU context to harmonise the various ways in which the ‘externalities’ are regulated in a well-defined manner.

II.A.1.b.2. PIL has already been communitarised

At the same time, the foregoing brings us to the second reason why it is to be expected that PIL issues could become a project target. As a result of the entry into force of the Treaty of Amsterdam, PIL, or at least parts of it, has been ‘communitarised’. PIL is linked directly with the idea and the project of the creation of an internal market and an area of freedom, security and justice, the fundamental freedoms and the non-discrimination principle, and under the terms of this movement, far-reaching powers have been conferred on the European institutions. This means that European institutions already have the powers to take action in the

⁶ As indicated above, PIL answers questions of ‘international jurisdiction’, ‘applicable law’ and ‘recognition and enforcement’. PIL is, however, in its essence national law written for international situations: the circumstance that situations have a relevant connection with more than one legal system adds an international dimension to the legal process, which may be found at three levels: (Dutch, French, German etc.) PIL rules include (1) rules of jurisdiction (in order to prescribe the conditions under which the Dutch/French/German etc. court is competent to entertain such a claim) (2) applicable law (in order to determine for each class of case the particular system of law (Dutch law/French law/German law/another law) by reference to which the rights of the parties must be ascertained) and (3) recognition and enforcement (in order to specify the circumstances in which a foreign judgment can be recognized and enforced). Sources of PIL can be found at both an international and a national level.

field of PIL as the occasion arises, including the power to issue PIL regulations. Is it possible to contend for this reason that, where De Schutter⁷ discusses the ‘legal basis’, the legal basis that has already been created for PIL intervention may perhaps come in useful? It should not be forgotten that the Europeanisation of PIL, which manifested itself in the Treaty of Amsterdam, has made the minds ‘ready’ and prepared to coordinate PIL rules at the European level, and this possibility has already been widely used.

In short, Europe is already interfering with PIL through the process of Europeanisation of PIL, albeit not specifically from the perspective of human rights promotion within Europe, but from the perspective of the promotion of the internal market – as a result of the attempts to encourage legal certainty and to remove obstacles perceived in an internal market – realising the instrumental function PIL may play in achieving an internal market.

This communitarisation phenomenon has triggered sensational developments in the field of PIL, both in terms of procedure and in terms of substance: several European PIL regulations have already been issued and several regulations are in the process of drafting at this very juncture, certainly in areas where European institutions have traditionally exercised restraint, in particular the field of international family law; in addition, the Court of Justice has undauntedly started to intervene in national PIL issues in quite a drastic manner. PIL lawyers are engaged in a debate⁸ on whether – and if so, how precisely – PIL should change as a result of European incentives.⁹

II.A.1.c. The current situation: PIL is in an interplay of forces

At this juncture, PIL is in an area of tension: on the one hand, PIL had already been the subject of instrumentalisation tendencies in the past few years, but on the other hand, PIL is now increasingly focussed on instrumentalisation attempts for European

⁷ O. De Schutter, ‘Monitoring Human rights in the Union as a Learning Process’ and O. De Schutter, ‘The implementation of the EU Charter’, p. 17 ff, 29 ff, and 40 ff.

⁸ It should be emphasized, however, that there were already discussions about the relationship between PIL and European law before the Treaty of Amsterdam, both from the perspective of the four freedoms and from the perspective of the non-discrimination principle, and that the Court of Justice, for example, had already intervened in matters such as the *cautio judicatum solvi*.

⁹ Incidentally, a special point to be addressed concerns the question of how things are to be formalized: what is the *form* (PIL regulations, PIL directives, intervention by the Court of Justice, etc.) to be opted for *and* how should the utilisation of these various relevant sources be *coordinated* in the most effective manner? For a recent publication on this issue, see also T. M. de Boer, ‘Olke bolke knol’, *NJB* 2005, issue 18, who is critical about the relationship between the Proposal for a Directive on Services, the Rome Convention on Applicable Law on Contracts and the Hague Convention on Applicable Law on Agency, and where he states that the rules may not actually ‘collide’ with each other, but that there definitely seems to be a problem in the field of accessibility. It seems that in the past, before the Treaty of Amsterdam, the ‘problem’ faced by PIL lawyers was mainly one of searching for the hidden IPR rules in Directives and ascertaining how these could be combined with other national or supranational rules. They were also confronted with the problems of directives that had not been implemented in a timely fashion or at all – in this context reference could be made, for example, to the problems that arose in connection with the application of Article 5 of the Convention on the Law Applicable to Contractual Obligations. As matters stand, both PIL regulations and directives that include IPR rules that are to be implemented at the national level are issued. These may sometimes be inconsistent with the general European PIL legislation, which may provide for a reservation in the regulation, so that the rules do not actually collide, but which may cause accessibility problems.

purposes, and all this has resulted in a battle of sometimes contradictory forces. I will explain these forces briefly.

The point of departure in respect of the first force is that PIL had already been 'instrumentalised' in previous years in various ways. Accordingly, the impact of political policy considerations on PIL has manifested itself in recent years such that in various domains there is by no means 'neutral' PIL, still based on the equality of legal systems, but that, on the contrary, PIL rules have been issued in a manner that is conducive to well-defined policy targets. Examples include concerns for the 'protection of the weak party' – see, for example, the rules concerning the applicable law relating to consumer contracts, employment contracts etc., or concerns about 'supporting' a substantive law result, such as supporting the result of the possibility of marriage (known as '*favor matrimonii*' in PIL) or supporting the possibility of divorce (known as '*favor divortii*' in PIL) or supporting the possibility of acquiring maintenance payments. In this context, reference may be made, for example, to developments in international tort law, where there has been an evolution from a focus on the tortfeasor and the place where the wrongful act was committed to more attention for the victim and the place where damage was sustained, certainly partly as a result of political developments, and where there have been pleas for using PIL to make a fitting contribution in the battle against international environmental pollution.¹⁰ As a matter of fact, the phrase 'making a contribution' was quite recently used in Dutch PIL in the context of the tendency to use PIL for the purpose of terrorist combating.¹¹ Where the literature uses the phrase 'PIL pollution'¹² in analyses of PIL rules concerning environmental pollution liability, the question arises whether we are really facing PIL pollution in this context. I refer to other tendencies I described as 'PIL pollution', especially in relation to Dutch PIL, in various publications in the past, namely using PIL for the purposes of restrictive migration policies and, in a more general sense, for the purpose of restricting public-law rights (rights based on aliens law, social security law and nationality law) of third-country nationals in the Netherlands.¹³

Apparently, the 'importance' of PIL is on the increase, but it seems that people sometimes recognise this importance as a result of their conviction that PIL may be

¹⁰ See, for example, for the Netherlands: B.M.M. Weiffenbach, '*Justitia en Mercurius. Materieelrechtelijke tendensen in het internationaal-privaatrechtelijke conflictenrecht bij grensoverschrijdende milieuvervuiling*' [*Lady Justice and Mercury: Substantive Law Tendencies in International Conflict of Laws in the Case of Cross-Border Environmental Pollution*], TMA 1989, pp.1-11; S.J. Schaafsma, *Vervuiling in het conflictenrecht: een onderzoek naar theoretische concepten in praktijk van de internationale milieuvervuiling onrechtmatige daad in het international privaatrechtelijke conflictenrecht*, Post Scriptum Reeks 1994.

¹¹ See P. Vlas, '*Terrorisme en IPR*' [*Terrorism and PIL*], WPNR 2005, pp. 663-666.

¹² See the above work by Schaafsma (footnote 10).

¹³ In these analyses, I have pointed out several times that the 'instrumentalisation' of PIL for the purpose of *encouraging* mobility of persons (which Europe is currently trying to achieve in the context of international family law) is much more in line with the essence of PIL *and* modern PIL, which is essentially, even if only in part, focussed on facilitating legal transactions and the target of international harmonization, certainly now that Europe takes '*favor*' tendencies to heart. On this issue, see also *infra*, under III.C.1. See also, on PIL and migration, Prel. Doc. No 8 of March 2006, "Some reflections on the utility of applying certain techniques for international co-operation developed by the Hague Conference on private international law to issues of international migration" (Note submitted by the Permanent Bureau of the Hague Conference on Private International Law, published on www.hcch.net under "Work in Progress")

conducive to achieving political targets that are basically associated with other fields. Attempts are then made to ‘model’ PIL on this basis. In other words, even though the importance of PIL is now recognised, this could, paradoxically, trigger tendencies to absorb, incorporate or, at the very least, model PIL from the perspective of other fields or political objectives in these fields.

No matter how one appreciates – in a positive or negative sense – any specific manner of instrumentalisation within or of PIL, instrumentalisation attempts or tendencies have occasionally led to a kind of ‘*acquis*’. Sometimes these instrumentalisation tendencies are reflected in specific PIL rules issued at the European level, in which case, this concerns a kind of ‘*acquis communautaire*’ – see, for example, the rules concerning jurisdiction in contracts of employment, as included in the Brussels Convention¹⁴, and the rules concerning applicable law in contracts of employment, as included in the Rome Convention.¹⁵ In these situations, there could be said to be a kind of *acquis communautaire*, albeit, with possible variations, at the national level.¹⁶ Sometimes, PIL rules incorporating any manifestation of instrumentalisation for political reasons are not unified – or the supranational sources reflecting these policy considerations are applicable only in specific European Member States. Naturally, even if there is no unification, it is conceivable that each of the European Member States have incorporated political policy considerations into their national PIL to the same or a different extent. For example, several countries have embraced the principle of ‘*favor divortii*’ – supporting the possibility of divorce – but in different degrees and in a variety of ways. All this may well result in what I could describe as ‘modern PIL’, although it should be borne in mind that this ‘modern PIL’ may well vary from country to country, and it may or may not have been given substance at the European level.

It turns out – and this brings me to the second force I pinpointed above – that PIL has become increasingly focused on instrumentalisation tendencies inspired by ‘European policy considerations’, in particular since the Treaty of Amsterdam – in other words, attempts are being made to use PIL as a tool in achieving European targets. This has resulted in ‘pressure’ being exerted on ‘modern’ PIL – of European or national origin – as instrumentalised at an earlier stage.

Occasionally, these ‘old’ and ‘new’ PIL incentives match each other well but at other times, they are in conflict: sometimes the Europeanisation of PIL does not involve any fundamental changes – see, for example, the conversion of the Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (‘the Brussels Convention’) into a Council Regulation to the same effect (‘The Brussels

¹⁴ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 27 September 1968, OJ C 189 28.07.1990 (consolidated version published in 1998 (OJ C 27, 26.01.1998) (‘the Brussels Convention’).

¹⁵ Convention on the Law Applicable to Contractual Obligations (‘Rome Convention’), OJ C 27, 26.01.1998, opened for signature in Rome on 19 June 1980.

¹⁶ On this subject, see also A.A.H. Van Hoek, *Internationale mobiliteit van werknemers; een onderzoek naar de interactie tussen arbeidsrecht, EG-recht en IPR aan de hand van de Detacheringsrichtlijn* [International Mobility of Employees; A Study into the Interaction between Labour Law, EC Law and PIL on the Basis of the Posting Workers Directive], Den Haag, Sdu Uitgevers (PhD UVA), 2000, pp. 103-104 and M.S. Houwerzijl, *De Detacheringsrichtlijn*, Deventer: Kluwer 2005, (Ph D on the Directive on Posting of Workers), p. 4.

Regulation')¹⁷, which did not encroach essentially on the principle of the protection of the weak party, which had been enshrined in the Convention; but sometimes there are fierce debates on the manner in which the existing PIL regime can or cannot be adjusted – examples include the debate on the implications of the country-of-origin principle in the Proposal for a Directive on Services¹⁸ for the Rome I proposal¹⁹ and the Rome II proposal²⁰, the discussion about the impact of the country-of-origin principle in the E-Commerce Directive²¹ and the original version of the Directive on unfair commercial practices²², and the debate on the Proposal Rome II itself. In the appendix below, I will deal with these dynamics again: there, I will make a first attempt to position – in a fragmentary way – the convergence or tension between 'old' (classic) and 'new' (European) tendencies to instrumentalise PIL and its interaction with human rights.

II.A.1.d. Ambition: instrumentalisation of PIL from the perspective of human rights promotion within the Union!?

So what is the relevance of these dynamics and debates for the project, one may well ask. This may be apparent where we address the question of what position should be taken in this debate by those who are concerned about the 'promotion of human rights'. The following ambition could be defined: how should we evaluate or develop PIL rules in various legal domains that are the most effective tools for the purposes of the *instrumentalisation of PIL from the perspective of promoting the protection of human rights within the Union?*

In short, if it is true that there are tendencies to instrumentalise PIL for European purposes, and if it is true that there are debates about how to develop PIL into the future, should we then not seize the opportunity to analyse at the same time how PIL is to be instrumentalised such that it is most conducive to the objective of human rights promotion? Or, to put it differently: if there is instrumentalisation of PIL anyway, would it not be a good idea to try and promote a type of instrumentalisation that also fosters human rights at the same time – or, at the very least, that does not impede the promotion of human rights?

¹⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16.01.2001, p. 0001-0023.

¹⁸ Proposal for a Directive on services in the internal market COM (2004) 2def/2 13 January 2004. Amended Proposal for a Directive of the European Parliament and of the Council on services in the internal market Com (2006)160 final 4.4.2006.

¹⁹ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations ("Rome I") 15.12.2005 COM (2005) 650 final.

²⁰ Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II") 22.07.2003 COM (2003) 427 (01). Amended Proposal for a European Parliament and Council Regulation on the law applicable to non-contractual obligations ("Rome II") 21.02.2006 COM (2006) 83 final.

²¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce") OJ L 178, 17.07.2000 p. 0001-0016.

²² COM (2003) 356 def (namely article 4 par. 1) and COM (2004) 753 def. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7 EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC), No 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive"), OJ L 149/22 11.6.2005.

Even if the project conclusion is that using OMC as a method in the human rights domain is not realistic and fertile, the results of a study as meant above could be useful in the context of the discussion about PIL issues and their relationship with human rights.

Conceivably, OMC could be relevant as a method of promoting human rights in this context in a variety of ways. One hypothesis might be, for example, that OMC could help to create PIL rules (at the European level or Member State level – eventually controlled by the Court of Justice) in a way that encourages the protection of human rights within Europe. Where De Schutter wrote about the function of OMC to define areas of intervention, it is also possible to argue that where such areas have already been defined, OMC could be used to identify *the manner in which* action is to be taken – in particular, in areas like PIL. Hence, PIL lawyers might assume the task of heeding the results of the use of the OMC method.

Viewed from this perspective, PIL would be relevant only at the end of the project. But it might be better to address PIL issues before that: the task would then be to devote systematic attention to PIL issues during the project already, including the manner in which PIL rules (supranational, European or national, and covering jurisdiction, applicable law, recognition and enforcement) regulate ‘externalities’ at the present moment. For example, this project might examine the manner in which the various European Member States have dealt with PIL issues, look into what the Member States can learn from each other and how European institutions can learn from the experiences of Member States if they intend to issue PIL rules: what are the ‘best practices’?²³ Another possibility is to examine and evaluate the way in which PIL problems are now being solved and whether or not PIL issues are being unified and the extent to which these are conducive to ‘promoting human rights’, taking account of the factor of ‘feasibility’ at the highest level. All this could be carried out with respect to domains such as international family law, international labour law, international tort law etc., where human rights issues are relevant – or, in a broader sense, wherever concerns such as the ‘protection of the weak party’, ‘family life protection’ etc. are relevant. In this context, I refer to a few studies that are very interesting for the project, viewed from this perspective, in particular when it comes to the interface between international labour law and social security law, several publications by Van Hoek²⁴ and Houwerzijl²⁵; in the field of international family law, studies by Waaldijk²⁶; in the field of anti-discrimination law as such, studies by Van Hoek²⁷ and Traest²⁸.

²³ Cf. the Project “European Research Network in PIL”, www.european-research-network.org

²⁴ See, for example, A.A.H. van Hoek, ‘Een schijnbaar simpel vraagje: zwangerschapsverlof in het IPR’ [‘A Seemingly Simple Question: Maternity Leave in PIL’], *NIPR* 2002, pp. 296-300.

²⁵ See, for example, M.S. Houwerzijl, *De Detacheringsrichtlijn*, Deventer: Kluwer 2005, especially pp. 159-166 (Ph D on the Directive on Posting of Workers).

²⁶ C. Waaldijk et al., *More or less together: levels of legal consequences of marriage, cohabitation and registered partnership for different-sex and same-sex partners. A comparative study of nine European countries*, Paris: INED 2005 (a comparative study, including PIL aspects).

²⁷ A.A.H. van Hoek, ‘Nationaliteitsdiscriminatie en IPR – een commentaar op de uitspraak van de Commissie Gelijke Behandeling van 4 februari 1997’ [‘Nationality Discrimination and PIL – A Commentary on the Opinion of the Equal Treatment Commission’], *Sociaal recht* 1997, pp. 353-358. A.A.H. van Hoek, *Internationale mobiliteit van werknemers* [International Mobility of Employees], pp. 478-481, about the applicability of the Dutch Equal Treatment Act in a variety of disputes, for example, relating to a potentially prohibited distinction based on marital status and/or sexual orientation in offering travel facilities to employees and their partners by an airline (Opinion of the Equal Treatment

The following provisional conclusion can be drawn in respect of the first role that could be played by PIL in this project: in this context, it is the impact of human rights on PIL and the impact of the project outcome in terms of its human rights promotion target on PIL, which for its part regulates ‘externalities’, that will perhaps be of particular importance. At this juncture, the crucial decision in this context would be whether the likelihood that the project will sooner or later affect PIL constitutes a reason for anticipating PIL issues from now on, taking account of current debates, opposition, sensitivity etc. concerning PIL, and, in this way, to think about suggestions relating to what PIL rules could be ‘appropriate’ at this stage already. In my opinion, this question should be answered in the affirmative.

II.A.2. Another ambition should be to examine how certain initiatives outside PIL would affect PIL (‘indirect’ impact of human rights on PIL)

Because PIL regulates aspects of ‘externalities’, it is useful to examine the implications for PIL if using OMC yields a suggestion of some kind of coordination or action.²⁹ This will reveal – still within the context of the first role to be played by PIL in the project – the extent to which PIL debates could be taken into account in a more indirect manner as well, in particular by focusing attention on the impact of any initiatives and proposals outside PIL on PIL. This concerns the ambition to define and evaluate the manner in which ‘solutions’ and proposals invented outside the realm of PIL and put forward to foster European integration and, perhaps in part, to promote human rights could, for their part, have an impact on PIL rules, and to evaluate these dynamics. This ambition could be prioritized from this moment on.

II.A.2.a Substantive law harmonisation

This could include interactions between developments relating to the harmonisation of substantive law on the one hand and PIL developments on the other – where PIL is to be taken as including ‘internationally mandatory rules’. First and foremost, it is worth mentioning that PIL is sometimes regarded as a way to *bridge* differences between various legal systems *without unifying the latter*, in which context PIL is claimed to be a substitute for the harmonisation of substantive law; in addition, it is often claimed that PIL *follows naturally* from the unification of substantive law, because it is considered necessary to achieve a specified minimum level of substantive law consensus before starting to apply – flexible – PIL rules. Does mutual recognition in this sense also assume a specified degree of harmonisation of substantive law, or does the very concept of mutual recognition allow quite essential differences to continue to exist? In short, the relationship between PIL and

Commission 96-97 dated 4 September 1996, *NIPR* 1997, 234); relating to an international shipping case, where the Collective Agreement made a distinction with respect to the terms and conditions of employment between employees residing in Indonesia and/or the Philippines on the one hand, and all other employees on the other hand (Opinion 97-13 of 4 February 1997, *NIPR* 1997, 235), and relating to the question of whether an international organisation is permitted to set conditions in terms of the nationality of the employee to be recruited and selected (Opinion 98-81 of 8 July 1998).

²⁸ M. Traest, ‘*Enkele overwegingen over de toepasselijkheid van de wet ter bestrijding van discriminatie in internationale (arbeids)verhoudingen*’ [‘Some Considerations about the Applicability of the Anti-Discrimination Act in International Labour Relationships’] in D. Cuypers (ed.), *Gelijkheid in het arbeidsrecht. Gelijkheid zonder grenzen?* [Equality in Labour Law. Equality without Limits?] 2003, pp. 67-95.

²⁹ For a characterization of the various different forms of coordination (meaning different ways to progress European integration), see O. De Schutter, ‘Monitoring Human rights in the Union as a Learning Process’, under III.3.b: under ‘the many forms of an improved coordination’.

substantive law seems to be quite dialectic in nature and may perhaps necessitate a broader analysis. Below, I will pinpoint a number of specific issues that merit further attention.

II.A.2.a.1 Implications for issues of ‘internationally mandatory rules’

A first point that merits attention in studying the interaction between harmonisation of substantive law and PIL could be the following: what would be the effects of the harmonisation of substantive law on specific PIL domains? This should cover not only the obvious changes in rules in the areas of recognition and enforcement and applicable law but also the implications in respect of ‘internationally mandatory rules’ – rules that are deemed to be applicable in specific international legal relationships, irrespective of the applicable law that customarily governs this legal relationship. This focus on internationally mandatory rules may raise questions in respect of the following: would the harmonisation of substantive law in some way or other (for example, in relation to the *type* of harmonisation: minimum or complete harmonisation; in relation to the *rationale* of harmonisation: harmonisation intended to remove internal market obstacles and/or intended to create a minimum protection level for specific persons) have an impact on the possibility or the obligation of using well-defined rules as internationally mandatory rules, and, if this is the case, would this be regrettable? In this context, I refer to international labour law studies³⁰ and to some observations made in a recent Belgian study on non-discrimination law, in particular relating to the impact of the Directive on equal treatment between persons irrespective of racial or ethnic origin³¹ on the status of national anti-discrimination legislation in an international context³², in particular concerning the possibility of invoking such legislation as internationally mandatory rules within the meaning of Article 7 of the Convention on the Law Applicable to Contractual Obligations: according to Traest, it is possible to argue that once the Directive has come into force in the Member States, national anti-discrimination law cannot be used anymore as internationally mandatory rules – yet, in his view, anti-discrimination law could still function as a ‘*loi d’ordre police*’. Would it be useful, one wonders, to evaluate from this perspective in what cases it is appropriate to have the possibility of invoking well-defined rules as internationally mandatory rules – and could this evaluation allow us to argue in favour of the unification of substantive law or a specific area thereof? If the conclusion is drawn, for example, that only minimum-level harmonisation is feasible, and that this would entail the creation of unwanted restrictions when it

³⁰ See in particular A.A.H. van Hoek, ‘*De bilateralisering van de voorrangregelleer in Europa*’ [‘*The Bilateralisation of the Doctrine of Internationally Mandatory Rules in Europe*’] in R. Kottling, J.A. Pontier and L. Strikwerda (ed.), *Voorkeur voor de lex fori. Symposium ter gelegenheid van het afscheid van Prof. Mr. Th. M. de Boer* [Preference for the Lex Fori. Symposium on the occasion of the Departure of Prof. T.M. de Boer], Deventer: Kluwer 2004, pp. 5-36, and J. Fetch, *Eingriffsnormen und EG-Vertrag: die Pflicht zur Anwendung der Eingriffsnormen anderen EG-Staaten* – as reviewed by A. van Hoek, *Common Market Law Review* 2005, pp. 1538-1541.

³¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. On this directive, see also O. De Schutter, ‘The implementation of the EU Charter’, p. 18.

³² See, for example, M. Traest, ‘*Enkele overwegingen over de toepasselijkheid van de wet ter bestrijding van discriminatie in internationale (arbeids)verhoudingen*’ [‘*Some Considerations on the Applicability of the Anti-Discrimination Act in International Employment Relationships*’], in D. Cuypers (ed.), *Gelijkheid in het arbeidsrecht. Gelijkheid zonder grenzen?* [Equality in Labour Law. Equality without Limits?] 2003, p. 80.

comes to the possibility of invoking specific rules as internationally mandatory rules, would this lead to the decision that it is better not to opt for harmonisation?³³

II.A.2.a.2. Problems raised in the *Ingmar* Case: the scope of harmonised law and its effects on party autonomy

A second issue that merits attention could be the manner in which the international scope of legislation that includes unified or harmonised substantive law is to be defined. This question has become particularly pregnant in PIL in the light of the Court of Justice's *Ingmar* decision.³⁴ In this case, the Court of Justice faced the legal position of an internationally operating agent. The parties had agreed on the application of the law of a non-European legal system – namely the law of the USA – but the question arose whether European unified rules that provide for specific rights for commercial agents after the termination of their agency agreement could be set aside by this choice of law. These unified rules had been codified in the European Directive on Agency, which is partly³⁵ intended to protect the agent, as a 'weak party'. In this case, where the agent performed his activities in the United Kingdom, the principal was established in a non-Member State (namely the United States), and where a clause in the contract stipulated that the contract was governed by the law of that third country, the Court of Justice held that Articles 17 and 18 of the Directive had to be applied even though the parties had chosen US law as the applicable law, and the Court was of the opinion that these rules could be regarded more or less as internationally mandatory rules.³⁶ But this *Ingmar* decision is still quite controversial – for example, in terms of its implications for the assessment of the legal position of internationally operating *employees* – and, in a more general sense, in terms of the question of how the international scope of unified European substantive law is to be defined if the legislation itself is not transparent in this respect. This problem shows how well it is possible to argue that it is necessary to unify substantive law for the purpose of removing internal market obstacles and/or for the purpose of protecting the weak party, but that the question of the international scope of this legislation, and the impact on the parties' choice of law options³⁷ etc., may still arise. This raises the question under what circumstances it is desirable that the parties' possibility of making a choice of law, as in the *Ingmar* case, should be 'affected'. This means that it is necessary to evaluate whether a specific type of unification of substantive law should be accompanied by the definition of the international scope of these substantive law provisions and, conversely, of the extent to which, even if the

³³ See also *supra* § II.A. And see also, on the issue of harmonisation, below, footnote 52, on the Communications and the Action Plan on European Contract law. And see also the project "European Labour Law Network (see <http://www.eln.eu.com>), an EU-wide network of labour law academics. The main activity of the ELLN will be the development of general rules and principles of European labour law – on the basis of law studies in the different EU-Member States – by using a Restatement approach.

³⁴ ECJ *Ingmar* C-381/98, 9 November 2000.

³⁵ See also, on the aim of stimulating a fair competition within the internal market, and the implications of focusing on either this aim (considered by de Boer as the aim of protecting a "public interest"), or the aim of protecting the agent (considered by de Boer as the aim of protecting an "individual interest"), Th. M. De Boer, comments with *Ingmar*, *NJ* 2005, 332.

³⁶ Compare, in this context, the remarks made by O. De Schutter in 'Monitoring Human rights in the Union as a Learning Process', p. 28, concerning the 'harmonisation or approximation of laws' and 'uniform (federal) law' as 'ways to manage the protection of human rights under a constitutional framework which guarantees essential freedoms of movement.'

³⁷ As permitted currently, for example, in Article 3 of the Convention on the Law Applicable to Contractual Obligations.

unification of PIL rules is achieved, in particular where agreement is reached on the choice of law options, such choice of law may be overridden by the applicability of harmonised substantive law. Because even in the case of the unification of applicable law, even in the case of the unification of the choice of law option, it turns out that problems may arise in connection with the relationship with unified substantive law.

II.A.2.b Introduction and proliferation of the country-of-origin principle – mutual recognition

When it comes to initiatives outside the field of PIL having an effect on PIL, another issue is undoubtedly the discussion about the implications of the country-of-origin principle on PIL. Naturally, I also refer to the debates on the original proposal of a Directive on Services³⁸, debates on the introduction of this principle in the E-Commerce Directive³⁹, or in the Directive on Unfair Business Practices⁴⁰ etc. As De Schutter and Francq⁴¹ explain in a recent article, the introduction of this ‘home country principle’ could have serious effects on PIL, and, accordingly, on the protection of internationally mobile employees. Applicable law rules would come under pressure, and the Directive on Posting of Workers⁴² could perhaps be transformed from a model based on minimum protection for cross-border posting of employees towards a model based on maximum protection. In a more general sense, ‘regulatory competition’ would be stimulated in this way.⁴³ In PIL, fierce debates are currently being conducted about the significance of the country-of-origin principle; which also turn out to be relevant to the project, because the proliferation of this principle in private law may have far-reaching effects, for example, on the manner in which traditionally weak parties are protected in international situations.

II.B. Introduction/maintenance of a specific type of PIL rules as one of the ‘conditions of success’ and ‘flanking measures’ of the project? (= mainly about the impact of PIL on human rights)

II.B.1. Introduction: some observations about OMC

Above, it was argued that OMC may possibly help to define better PIL rules or better ways of taking account of PIL rules – and that thinking about and working with OMC should be accompanied by a study of PIL issues. But, as one may suggest, cannot there be interaction in the opposite direction as well? Could PIL perhaps somehow support OMC as well? Is it a good idea to connect the use of OMC with the promotion of specific kinds of PIL rules? Can PIL function as the driving force behind the promotion of human rights?

This idea is inspired by a passage from an article by De Schutter, in which he writes about the ‘conditions of success’ and ‘flanking measures’ of OMC. The hypothesis

³⁸ See footnote 18.

³⁹ See footnote 21.

⁴⁰ See footnote 22.

⁴¹ O. De Schutter en S. Francq, ‘*La proposition de directive relative aux services dans le marché intérieur: reconnaissance mutuelle, harmonisation et conflits de lois dans l’Europe élargie* » *Cahiers de droit européen* 2005, issue 5-6, pp. 603-660.

⁴² Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services OJ L 018 21/01/1997 p. 0001-0006.

⁴³ See also *infra* § III.B.2., in a footnote including a quotation from De Schutter and Francq.

would then be that the inclusion of specific PIL rules may be regarded as one of the conditions of success of OMC.

So this is a second possibility where PIL could be relevant to the project – and, hence, a second possible role to be played by PIL in the project. This role may become clearer if one considers the impact of PIL itself on the promotion of human rights, which is connected with the idea that PIL may ultimately help to promote human rights. Earlier, De Schutter⁴⁴ referred to the ‘conditions of success’ and ‘flanking measures’ of OMC and it is quite possible to conceive that PIL could be one of these conditions of success or ‘flanking measures’ of OMC, because it is quite certain that where specific conditions have been satisfied, PIL may well be regarded as a catalyst in promoting human rights in Europe; indeed, if certain conditions have been satisfied, PIL may even be regarded as a catalyst in the promotion and flourishing of OMC, ultimately resulting in the promotion of human rights across Europe. Below I will briefly explain a number of potential approaches in this context: how exactly could PIL promote human rights in Europe?

Some of what will be addressed below could also be considered in the light of De Schutter’s observations⁴⁵ about maximizing ‘the benefits of regulatory competition between the horizontal units, while limiting the risk of a race to the bottom in the field of human rights. (...) identify situations where the Union should exercise its powers to protect and promote human rights, while organizing the competition between the Union and the Member States through a renewed understanding of the principle of subsidiarity. At both levels, forms of co-ordination between the units concerned (the Member States and the Union) should be invented’, et cetera. The question arises whether a form of PIL coordination could possibly be this form of coordination. For example, is the organisation of a flexible system of mutual recognition (where it is legitimate to represent ‘recognition’ as a PIL principle) a form of coordination that can promote human rights? In this context, it is appropriate to immediately refer to the debates about the Directive on Services, which was criticised heavily because the principle of ‘mutual recognition’ enshrined in it would in all likelihood be anything but conducive to the protection of employees – and this criticism was also expressed by the PIL discipline, because PIL achievements (and proposals for the ‘Europeanisation’ of PIL, above all proposals for a Rome I and a Rome II regulation) could be put aside. On the other hand, it is fitting to point out the potentially ‘uplifting’ movement that could be the result of an obligation to recognise a same-sex marriage solemnised in a Member State.

The passage below should also be viewed in the light of De Schutter’s observations⁴⁶ about ‘two elements (...) lacking in the current system. First, there exists no screening mechanism which would identify, on a systematic basis, where some form of coordination between the Member States – or even some form of legislative action at the federal level – might be required, in order to ensure that, left to themselves, the dynamics of the internal market or of the area of freedom, security and justice, will not lead to a lowering of the level of protection of human rights. Second, there is no mechanism for collective learning between the Member States, despite the

⁴⁴ O. De Schutter, ‘Monitoring Human rights in the Union as a Learning Process’, under IV.3: under ‘the conditions of success of an open method of coordination in the field of human rights.’

⁴⁵ O. De Schutter, ‘Monitoring Human rights in the Union as a Learning Process’, p. 6.

⁴⁶ O. De Schutter, ‘Monitoring Human rights in the Union as a Learning Process’, p. 7.

usefulness of such a device, if it is properly imagined.’ Elsewhere, De Schutter⁴⁷ describes one of the functions of OMC as follows: ‘(...) the open method of coordination could be seen as an encouragement to mutual learning, as the solution preferred in certain Member States may inspire the adoption of similar solutions in other Member States, especially where such replication avoids the risk that the implementation of human rights at the level of each State recreate obstacles within the internal market or impede the cooperation between the Member States in the area of freedom, security and justice’ and De Schutter and Deakin⁴⁸ define the following hypothesis: ‘Thus our hypothesis is that central among the conditions of success of OMC and related processes are mechanisms which function as incentives for the actors to reflect upon the extent to which their understanding of the problem which is to be overcome and their own position may be context-dependent, and therefore may be open to revision in the light of experience (...)’ and, he goes on to say that ‘(...) certain institutional frameworks facilitate reflexivity, while others discourage it’. To what extent can PIL be useful?, one wonders. To what extent can PIL be this kind of ‘incentive’, to what extent can PIL promote ‘reflection’ etc.? To what extent can PIL act as a catalyst and driving force in promoting human rights, in the knowledge that issues such as ‘availability’ are often relevant in the context of human rights and PIL has a contribution to make when it comes to issues such as ‘availability’ and ‘transferability’.⁴⁹

II.B.2. Attention for PIL rules which could ‘promote’ human rights

II.B.2.a. PIL rules may create domino effects

PIL could act as a driving force in promoting human rights, as suggested above. One possible approach in this context would be a focus on the domino effects that could be created by means of PIL rules, for example when it comes to the effects of the imposition of an obligation on Member States to recognise concepts created elsewhere: this could be perceived as a kind of injection given to a legal system by means of PIL rules, an incentive to develop in a well-defined direction. To substantiate this point, reference can be made to current developments in European international divorce law: as a result of the issue of flexible rules concerning the recognition of international divorces in the ‘Brussels II’ Regulation⁵⁰, as well as in the ‘Brussels II bis’ Regulation⁵¹, in which the ‘*favor divortii* principle’ has been incorporated, it turns out that European incentives are offered in the direction of a more general tendency to liberalise international divorce law and perhaps even substantive divorce law.⁵² There is room for arguments with respect to the necessity

⁴⁷ O. De Schutter, ‘The Implementation of the EU Charter’, p. 3.

⁴⁸ O. De Schutter and S. Deakin, ‘Introduction: Reflexive Governance and the Dilemmas of Social Regulation’, p. 3.

⁴⁹ On this subject, see also *infra* § II.C.

⁵⁰ Council Regulation (EC) no. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ L 160, 30 June 2000, p. 19.

⁵¹ Council Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) no. 1347/2000, OJ 23 December 2003, pp. 1-29.

⁵² See V. Van Den Eeckhout, ‘*Internationaal privaatrecht en migratierecht. De Evolutie van een tweesporenbeleid*’ [*Private International Law and Migration Law. The Evolution of a Two-Track Policy*], *Nemesis* 2002, pp. 75-88. See also (but in this publication, these dynamics are assessed in a rather negative way; at least there is an appeal for stopping these dynamics where they go too far), J. Meeusen, ‘The personal status of migrants at the interaction of human rights, private international law and European Union Law (to be published in the proceedings of the ‘*Toogdag Mensenrechten*’ on

to make further progress towards the liberalisation of divorce law once divorces obtained under flexible conditions elsewhere have been recognised: it seems logical to argue that anything that is 'available' elsewhere and that is 'transferable' to the country of origin should also be made 'available' in that country itself – first of all by means of flexible rules concerning jurisdiction and applicable law, and subsequently perhaps for those whose legal relationship manifests itself only in an internal context (because if they are refused access to such 'rights', there would be a situation of reverse discrimination). It is conceivable that these arguments are advanced even if they are not necessarily successful. The awareness and appreciation of these arguments and dynamics may both encourage people to create liberal recognition rules and discourage them from doing so. Principles that are to be taken account of in this context include the principles of non-discrimination, fraud prevention, respect for cultural values in a society etc. However this may be, divorce law does seem to be undergoing an evolution at the moment, ranging from recognition rules to jurisdiction and applicable law rules, and this may ultimately result – as some people hope and others fear – in an evolution of the substantive divorce law of the Member States whose divorce law is currently not yet as liberal as that of other Member States. In this way, PIL may give rise to a kind of 'backwards progression'. This is precisely what some people are hoping for and that others are fearing, if European divorce recognition rules are introduced or if European recognition rules concerning same-sex marriages *were to be* introduced – or if the European Court of Justice were to intervene along these lines in national PIL, in particular by forcing a Member State to recognise a same-sex marriage created elsewhere. After all, if a Member State has not introduced the concept of the same-sex marriage in its legal system, it is conceivable that this Member State, perhaps under pressure from the Court of Justice, may recognise a same-sex marriage concluded elsewhere, perhaps even in the hypothetical case that it concerns two of its own citizens; it is conceivable that the

'Mobilising Human Rights – Rethinking the Significance of Human Rights in an Era of Great Mobility', organised in Leiden, October 2005. See also J. Meeusen, 'System Shopping in European Private International Law in Family Matters', presented at the Private expert seminar (JAI Conference) on, 'What international family law is 'necessary for the proper functioning of the internal market? An inquiry into the desirability of European private international law in family matters, with special regard to its legality, scope and implications in practice', organized in Antwerp, Belgium, 21-22 October 2005 and J. Meeusen, "Instrumentalisation of private international law of and by European migration law", lecture at the expert seminar on "Instrumentalisation of and by migration law", organised by the Scientific Research Network of the Research Foundation-Flanders on "Transposition of and Legal Protection under European Migration Law", Antwerp, 9 December 2005. On the phenomenon of 'backwards progression', see also G. Steenhoff et al., *Een zoektocht naar Europees familierecht [A Search for European Family Law]*. Preliminary Report No. 58 Netherlands Comparative Law Association, Kluwer: Deventer 1999, 141 p.: this preliminary report argues in favour of the further unification of European family law, and it is clear that the writers have the unification of substantive law in mind. They claim that the unification of PIL does not go far enough. Remarkably, as far as the opposite direction is concerned, these writers do regard PIL as a field where it can be quite useful to use uniform European family law. For example, they consider using European family law as 'surrogate law', 'subsidiary law', and also law that can be used by means of a choice of law in international cases (in this context, reference could be made, for example, to contract law legislation, such as the Vienna Convention (United Nations Convention on Contracts For the International Sale of Goods, 1980 (CISG); cf. also the problems outlined in the Communication from the Commission on European Contract law from 2001, the Action Plan from 2003 and the new Communication dated 11 October 2004). Here the question arises, according to the authors, whether the creation of a choice of European family law for internal cases could perhaps be a next step. The preliminary reports clearly show that the authors intend to apply European family law to purely internal legal relationships in due course as well. Apparently, the strategy of the introduction of new legislation by means of PIL seems to be the path of least resistance in their eyes.

Court of Justice could compel this Member State to recognise the same-sex marriage – more or less by analogy with the *Grunkin* case.⁵³

This reference to the *Grunkin* case brings us to a point that merits attention. In the Opinion in respect of the *Grunkin* case, reference was made to human rights principles. The question arises whether it is desirable and sufficient to impose European PIL rules only and exclusively where there are purely human rights issues – rights that are currently recognised as such – or can and should European interference extend further, in a process of liberalisation of international family law, in particular in areas where human rights are not discussed as yet.⁵⁴ At this juncture, Europe is interfering with international divorce law in a far-reaching manner, but has not yet intervened in issues involving same-sex marriages. If European PIL rules in this field were to be issued, ‘injections’ and incentives of some sort would be given to the Member States.

II.B.2.b. Stimulating reflection on the differences between legal systems: becoming familiar with foreign rules through PIL

A second way of considering PIL as a potential catalyst in promoting human rights can be defined as follows: it is possible to argue, for example, that once Member States are forced under certain circumstances to recognise concepts that have been achieved elsewhere, this could encourage them to ‘collective learning’; in this way, PIL may well be considered a manner of making the Member States’ confrontation with one another’s legal systems inevitable. PIL could offer possibilities of becoming familiar with one another’s legal systems and use this as a basis for evaluating the best ‘solution’.

PIL could then stimulate OMC, in the sense that the confrontation with other legal systems and with ‘solutions’ in these other legal systems – through the obligation of recognising the achievements of these other legal systems – could contribute towards the promotion of reflecting on a country’s own legal system⁵⁵ and towards a balanced choice in favour of ‘best practices’.

II.B.2.c. Harmonization of internationally mandatory rules under specific conditions?

⁵³ Grunkin, C-96/04. The Opinion dates from 30 June 2005. The judgment dates from 27 April 2006. The judgment has fizzled out: the Court of Justice stated that “The Court of Justice of the European Communities has no jurisdiction to answer the question referred by the Amtsgericht Niebüll in its decision of 2 June 2003.”

⁵⁴ On this issue, see also the quotation from J. Meeusen, *infra* § III.C.2., where he states that there should be an essential distinction between the way in which the European Court intervenes in cases involving human rights principles and other cases.

⁵⁵ On this issue (in particular the effects of the confrontation with other legal systems through PIL and the issue of a country’s reflecting on its own legal system), see also V. Van Den Eeckhout, ‘*Thuisbrengen van een op drift geraakte rechtsverhouding. Buitenlandse rechtswaarden in het personen- en familierecht*’ [‘*Identifying an Overheated Legal Relationship. Foreign Legal Values in the Law of Persons and Family Law*’] in S. Parmentier et al. (ed.), *Migranten kleuren het recht in. Over de bijdrage van vreemdelingen tot het recht* [Migrants Colour the Law. On the Contribution of Aliens to the Law], Leuven: Acco 1997, pp. 171-194, with further references. Admittedly, the first impressions are not very encouraging. Compare the question of whether the application of PIL rules in a well-defined manner could encourage other legal systems to adjust their law: in this context, too, it is often claimed that there are major limitations – even if it is assumed that one is willing to do so and that one is of the opinion that PIL should be entrusted with this task – with respect to the possibilities of exerting any influence on another legal system by means of PIL rules. Earlier PIL experiences may help to assess the foregoing in a ‘realistic’ manner.

If one reflects on the manner in which the introduction of specific PIL rules could be conducive to achieving the objective of human rights promotion, one should by no means focus only on the 'classical' PIL rules of jurisdiction, applicable law, recognition and enforcement. The significance and potential of internationally mandatory rules, as they exist and are handled in PIL, should be taken into account as well. One question that needs to be addressed is whether OMC should be supported by the introduction or enforcement of internationally mandatory rules, if necessary, in a unified form, as has happened, for example, in the Directive on Posting of Workers – because this Directive may well be considered a model of European unification of internationally mandatory rules in the domain of international labour law, as far as the cross-border posting of employees is concerned; conceivably, it may be argued that it is necessary to be able to use these rules as minimum standards in every respect – I refer to what was stated above⁵⁶ about the impact of the Directive on Services on this directive, especially when it comes to the conversion of this directive from a minimum standard to a maximum standard. Incidentally, the development – or at the very least the enforcement – of specific rules as internationally mandatory rules and the evaluation about whether these are to be used as minimum standards could relate not only to domains such as international labour law and international labour law, as interwoven with social security rights: this could also be considered, for example, with respect to non-discrimination legislation as such. In this context, I refer to analyses that have already been undertaken into the status of equal treatment legislation in international situations, which have addressed the concrete question of whether these rules may be applicable as rules of normally applicable law in the area of international tort law or international contract law, as '*loi de police*' or as internationally mandatory rules.⁵⁷

II.B.2.d. Using specific PIL rules in defining certain 'terms' in Community legislation

PIL could act as a driving force in yet another way, namely by giving 'substance' to specific concepts used in European legislation in a well-defined manner.⁵⁸ This could concern, for example, family-law concepts such as those used in European Migration Directives.⁵⁹ For example, the Commission already argued during the preparation of the Directive on the right of citizens of the Union and their family members to move freely within the territory of the Member States that it has no jurisdiction to give further substance to family-law concepts itself⁶⁰, but on the other hand, the Court of

⁵⁶ See above, under II.A.2.b.

⁵⁷ See, in particular, the publications by M. Traest and A.A. van Hoek, to which reference was made above (see *supra* § II.A.1.d).

⁵⁸ On this issue, see also the combined paper 'Characteristics in Family Matters for Purposes of European Private International Law, including Family Law Notions in EU/EC Acts and Instruments' (L. Tomasi), 'The Interpretation of Family Law Notions by the EC Courts' (C. Ricci) and 'Principles of Interpretation and Characterisation in EC Private International Law and Family Matters' (S. Bariatti), presented at the Meeting in Antwerp, October 2005. See also J.-Y. Carlier, comments with Chen (Case C-2000/02) *Common Market Law Review* 2005 August issue 42, 4, pp. 1121-1131, in particular p. 1129, where he states the following: '(...) the *Garcia Avello* case law could lead to the application of the law of origin, following the choice of the persons concerned, in fields broader than only the name, such as family law or, on the contrary, it could be 'the legislation of the host Member State', and not the law of the country of origin that would determine if 'the partner with whom the Union citizen has contracted a registered partnership' should be recognized as a family member (Dir. 2004/38, Art. 2.2).

⁵⁹ On these Directives, see also O. De Schutter, 'The implementation of the EU Charter', pp. 18-19.

⁶⁰ See the Amended proposal for a Directive of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM (2003) 199 def), p. 3: 'Parliament's amendments would recognize as family

Justice does have the power to check specific PIL aspects. By giving well-defined substance to this PIL regulation, it would then be possible to give an injection to the development of family-law concepts in, for example, European migration law.⁶¹

II.B.3. Attention for PIL rules which could slow down and impede human rights protection and which could contribute to a backlash

Reflecting on the potential role of PIL in the project in this second sense – namely functioning as a catalyst in promoting human rights, and as a hinge – I believe that, if the conclusion is drawn that PIL can indeed act as a catalyst, it can do so only if well-defined PIL rules are used and if specific parameters are satisfied. It is also particularly important to focus attention on any negative effects of the introduction of these kinds of PIL rules.

II.B.3.a. The risk that PIL Rules may serve as an ‘excuse’ to stop further evolution

More specifically, it should be recognised that PIL rules may also slow down the promotion of human rights. As such, one should always be alert to any potentially ‘perverse’ and counterproductive effects of PIL. Issues that merit attention include the extent to which PIL may be used as an ‘excuse mechanism’, an alibi as it were, where Member States may argue that they definitely – up to a certain point – accept specific principles, but that they cannot be forced to go further than that: for example, would it be legitimate to argue that it is sufficient for a Member State to declare that it is prepared to recognise decisions made or achievements realised elsewhere subject to certain conditions, but that it need not organise this possibility in the Member State itself? ‘Up to that point but not any further’, could that be the consequence? In my opinion, one should realise at the very least that arguments of this kind will be advanced, evaluate the chances of such arguments and how regrettable it would be if the ‘evolution’ would stop at that point: should a situation like that be appreciated as being sufficient, as the best possible result, possibly as the ‘second best solution’, as in an international context, at least, people who are mobile and/or have a link with a foreign legal system are able to get what they want and may even be able to have this result recognised when they return to their own countries? Then, the final result would be that specific rights are ‘available’ and possibly even ‘transferable’ for, at least, a number of people. Or should we always have the ambition to achieve more than that; and if we have this ambition, to what extent should we expect PIL rules to create a domino effect, or to what extent should we fear that PIL rules will slow down further developments? Attempts to find the answer to questions of this kind could help us make our choice of specific kinds of PIL rules as specific rules aimed at promoting human rights. PIL analyses, including analyses of earlier experiences, could be helpful in this respect.

members the spouse of the same sex in the same way as the spouse of a different sex, the registered partner in accordance with the legislation of the Member State of origin, and non-married partners in accordance with the legislation of practice of the host or home Member State. On this point, the Commission feels that harmonization of the conditions of residence for Union citizens in Member States of which they are not nationals must not result in the imposition on certain Member States of amendments to family legislation, an area which does not fall within the Community’s legislative jurisdiction.’

⁶¹ On this philosophy, see also V. Van Den Eeckhout, ‘Communitarization of international family law as seen from a Dutch perspective: what is new? A prospective analysis’, in A. Nuyts and N. Watté (ed.), *International Civil Litigation in Europe and Relations with Third States*, Bruxelles Bruylant 2005, pp. 509-561.

II.B.3.b. Risk of introducing principles such as ‘mutual recognition’ by using the ‘country-of-origin principle’ and present these as PIL rules

It is quite certain that there are risks in connection with the protection of human rights in some domains if principles such as the country-of-origin principle are used and are even represented as PIL rules. There is the risk that this principle may change existing PIL rules in a rather drastic manner and involve the obligation of ‘mutual recognition’ without any further conditions or guarantees – for example, the preceding harmonisation and organisation of minimum protection (which, in addition, should not be allowed to function as a model of maximum protection) – in the substantive law of Member States or through harmonisation of internationally mandatory rules, in the sense of requirements concerning the existence of a ‘genuine’ link before anything can be recognised, etc.⁶² At this point, I once again refer to the discussions about this principle as enshrined in the Directive on Services, the E-commerce Directive, the Rome II-proposal...⁶³

II.C. Is it useful to pay attention to PIL issues because PIL can be considered a discipline from which lessons can be learned in a more general way? (= mainly about debates on human rights within PIL)

II.C.1. Introduction

PIL analyses could be useful in a broader sense and this brings us to the third potential role to be played by PIL in the project: PIL may be considered a discipline that has long been confronted with aspects of ‘externalities’ and human rights and has thus been able to gain wide experience in addressing several issues that are relevant in discussing the position and development of human rights in Europe.⁶⁴

For my part, I am not convinced that PIL can immediately provide full and adequate answers that are convincing for everybody, but I am of the opinion that it is worth looking into the debates that have been and are still being conducted in PIL circles, the arguments used in these debates, the importance attached to these insights and arguments, etc. In this context, it is certainly worth analysing concepts such as the ‘availability’ of rights – both in relation to issues of jurisdiction law, applicable law and in relation to recognition and enforcement, as well as the concept of ‘transferability’. In this way, one will probably be confronted with arguments and concepts with respect to how to avoid class justice, fraud, ‘shopping’ et cetera, which have already been used in PIL debates about such issues as divorce and repudiation. Incidentally, the issue of ‘availability’ was also raised in the *Casus Cha'are shalom ve tsedek v. France* case⁶⁵, as explained and discussed by Lawson.⁶⁶ This matter could now be considered from the PIL perspective, within the context of the Europeanisation of PIL,

⁶² See also O. De Schutter, *Monitoring Human rights in the Union as a Learning Process*, p. 24.

⁶³ See already above, e.g. under II.A.2.b. See also, on mutual recognition in family matters, the comments of J. Meeusen (see e.g. below, under III.C.2.).

⁶⁴ This could be placed in the context of what De Schutter describes as a function of OMC in ‘The implementation of the EU Charter’, pp. 3-4: ‘(...), the open method of coordination could be an adequate means of better reconciling the requirements of market (economic) freedoms constitutive of the internal market, with human rights, especially social rights, which the Member States are bound to protect and implement under their jurisdiction.’ Possibly, PIL could help to find such ‘means of better reconciling’!

⁶⁵ ECHR decision dated 27 June 2000, Judgment in the *Cha'are shalom ve tsedek v. France* Case.

⁶⁶ R. Lawson, “The attitude of the Eur. Ct. HR towards the establishment between the EU Member States of an area of freedom, security and justice”, published on <http://refgov.cpdr.ucl.ac.be>.

in which context, principles such as ‘liberal access to justice’, ‘no-loss-of-rights’ and the like seem to be crucial.

In a more general sense, the hypothesis would be that it is instructive to analyse debates about ‘availability’ and ‘transferability’ in PIL, taking account of arguments advanced and evaluated in ‘classical’ PIL discussions in the past as well as with arguments that are evaluated at this juncture in the ‘new’ context of the Europeanisation of PIL.

II.C.2. ‘Transferability’ issues in PIL debates

PIL issues concerning ‘transferability’ are basically about the possibilities of ‘importation’, and sometimes also problems in connection with ‘exportability’. ‘Importability’ issues are raised in the context of recognition and enforcement – one of the three classical PIL issues.

Exportability issues are relevant when the question arises whether and if so, in what manner, a Member State should take account of the fact that a legal relationship created in this Member State may not be recognised in another Member State. If Member State A takes account of Member State B’s non-recognition of what would be created in Member State A in an anticipatory manner by simply prohibiting the creation of such legal relationship, this kind of anticipation may well act as a brake. Arguments like this were already advanced in Dutch PIL discussions about same-sex marriages⁶⁷, but were put aside at the end of the day.

In this context, it is fascinating to draw attention to the Dutch statutory provision laid down in Section 3(2) of the Marriages (Conflict of Laws) Act (*Wet Conflictenrecht Huwelijk*), which provides that the solemnisation of a marriage may not be refused on the ground that, under the law of a State of which one of the future spouses possesses the nationality, there is an impediment to such solemnisation that is in breach of Dutch public policy: accordingly, a foreign impediment to a marriage that is designated as being in breach of public policy in the Netherlands, should not be taken heed of in the Netherlands, even if this means that a marriage may be created that will not be recognised in the country where this impediment is in force. It is also fascinating in this context to draw attention to a German court decision⁶⁸ that involved a marriage to be solemnised in Germany between a German divorcee and a Spanish man, where there was an impediment under Spanish law in respect of divorcees, which meant that a marriage solemnised despite this impediment abroad could not be recognised either. The German Constitutional Court involved the fundamental right to marry in its assessment and permitted the parties to marry in Germany, even though it had been argued earlier during the proceedings that the parties had to be protected against the negative effects of a ‘limping marriage’.

⁶⁷ On this subject, see, for example, V. Van Den Eeckhout, ‘*De wisselwerking tussen materieel recht en internationaal privaatrecht: eenrichtings- of tweerichtingsverkeer?*’ [‘The Interaction between Substantive Law and Private International Law: One-Way or Two-Way Traffic?’], *Rechtskundig Weekblad* 1999-2000, pp. 1249-1265.

⁶⁸ Decision of the German Constitutional Court of 4 May 1971 (RCDIP 1974, pp. 72-75). On this issue, see, e.g., V. Van Den Eeckhout, *Huwelijk en echtscheiding in het Belgische conflictenrecht. Een analyse vanuit de invalshoek van nationaliteitsgemengde partnerrelaties* [Marriage and Divorce in Belgian Private International Law. An Analysis from the Angle of Mixed Nationality Partner Relationships], Antwerp: Intersentia 1998, pp. 300-301. See also *infra* § III.C.3.a.

Any debates on this issue are centred on the possibility of using the non-recognisability in the one Member State of achievements in another Member State as an argument to withhold rights in that other Member State. Debates on this issue are also centred on the question of the extent to which it is relevant in assessing any right whether it concerns a human right as such. Debates on this issue are also centred on the question of how all this is to be evaluated in a European context – a context of stimulating the internal market and the creation of room for freedom, security and justice.

II.C.3. 'Availability' issues in PIL debates

'Availability' issues in PIL may be raised in the context of PIL debates concerning jurisdiction, applicable law, recognition and enforcement. If one considers the PIL debates in a 'European context', it turns out that these issues are also connected with the difficulty of the separation of 'intra-Community' situations from other situations, as I will explain under II.C.d.

First and foremost, as far as the jurisdiction debate is concerned, it is worth remembering that there were times when people were almost systematically 'sent back' to their 'own' national institutions if they wanted any right to be upheld. Arguments based on 'access to justice' may be advanced against such conduct. In this day and age, it often happens that institutions of several countries are competent at the same time. Where litigation in a specific country could yield an advantage in the procedure (for example, in terms of the law to be applied), parties are able to make a strategic choice. Placing it in a broader context, potential debates on this issue are centred on the assessment of well-known PIL techniques and 'solutions', such as the '*forum (non) conveniens*', the '*forum necessitatis*', the use of jurisdiction rules such as 'exclusive jurisdiction' rules, attempts to avoid 'class justice'⁶⁹, evaluating the argument that the one court, institution or country may be in a better position to apply a specific law, that this specific court, institution or country may have more knowledge⁷⁰ and experience in this field and for this reason people had best be referred to that court, institution or country etc.

Second, as far as the other procedural PIL question is concerned – the recognition and enforcement question – this is about the possibility of recognising in country A what has been obtained in country B. Should anything obtained in country B be recognised in country A if this right or possibility was not 'available' in country A itself, one wonders. And if country A recognises anything in a situation like that, may this willingness to recognise then be used as an excuse for not recognising this right in the country A itself? In this context, it is worth remembering the experiences of the

⁶⁹ This means that there could be class justice if only people who can afford, time-wise or financially, to travel to that other country where a right may be recognised under the applicable law may have effective access to this right.

⁷⁰ The argument that a country may have knowledge or expertise that is lacking in another country and that it is therefore reasonable under certain conditions to require people to go to that other country reminds me of an issue that recently hit the headlines in the Netherlands: this was about Dutch people who had gone to Belgian hospitals with highly developed technological expertise not present in the Netherlands, for the birth of their child that had been fathered for the purpose of helping a sick child born earlier, and where this conduct seemed to be assessed as 'contrary to human dignity' in the Netherlands but not in Belgium.

possibility or impossibility of the conclusion of civil marriages in Lebanon, ‘getting’ a divorce abroad by the citizens of countries where divorce used to be prohibited at the time, repudiation in France and other European countries⁷¹ – and at this juncture, this is relevant in the context of PIL rules concerning same-sex marriages. In these discussions arguments relating to the significance of ‘fraud’ are advanced, the assessment of the necessity that the parties have a specific ‘link’ with a legal system, the possibilities and limitations of ‘shopping’ for parties whose legal relationship is defined in an international context, the fear of creating a situation that may lead to a ‘race to the court by the strongest party’, etc.

Finally, as far as applicable law is concerned, it is worth remembering the discussions about the possibilities and limitations in respect of party autonomy that have been held for a long time now – on the issue of choice of law, see also what was stated above⁷² in the context of the *Ingmar* case – the possibilities parties may have to convert a purely internal legal relationship into an international legal relationship (for example, by using the choice of law option if this ‘internationalisation’ of the legal relationship could be advantageous for them⁷³) – the conversion from an internal into an international legal relationship could be more attractive, for example, if the parties are able to obtain another – more advantageous – applicable law than the one that normally applies to their internal legal relationship⁷⁴ – etc.

II.C.4. Scope and characteristics of Community law – delimitation of intra-Community cases and the issue of reverse discrimination

As for the dichotomy between ‘internal’ and ‘international’ cases, problems like those relevant in the *Ingmar* case, allegations concerning reverse discrimination etc., it is appropriate in this context to refer to the distinction between intra-Community cases and non-intra-Community cases – where the latter may comprise both ‘purely national situations’ and international situations that are ‘extra-Community’. In that case, the discussions about the extent to which differences in approach between intra-Community and non-intra-Community cases are justified are also relevant. At this juncture, there are developments in this area and pregnant questions need to be addressed.⁷⁵ Below, I will make some observations about the difficulties and complications in respect of the distinction between internal and international cases, and between intra-Community cases and other international family law cases. The latter applies by analogy to some other PIL domains.

⁷¹ With respect to France, see, for example, the *Simitch* case law. On this subject, see V. Van Den Eeckhout, *Huwelijk en echtscheiding [marriage and Divorce]*.

⁷² Compare *supra* § II.A.2.a.2.

⁷³ In this context, see, for example, Article 3(3) of the Convention on the Law Applicable to Contractual Obligations, which provides as follows: ‘The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called ‘mandatory rules.’

⁷⁴ On this issue, see also my remarks in the appendix below about the problems of international environmental pollution and Article 7 of the Rome II proposal.

⁷⁵ See also V. Van Den Eeckhout, *Tien jaar Europees internationaal privaatrecht’ [Ten Years of European Private International Law]*, especially p. 298 and pp. 300-301. I repeat a passage from this contribution.

In international family law, the *Garcia Avello* case⁷⁶ reveals that the sociological reality of migration – and, consequently, the sociological reality of the underlying PIL questions – is currently quite diverse.⁷⁷ This means, for example, that descendants from mobile EU citizens, who have never migrated themselves, may still possess the nationality of another EU Member State and may subsequently claim rights from an EU perspective.⁷⁸ As a matter of fact, the personal exercise of the right of free movement within Europe does not need to be confined to the mobility stage but may sometimes result in permanent establishment as well. In addition, the *Baldinger* case⁷⁹ shows that this is sometimes followed by naturalisation in the country to which the person concerned has migrated, which may involve the transition from an ‘internal legal relationship’, through a ‘European legal relationship’ to a ‘foreign internal legal relationship’. In this kind of situation, the newly acquired legal position could turn out to be more advantageous or more disadvantageous than that held by the EU citizens in that ‘new country’ – and than that held by the person himself before the migration. Variations are possible: the originally ‘internal legal relationships’ may also, after first having become ‘European’, become ‘internal’ again, in particular where the person concerned returns to the country of origin – see also the *Singh and Hacene Akrich* case.⁸⁰ Confronted with situations of this kind, the European legislator has to address questions relating to the scope of jurisdiction, and relating to the line of action to be adopted if they want to persist in the idea of stimulating free movement. A case that is *not yet* intra-Community or *no longer* intra-Community, where it is always possible to draw a distinction between the hypothesis that the case does not have any international elements anyway, or where it does have international elements, which do not make it into an intra-Community case, however. To my mind, decisions that extend beyond the scope of PIL, like the decisions in the *Singh* and *Baldinger* cases⁸¹, appear to be highly relevant in this context, because it is interesting to study the Court of Justice’s considerations in these cases, and to subsequently examine the extent to which the same or other considerations and concerns should play a role in PIL issues. To what extent should there be a focus, for example in PIL issues relating to the free movement of persons, on the aspect and objective of avoiding limping relationships⁸² – in the light of the fact that limping legal relationships could pose a problem in cases involving mobility, and which could slow down mobility – or also, possibly as an independent issue, the objective of preventing people from losing their rights in the case of mobility – given the fact that the loss of rights in the case of mobility may well discourage people from

⁷⁶ *Garcia Avello*, C-148/02, Judgment dated 2 October 2003.

⁷⁷ In this context, see also the Opinion rendered by Advocate General Geelhoed dated 27 February 2003 in the *Hacene Akrich* case, C-109/01.

⁷⁸ And see, for example, in this context also the *Chen* case (C-200/02, 19 October 2004), concerning a child with and parents without EU nationality.

⁷⁹ See the *Baldinger* decision, C-386/02, decision dated 16 September 2004.

⁸⁰ *Singh* (Singh C-370/90, 1992, ECR I-4265) and *Hacene Akrich* (23 September 2003, C-109/01). Another case worth mentioning is *Jia* (C-1/05), in which case the Opinion is rendered on 27 April 2006.

⁸¹ Also on the basis of the analysis of the *Baldinger* case, it turns out that in specific cases, considering specific rights as a ‘social advantage’ may offer a solution, but that this is not always the case. In this context, see also the *Reed* case (judgment dated 17 April 1986 (59/85), ECR, p. 1283).

⁸² Likewise, it was also considered in *Garcia Avello* (no. 36 of the judgment) that ‘(...) it is common ground that (such a) discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, *inter alia*, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals.’

exercising their right of free movement in actual practice. This may, for example, be related to the consideration in the *Baldinger* case, where Advocate General Ruiz-Jarabo Colomer took the following ground in his Opinion dated 11 December 2003⁸³: 'Although citizenship of the Union is not itself capable of conferring the full range of rights which are traditionally attached to membership of a political community, it must at least guarantee that it is possible to change nationality within the European Union without suffering any legal disadvantage.' Placed against the background of current migration law – partly controlled by national institutions, partly at the European level, see, for example, the Directive on Family Reunification⁸⁴ – this could be perceived as being very pregnant indeed. For example, if a legal relationship is first considered to be an 'internal Belgian matter', but is then classified as an 'intra-Community matter' by the exercise of the right of free movement, after which it becomes 'an internal Dutch matter' by naturalisation, could the persons involved lose the 'acquired' family reunification rights they held under Belgian or European law, and could the regime applicable to them change to such an extent that it would be unattractive for them to opt for acquiring Dutch nationality by naturalisation, if it turns out, for example, that the possibilities of having a non-European partner come over will change to a great extent? The question arises to what extent the European legislator will address such issues affecting EU citizens in the future, and how traditional PIL arguments and views in relation, for example, to the concern for international harmony and the preservation of rights in the case of migration should be assessed from a European perspective, from the perspective of human rights promotion.⁸⁵

In the current 'European context', 'classical' arguments and views would then have to be evaluated, taking account of the views, for example, of the Court of Justice in relation to 'fraud' – for example in international company law, the *Inspire* case; see also the *Hacene Akrich* Case concerning migration law – ⁸⁶, accompanied by the European commitment to a 'liberal access to justice' etc.

III. Appendix: first explorative attempt to position, in a fragmentary way, the convergence or tension between 'old' (classical) and 'new' (European) tendencies to instrumentalise PIL and its interaction with human rights

When principles are discussed in a European context, it turns out, on closer inspection, that European principles and objectives are sometimes consistent and at other times inconsistent with PIL. In an appendix to this Paper, I will try to explore the relationship between PIL on the one hand and European objectives, such as stimulating the internal market, protecting the European fundamental freedoms

⁸³ No. 47.

⁸⁴ Council Directive 2003/86/EC of 22 September 2003 concerning the law of family reunification, OJ L 251/12.

⁸⁵ This touches on the *interdependencies* between European law, PIL, nationality law and aliens law. On these interdependencies (including interdependencies between PIL and social security law), see also V. Van Den Eeckhout, 'Communitarization of international family law as seen from a Dutch perspective', see, specifically, p. 552 ff in relation to nationality law (in this context, see the decisions in cases such as *Micheletti* (C-369/90 (1992) ECR I-4239), *Mesbah* (11 November 1999, no. C-179/98) and *Manjit Kaur* (20 February 2001, C-192/99, as for the problems of dual nationality, see also the recent judgment in the Netherlands *RvSt* 29 March 2006, JV 2006/172 comments CAG, which concerned a person with both Dutch and Moroccan nationality, who wanted to derive rights from the Directive on Family Reunification.

⁸⁶ On the aspect of fraud prevention in a European context, also in the context of sham marriages, see, for example, V. Van Den Eeckhout, 'Communitarization of International Family Law' and J. Meeusen, 'System Shopping'.

(freedom of movement, freedom of establishment etc.), preserving the principle of non-discrimination based on nationality, and in addition, the position of human rights, on the other hand. If one considers the potential tensions between current European dynamics on the one hand and PIL on the other hand, one of the crucial questions to be addressed is whether there is a risk that there will be a trend towards increased 'regulatory competition'. If this is the case, what will be the position of the doctrine of human rights and the ambition to promote these? 'Which side' should advocates of the promotion of human rights favour, if tensions arise between European incentives on the one hand, and old PIL developments on the other hand?; and should it be welcomed if European incentives and international PIL developments coincide from the perspective of human rights promotion, or had these developments be best discouraged?

In general, from the promotion of human rights perspective, a first analysis justifies the conclusion that sometimes PIL lawyers had best oppose European incentives, but at other times they had better support these European incentives, where they encounter opposition from the PIL field: at first sight, the interaction between European tendencies, 'modern' PIL and human rights may vary depending on the legal domain of PIL; in quite general terms, a distinction could be made between international family law on the one hand, and PIL with the exception of family law on the other hand. I will explain this briefly below. First, I will make two remarks about the nature of PIL and how it should be understood in this context, as well as the implications of that for an analysis as proposed.

III.A. Two preliminary and general remarks

III.A.1. Remark about 'the essence' of PIL and its implication in analyzing the interaction between PIL, European incentives and human rights

First and foremost, it should be emphasized that, if one raises the question whether European tendencies conflict with 'the nature of PIL', the manner of assessing its nature can vary. My analysis of the tensions is based on my observation that – as I indicated above⁸⁷ – PIL, as currently applicable, has regularly been subject to tendencies of instrumentalisation or attempts thereto, even before the recent process of Europeanization of PIL, and before European influence on PIL was exerted, as in this day and age.

In international labour law, for example, the principle of the protection of the weak party – the employee – has been widely adopted⁸⁸; it can even be argued that, at the European level, this has resulted in some '*acquis*' in this context, such as the Brussels Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and the Rome Convention on the Law Applicable to Contractual Obligations. International tort law has been confronted with modern incentives, too, which have resulted in a greater focus than in the past on the victim's position and protection, or on legal-political objectives, such as the fight against international environmental pollution, which is shown by the rules concerning jurisdiction and applicable law included in various treaties or in national PIL. It could even be advantageous to victims of environmental pollution if PIL rules are

⁸⁷ See *supra* § II.A.1.c.

⁸⁸ See also, e.g., M.V. Polak, "*Laborum Dulce Lenimen*'? Jurisdiction and Choice of Law Aspects of Employment Contracts', in J. Meeusen, M. Pertegas and G. Straetmans, *Enforcement of international contracts in the European Union: convergence and divergence between 'Brussels I' and 'Rome I'*, Antwerp: Intersentia 2004, pp. 323-342.

applicable, as these could enhance the possibilities for recovering damages, and therefore offer better chances, compared to victims whose cases are merely defined by national legislation – this could, for example, be the case if PIL rules allow the victim to choose between different legal systems.

Nowadays, there is a pluralism of methods in PIL. Where I refer to ‘PIL’ below, I mean ‘modern PIL’.

III.A.2. Remark about the basically ‘national’ nature of PIL and its implications in analyzing the interaction between PIL, European incentives and human rights

The remarks made above concerning the ‘essence’ of PIL require an additional remark, in particular, concerning the originally national origin of PIL. If one looks into the compatibility of European incentives on PIL (tendencies to instrumentalise PIL for European purposes) with the ‘essence’ of PIL – in respect of which I stated that I focus on PIL as it has developed to date – one faces the complication of the basically national nature of PIL. Sometimes, PIL has been unified at a supranational level – European or otherwise – but sometimes this is not the case.

A first consequence is that one should be aware that ‘modern PIL’ may be of European or of non-European origin.

Sometimes modern ‘modern PIL’ has a common basis in European Member States – see, for example, the rules concerning international labour law as incorporated into the Brussels Convention, which has by now been transformed into a regulation concerning jurisdiction, recognition and execution, and as incorporated into the Rome Convention on the Law applicable to Contractual Obligations. In such a situation, one could refer to a type of ‘*acquis communautaire*’ in European PIL, which may come under pressure from new European incentives.

But sometimes ‘modern PIL’ may also vary substantially between the Member States – this is the case, for example, in specific domains of international family law.

A second consequence of the essentially national nature of PIL is that if one discusses the convergence and/or tensions between ‘modern’ PIL and European tendencies, in their interactions with human rights, and if one wishes to define proposals on the position to be taken, this may involve two separate types of action.

First and foremost, this could mean that lawyers who wish to promote human rights will propose adherence to the ‘*acquis communautaire*’, or the partial abandonment of the *acquis communautaire*, as it has been developed in European PIL to date – to the extent that it is advantageous or disadvantageous to adhere to such *acquis communautaire*, from the perspective of human rights promotion. This assessment should be made in domains where there is *acquis communautaire* and where there are tensions between this *acquis* and European incentives.

Subsequently, this could mean that lawyers who wish to promote human rights will encourage specific Member States to adjust their national PIL or to leave it intact in their efforts to develop their own national, ‘modern’ PIL. Such choices should be made possible in domains where PIL is still mainly national or, where there is supranational PIL, where unification was not achieved at the European level.

III.B. PIL outside family law: some patrimonial cases

III.B.1. Introduction: some aspects of international labour law and international tort law

First, I will make some comments on international patrimonial law, in particular, in respect of international labour law and tort law.

If one considers ‘modern’ PIL in relation to international labour law and ‘modern’ PIL in relation to tort law, one finds that these fields have undergone change and ‘modernisation’ under the influence of principles such as the protection of the weak party, the protection of the victim and attention for human rights principles. The relevant rules have sometimes been incorporated into legislation harmonised at the European level.⁸⁹ In the field of international labour law, examples include the Brussels Convention and the Brussels Regulation, the European Convention on the Law Applicable to Contractual Obligations and the plans for the conversion of this convention into a regulation. In the field of international tort law, the Brussels Convention and the Brussels Regulation are important as well; at the European level, there are no harmonised rules of applicable law as yet, but they are being prepared, in particular, in the context of the proposal for a ‘Rome II’ regulation.

The conversion of the Brussels Convention into a regulation did not involve any fundamental discussions or revisions in respect of rules of jurisdiction, recognition and enforcement in the field of international labour law and international tort law. But debates are currently being held on specific aspects of the proposal for a Rome II Regulation and a Rome I Regulation – concerning rules of applicable law in the area of unlawful acts (‘torts’) and contracts, respectively.

Intriguingly, the Explanatory Memorandum⁹⁰ to the Rome II Proposal argues that one of Europe’s objectives and concerns is the fight against environmental pollution, and, accordingly, Article 7 of the Proposal allows the victim to choose the most favourable law.⁹¹ The fight against environmental pollution turns out to be an objective that is

⁸⁹ Even though there may exist national differences in that case. On this issue, see, for example, A.A.H. van Hoek, *Internationale mobiliteit van werknemers [International Mobility of Employees]*, for example, p. 96. See also above, footnote 16.

⁹⁰ See the explanatory memorandum to the Proposal, pp. 18-19. The passage deserves to be quoted: ‘The basic connection to the law of the place where the damage was sustained is in conformity with recent objectives of environmental protection policy, which tends to support strict liability. The solution is also conducive to a policy of prevention, obliging operators established in countries with a low level of protection to abide by the higher levels of protection in neighbouring countries, which removes the incentive for an operator to opt for low-protection countries. The rule thus contributes to raising the general level of environmental protection. But the exclusive connection to the place where the damage is sustained would also mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union’s more general objectives in environmental matters, the point is not only to respect the victim’s legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other tort or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained would give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country’s laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the ‘polluter pays’ principle.’

⁹¹ Article 7 reads as follows: ‘The law applicable to a non-contractual obligation arising out of a violation of the environment shall be the law determined by the application of Article 3(1), unless the

considered so relevant as to have PIL regulations prepared in a manner useful for this purpose and in line with modern tendencies in respect of international tort law as well. But what about the objective of human rights promotion?, one wonders.

In the above Rome II proposal, the human rights issue, such as the protection of the freedom of expression, was discussed in the context of the law applicable to international defamation. And the principle of employee protection was discussed in the context of international labour law in connection with the preparation of the Directive on Services. In February 2006, both the proposal for a Rome II Regulation and the proposal for the Directive on Services were changed fundamentally⁹², but even so, these issues are illustrative examples and may serve as interesting case studies.

III.B.2. International labour law

As far as international labour law is concerned, the original proposal for a Directive on Services has caused quite a stir, also among PIL lawyers, in particular because the inclusion of the country-of-origin principle would put great pressure on 'modern' PIL. Specifically, this principle would result or would have resulted in changes in the rules regarding international employment contracts without any prior harmonisation or guarantees of minimum employee protection: the changes would relate or would have related to applicable law and internationally mandatory rules. De Schutter and Francq⁹³ showed in a recent analysis the extent to which the Directive on Posting of Workers, for example, would be transformed from a model of minimum to one of maximum protection, and how the foregoing, in view of the consequences of the *Inspire* case, could result in far-reaching 'regulatory competition'.

In discussions about the Directive on Services, it may become clear why the tendency to liberalise and stimulate the internal market, as envisaged by the Directive, would conflict with modern PIL principles concerning employee protection, as well as international tort law. 'Modern' PIL in relation to international tort law, serving the purpose of employee protection, was even presented as 'classical' PIL during the discussions, and it was recognized that the Directive would conflict with these PIL principles.⁹⁴

person sustaining damage prefers to base his claim on the law of the country in which the event giving rise to the damage occurred.'

⁹² See the Amended Proposal for Rome II COM (2006) 83 final, p. 18. In the new Rome II proposal (...), the entire issue of 'international defamation' was taken out of the sphere of application.

⁹³ O. De Schutter and S. Francq, p. 14: 'Les régimes nationaux de protection des droits des travailleurs sont mis en concurrence les uns avec les autres de manière accentuée dans un système régi, sans exception, par le principe du pays d'origine, et où les Etats Membres cherchent à attirer les entreprises afin qu'elles s'établissent sous leur juridiction », and they add in footnote no. 44: « L'on peut rappeler ici que, selon l'interprétation qu'en donne la Cour de justice, la liberté d'établissement des personnes morales leur permet de déterminer le lieu de leur établissement notamment en fonction du régime juridique qui sera applicable à leurs activités : ainsi, n'est pas constitutive d'abus la circonstance que la société n'a été créée dans un Etat Membre que dans le but de bénéficier d'une législation plus avantageuse, et ce même si la société en cause exerce l'essentiel, voire l'ensemble de ses activités dans l'Etat d'établissement – C.J.C.E., 30 September 2003, Inspire Art C-167/01 ». On the case law concerning Centros, Uberseering en Inspire Art, see also O. De Schutter, 'Monitoring Human rights in the Union as a Learning process', p. 23. And on the Directive on Services, see also O. De Schutter p. 24.

⁹⁴ See the Working document on the Proposal from the Committee on the Internal Market and Consumer Protection: (document 21.12.2004, DT551156ENG.doc PE 353.297v01-00, p. 5): '(...) The

Naturally, the foregoing is currently considered from the perspective of the protection against ‘social dumping’ and ‘unfair competition’ – to be understood as including local employee protection – but a further analysis shows rather complicated tensions, interactions and assessment processes between different principles and concerns: the fight against national protectionism and unfair competition; internationally mobile employee protection and local employee protection, etc.⁹⁵

III.B.3. International tort law

International tort law does not yet include any unified rules of applicable law at the European level. *Acquis communautaire* does not apply to this domain, although it should be pointed out that, unification apart, various countries seem to have focused increasing attention on the victim’s position and the like.

European rules of applicable law in the field of tort law are currently being prepared, in the form of a proposed regulation, the ‘Rome II Proposal’.⁹⁶ As discussions about this Rome II Proposal show, there are sometimes tensions between ‘modern PIL’ on the one hand and European concerns about stimulating the internal market on the other hand – see, for example, the tensions between the proposed Article 3 of the Rome II Regulation and the country-of-origin principle. It turns out that there are also tensions between the original Proposal for a Directive on Services and modern PIL in respect of tort law, as was mentioned above.⁹⁷ The discussions on ‘a Community public order’ held in the context of the Rome II Proposal are also worth mentioning!⁹⁸

But Article 6 of the Rome-II Proposal in particular, which concerns ‘international defamation’, has given rise to much discussion. Article 6, which deals with ‘Violations of privacy and rights relating to the personality’, reads as follows: ‘1. The law

country of origin principle conflicts with existing and much more specific instruments such as Rome I and the time-honoured principles of international private law.’

⁹⁵ See also in this context the discussions in PIL on the interpretation of the words “temporarily employed” and “the country in which the employee habitually carries out his work” in Article 6 (2) (a) of the Rome Convention, sometimes explicitly taking into account this kind of considerations and concerns. See e.g. A.A.H. Van Hoek, “Het toepasselijk recht op arbeidsovereenkomsten – een reactie op het Groenboek EVO”, *Sociaal recht* 2003, p. 365 ff, also published on www.europa.eu.int See also the jurisprudence of the Court of Justice in cases such as *Arblade* (C-369/96 and C-376/96, Judgment of 23 November 1999; the Court of Justice stated in this judgment, among other things “1. Articles 59 of the EC Treaty (now, after amendment, Article 49 EC) and 60 of the EC Treaty (now Article 50 EC) do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to pay the workers deployed by it the minimum remuneration fixed by the collective labour agreement applicable in the first Member State, provided that the provisions in question are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply”; in consideration 34 it was argued “Even if there is no harmonization in the field, the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (...)”, followed in consideration 36 by “The overriding reasons relating to the public interest which have been acknowledged by the Court include the protection of workers (...)”. See also in this context *supra* § II.A.2.a.2.

⁹⁶ Proposal for a European Regulation on rules of applicable law on international tort law, COM (2003) 427 final, 22.7.2003.

⁹⁷ Cfr *supra* § III.B.2.

⁹⁸ See *supra* § III.B.2.

applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.’ The discussions centred on considerations – some of which partly overlapping each other at times – such as the freedom of the press, privacy protection, stimulation of the market through the introduction of the country-of-origin principle in relation to ‘modern PIL’ (paying more attention to the victim’s expectations, the place where damage was sustained, etc.), difficulties in handling the requirement that the publisher should comply with different laws, if the law of the residence of the victim or the law of the place where the damage was sustained would be applied, fear that publishers would have to comply with foreign press laws in order to avoid civil liability, namely the constant threat of being sued under other foreign laws and the negative impact this might cause, as this could prevent a newspaper published from extending their activities abroad, in relation to ‘internal market concerns’, in relation to the need to apply the country-of-origin principle and the fact that the publisher will be more reluctant to publish in other countries if he can’t rely on ‘his own law’, in relation to the unpredictability of the necessity to comply with various tort laws, which would not be in line with the country-of-origin principle of the internal market, etc.⁹⁹

In the Commission’s modified proposal of February 2006¹⁰⁰, international defamation was finally left out of the scope of the Rome-II Proposal: ‘Taking into account the difficulties to articulate a inter-institutionally generally acceptable and balanced solution as regards the question of defamation by the media (Article 6 of the original proposal), the Commission decided to propose the exclusion of that issue from the scope of the proposed Regulation, paving the way for the adoption of the Regulation.’

III.B.4. In conclusion: need to stick to PIL principles?

Issues of international labour law and tort law often include discussions on the country-of-origin principle or ‘the home country rule’ as associated with the principle of ‘mutual recognition’. It has by now become clear that the introduction of this principle may give rise to fundamental questions¹⁰¹ and opposition¹⁰² in PIL.

⁹⁹ For a description, see the « Summary and contributions of the consultation « Rome II » (commentary on the original draft proposal) – in the original draft proposal, the application of the law of the residence of the victim was proposed (art. 7); but newspaper and broadcasting industries stated that Art. 7 ‘does not strike a fair balance between the freedom of the press and the personal integrity of the victim of defamation. The fear was expressed that publishers would have to comply with foreign press laws in order to avoid civil liability), as well as the Explanatory Memorandum on the Rome II Proposal – here, it is argued ‘(...) the Commission has been sensitive to concerns expressed both in the press and by certain Member States regarding situations in which a court in Member State A might be obliged to give judgment against a publisher with its own nationality A under the laws of Member State B, or even a third country, even though the publication in dispute was perfectly in conformity with the rules applicable in Member State A. It has been pointed out that the application of law B could be unconstitutional in country A as violating the freedom of the press. Given that this is a sensitive issue, where the Member States’ constitutional rules diverge quite considerably, the Commission has felt that Article 6(1) should make it explicitly clear that the law designated by Article 3 must be disapplied in favour of the *lex fori* if it is incompatible with the public policy of the forum in relation to freedom of the press’.

¹⁰⁰ See *supra*, footnote 92.

¹⁰¹ See, e.g., M. Fallon and J. Meeusen, ‘Private international law in the European Union and the exception of mutual recognition’, *Yearbook of Private International Law* 2002, vol. 4, pp. 37-66.

¹⁰² See, e.g., M. Hellner, «The country of origin principle in the E-commerce Directive: a conflict with conflict of laws?» in *Les conflits de lois et le système juridique communautaire*, E. Pataut et al. (ed.).

If one considers the country-of-origin principle as a PIL rule, then this may have far-reaching implications. It could entail the partial abandonment of modern PIL. It could mean that principles such as the protection of the weak party in an international legal relationship would become less important. Consequently, the question arises whether the introduction or proliferation of the country-of-origin principle could also jeopardise the protection of human rights. If this is the case, it might be argued that there is a strong need to stick with PIL rules and unify these rules in areas where this has not happened yet.

But in general, it turns out that ‘modern’ PIL in relation to international labour law and international tort law may sometimes come under pressure and may even conflict with current European incentives. And as modern PIL includes principles such as ‘protection of the weak party’, it turns out that European incentives conflict with such principles, and with what is designated as ‘human rights protection’. Based on a first analysis, the provisional answer to the question whether modern PIL should be adhered to – contrary to European incentives – could be, viewed from the perspective of human rights promotion, that in areas where PIL has already been unified in Europe and instrumentalised based on principles such as the protection of the weak party, a case should be made out for adhering to this result, notwithstanding new European incentives to the contrary.

III.C International family law

III.C.1. A first analysis: ‘modern’ PIL tends to concur with European incentives on PIL and human rights

A first survey of the dynamics in respect of international family law, considered in its relation to European developments and human rights, shows a somewhat different picture.

This sub-discipline of PIL has a long tradition of balancing the objectives of international harmony against other objectives, such as favouring divorce possibilities; modern PIL seems to be developing in the direction of increased party autonomy, recognition of rights contrary to provisions in the national law of the persons concerned, liberalisation of international family law.

Developments concerning European interference in international family law essentially relate to the central principle of the free movement of EU citizens and their family members. Legislation enacted to date and recent jurisprudence by the Court of Justice interfering with the laws of Member States¹⁰³ show that the ‘European tendency’ to promote this free movement involves liberalisation of international family law, in the sense of stimulating party autonomy, stimulating increased possibilities in the international law of names, as well as stimulating divorce possibilities. Partly in order to avoid situations of international disharmony

See also the reactions on the initial idea to introduce the country-of-origin-principle in the Directive on unfair commercial practices (Directive concerning Unfair business-to-consumer commercial practices, OJ L 149/22, 11 June 2005).

¹⁰³ See, for example, the Brussels II bis Regulation as well as the decisions in *Garcia Avello*, and the Opinion in the *Grunkin* case. European intervention sometimes turns out to go even further than what is strictly required if one wants to promote human rights – see, for example, the manner in which the Brussels II bis Regulation incorporates the ‘*favor divortii*’ principle.

(avoiding 'limping situations'), and to avoid 'loss of rights' in the case of migration – concerns also inspired by the need to avoid obstacles persons may encounter if they exercise their right of free movement – solutions are found that essentially result in more far-reaching liberalisation of international family law.

In this context, modern tendencies in PIL seem to concur with European objectives, all in all. And a first analysis reveals that human rights may definitely support this 'combined' tendency towards the increased liberalisation of PIL. This means that the foregoing justifies the conclusion that international family law is in special need of European incentives to support PIL, should there be a wish to promote human rights. Because at the end of the day, the objective of promoting the free movement of persons and the objective of promoting human rights, such as family life protection, could be a very good match, and liberal PIL rules fit in with this development very well.¹⁰⁴

Even so, it is appropriate to make two remarks about the above general observation.

III.C.2. First remark: implications of the predominantly national nature of international family law

First, it should be borne in mind that much of international family law has not been unified in Europe yet. To be sure, there are supranational sources – conventions – that relate to international family law, which originate mainly from the Hague Conference; but even where these sources exist, they have been ratified only by a few countries. For this reason, PIL is still predominantly national. In several Member States, 'favor tendencies' may be distinguished in this national PIL – especially to be understood as tendencies to liberalise PIL – which could be indicated as 'modern international family law', but at various levels. This is often connected with the 'liberal' nature of the substantive divorce law: if, for example, the national substantive divorce law is rather rigid, the international divorce law is often rather rigid as well – by contrast, in the Netherlands both the substantive and the international divorce law are extremely liberal nature. In other words, the tendency to liberalise international family law may be very manifestly present in a specific country, but, to a lesser degree, in some other European legal systems. This also explains why there is resistance against European developments in specific countries.

Recently, Europe has taken unification initiatives in the field of international family law. A regulation such as Brussels II bis incorporates the principle of '*favor divortii*' to an important and far-reaching degree, and in the field of applicable divorce law, arguments seem to be based on the '*favor divortii*' principle. From a broader perspective, European PIL developments show liberalist tendencies, which causes resistance in specific Member States with less liberal PIL rules; arguments are being raised to put a stop to the increasingly far-reaching liberalisation tendencies. For example, Meeusen advocated in favour of setting a limit on unbridled developments

¹⁰⁴ As far as the concurrence of European incentives with PIL and human rights is concerned, see V. Van Den Eeckhout, 'Communitarization of Private International Law: tendencies to 'liberalise' international family law', tijdschrift@ipr.be (accessible through www.ipr.be) 2004, pp. 52-70 and V. Van Den Eeckhout, 'Communitarization of international family law as seen from a Dutch perspective: what is new ? A prospective analysis', in A. Nuyts and N. Watté (ed.), *International civil litigation in Europe and relations with Third States*, Bruxelles Bruylant 2005, pp. 509-561, see also J. Meeusen, 'The personal status of migrants' and J. Meeusen, 'System shopping'.

in the direction of liberalism, for example, by introducing specific rules of applicable law or by accepting that, under specific circumstances, grounds for refusal are used at the stage of recognition of rules drawn up abroad, and, in a more general sense, by advocating a restriction on the obligation to recognise rules adopted abroad to those situations where human rights are involved: '(...) human rights protection constitutes an inevitable limit to the Member States' private international law. As the ECJ characterizes human rights as general principles of Community law, they are pertinent in all contexts of Community law, including those where private international law is at issue within the scope of application of Community law. Their intervention can reinforce mutual recognition, as Advocate General Jacobs submitted in *Grunkin-Paul*, and so increase the pressure which EC law puts upon private international law. In cases where no human rights are involved, which probably still is the case for the right to marry a person of the same sex, Member States should accept that private international law rules can result in the non-recognition of a marital, or other personal, status obtained abroad without that this should necessarily be seen as obstructing intra-Community freedom of movement in an unacceptable way', says Meeusen¹⁰⁵. Meeusen¹⁰⁶ calls for 'a better balance through harmonization of choice-of-law rules and a proper interpretation of public policy'. Meeusen argues that 'the Community legislator should search for a proper balance between the internal market requirements and the proper goals and values of private international law in family matters, instead of allowing the latter to be completely absorbed by system shopping and mutual recognition which do not suit in all respects its peculiarities.'

In this context, it is crucial to know the extent to which Europe may 'push' the Member States in the direction of more far-reaching liberalisation of their PIL. Of course, there are extensive discussions on the right to protect national cultural or moral values. A focus on the protection of these values could certainly slow down tendencies to liberalise international family law. This means that the key question is the following: to what extent should the tendency to liberalise international family law, as pushed along by European incentives and human rights principles, take account of resistance put up by Member States? And, as an additional question: should intervention be confined to situations where human rights are involved, or would it be desirable if Europe intervened in the direction of liberalisation in a broader sense, in particular where human rights as such are not involved and where modern PIL should be based on principles such as *favor matrimonii* and *favor divortii*? In other words, should the *favor* tendency be limited to a degree of liberalism enforced by human rights and should the remainder be left to the Member States, or should PIL evolve in the direction of *favour* even further?

III.C.3. Second remark: Sometimes, the protection of human rights means that it may be better NOT to 'go along with European concerns'

It was argued above that one of Europe's concerns is to avoid situations of international disharmony; after all, situations of international disharmony – also known as 'limping relationship' – may be an obstruction to persons who wish to move within the Union and these are, in this sense, conducive to the internal market. It turns out that the human rights doctrine may also help to achieve a situation of

¹⁰⁵ See, e.g., J. Meeusen, 'The personal status of migrants at the interaction of human rights, private international law and European Union Law', and J. Meeusen, 'System shopping in European private international law in family matters'.

¹⁰⁶ See J. Meeusen, 'System shopping in European private international law in family matters'.

harmony, as it supports the recognition obligation. Certainly where foreign law is more liberal than the law applicable in a specific Member State and if the possibility of invoking this foreign law can be enforced in that Member State – partly by relying on the doctrine of human rights – or if the possibility of arranging for the recognition of rights achieved abroad as a result of the application of this law is enforceable in that Member State, this may give an impetus to the creation of ever more liberal PIL focussed on '*favor*', which at the same time fosters international harmony, and may go some way towards preventing the 'loss' of rights in the case of migration, and does not discourage people from moving freely within the Union.

It should be recognised, however, that invoking the human rights doctrine may sometimes give rise to a situation of international disharmony, too. In at least two situations, which are briefly explained below, invoking the human rights doctrine could give rise to this kind of situation.

III.C.3.a. If human rights are used as a 'defence mechanism', refusing to apply foreign law

The first situation where invoking human rights may cause international disharmony is where the application of human rights in a 'liberalising' way results in specific rights being granted to people who "normally" do *not* have these rights – for example, the situation where the national, normally applicable law governing the person involved in the legal relationship fails to offer the possibility that is available if human rights are invoked, and where this person's country of origin will not be prepared to recognise the legal relationship created in this way. In spite of the prohibitory provisions in the national law of the relevant person, a legal relationship is created that will not be recognised in the relevant person's country of origin. In these situations, concerns for human rights in the sense that such invocation should guarantee a right – or, to put it more broadly, concerns for '*favor*' principles – turn out to be in conflict rather than concur with concerns for creating a situation of international harmony. If this human right is recognised, it may be very difficult for the person concerned to move to the country that refuses to recognize the legal relationship created in this way.

It is also conceivable that foreign law that would normally be applicable in Member State A is more flexible than the national law of Member State A, and the application of that more flexible law would as such be more in line with '*favor*' tendencies, but that there are objections based on human rights considerations against the application of this law. A classic example in this context is the concept of minor marriage. If, in this hypothesis, Member State A fails to apply foreign law, it is apparently unwilling, under these conditions, to create a legal relationship that would probably be recognised in the country where the legislation is in force. If, after their request has been rejected, the persons concerned subsequently create the desired legal relationship under foreign law, and if Member State A persists in its refusal to recognize this legal relationship, then there is a situation of international disharmony. In this situation, it could be argued that the observance of '*favor*' tendencies may prompt the application of foreign law, whereas the observance of human right principles is incompatible with it. Accordingly, in this hypothesis, the persons concerned are not permitted to retain their 'rights' held in their country of origin in the case of migration, or if they submit their request in Member State A.

This and the earlier mentioned hypothesis (where foreign law is more rigid or more flexible, respectively, than the law applicable in a specific Member State) show the extent to which the observance and a specific interpretation of human rights may sometimes concur and at other times conflict with concerns relating to international harmony as well as with concerns relating to the preservation of rights in the case of migration; in this context, the '*favor*' principle sometimes concurs but at other times conflicts with the argument of international harmony.¹⁰⁷

If one considers how PIL deals with such different situations, it is found that PIL sometimes accepts the potential lack of international harmony without any scruples. In this context, the aforementioned decision of the German Constitutional Court¹⁰⁸ dating from the 1970s may be highlighted again: at the time, Spanish law prohibited marriages involving a divorced person; in Germany, however, a Spanish man, exercising the right to enter into a marriage, was allowed to marry a German divorcee, in the knowledge that the marriage would not be recognized in Spain. Initially, the German Federal Court had prohibited the solemnization of the marriage and had invoked the argument of protection of the woman (and the children born of a limping marriage) against the negative effects of a limping marriage. In this way, this court wanted to avoid the solemnization of a limping marriage at all costs, even against the will of the persons concerned, under the banner of achieving a situation of international harmony. Later on, this decision was reversed by the German Constitutional Court. The Constitutional Court dismissed the Federal Court's reasoning as being paternalistic and invoked the argument of the freedom to marry as a fundamental right. The Court considered that it is the future spouses' responsibility to take the risk of a limping legal relationship, while the competent authorities are only obligated to point out this risk to them and cannot protect the spouses against their will. This would be incompatible with the fundamental right of the freedom to marry and with the idea that only the spouses are responsible for themselves.

In this context, reference may also be made to Section 3 of the Marriages (Conflict of Laws) Act, as cited above¹⁰⁹, which provides, for example, that a foreign prohibition against interreligious or interracial marriages does not apply in the Netherlands. Recently, the issue emerged in relation to PIL rules for same-sex marriages, in particular, in debates held on the desirability to anticipate the fact that a same-sex marriage will not be recognized in the national law of the relevant prospective spouse, in particular, by prohibiting this person from entering into such marriage. Even though in same-sex marriages, it does not concern a human right, Dutch law permits such marriages subject to specific conditions.

By now, PIL has gained some experiences with the type of situation described above. Now the question arises how this should be evaluated in the current European context, where it seems to be the ambition to have PIL function in a manner that does not hinder the mobility of persons, and ease of mobility turns out to

¹⁰⁷ On the diffuse relationship between '*favor*' principles on the one hand and principles relating to international harmony on the other, see also V. Van Den Eeckhout, '*Internationaal privaatrecht en migratierecht*' ['Private international law and Migration Law'], and V. Van Den Eeckhout, '*Review P.M.M. Mostermans, Echtscheiding. Praktijkreeks IPR*', *NIPR* 2000, pp. 38-41.

¹⁰⁸ See *supra* § II.C.2. See V. Van Den Eeckhout, *Huwelijk en echtscheiding*, p. 300 ff, in particular footnote 1307 (with further references), footnote 1308 and footnote 1314.

¹⁰⁹ See *supra* § II.C.2.

be very much connected with 'international harmony'. The question then arises whether in this day and age, one should take account of the fact – to a greater extent than before – that a legal relationship created in one Member State may not be recognized elsewhere. Or should the focus be on quite the opposite nowadays, on the obligation of that other Member State – in the case of the Spanish man who wanted to marry: Spain – to recognize a legal relationship created abroad, despite the rules of national law, so that international harmony will be achieved in the long term? To what extent should the principle of nationality be adhered to as a connecting factor – can nationality be used as a connecting factor only in a 'liberalising' sense, or also in the sense that restrictions and prohibitions as incorporated into a person's national law may be heeded in a country that does not have these restrictions and prohibitions in its legal system? What is, in this context, the significance of the principle of non-discrimination based on nationality applicable in EU law? Does it make any difference in this context, whether such issues concern human rights or not?¹¹⁰ etc.

III.C.3.b. If human rights are used as a 'defence mechanism', refusing to recognize what has been created/recognized in another Member State

Sometimes human rights are applied as a defence mechanism in respect of the request for recognition of legal relationships created elsewhere: if these legal relationships were created in violation of principles of human rights, recognition could be refused on this ground, although this could result in a situation of international disharmony, as one country fails to recognize legal relationships legally created in another country. Classic examples in this context include the confrontation with minor marriages concluded abroad, repudiations abroad, etc.

¹¹⁰ For a treatment of a number of these issues, in a period dating back to a time before the phenomenon of the Europeanisation of international family law (and with a strong focus on *favor*), see, for example, V. Van Den Eeckhout, *Huwelijk en echtscheiding in het Belgische conflictenrecht [Marriage and Divorce in the Belgian Law of Conflicts]*. For a treatment of a number of these issues after the phenomenon the Europeanisation of international family law emerged, see V. Van Den Eeckhout, 'Communitarization of Private International Law: tendencies to 'liberalise' internationally family law', tijdschrift@ipr.be 2004, pp. 52-70, especially p. 63. On the *Garcia Avello* case, see M. Bogdan, 'The EC Treaty and the use of nationality and habitual residence, as connecting factors in international family law' (arguing that one could interpret the case as only offering the possibility to apply the national law if the person involved himself asks for this – without any obligation to apply the national law, e.g. in cases where the national law would be more restrictive: writing on the *Garcia Avello* case, Bogdan says: 'It must be stressed that the judgment cannot be interpreted to require the application of the law of the country of citizenship against the will of the person concerned. In fact, it can be argued that Union citizens have the right to demand the application of the law of the Member State where they reside, in order to avoid being discriminated in comparison with local nationals'). In this way, Bogdan also talks about non-discrimination based on nationality, viewed from the perspective of the mobile EU citizen who may be confronted in a specific Member State, where nationality is used as a connecting factor, with a prohibition in that national law, which prohibition is not applicable in the Member State where the relevant person is resident to this State's own citizens, and where this EU citizen raises the argument that he is confronted with nationality discrimination. See also several other contributions to this conference, presented at the JAI Conference, 'What international family law is 'necessary for the proper functioning of the internal market?' An inquiry into the desirability of European private international law in family matters, with special regard to its legality, scope and implications in practice', organized in Antwerp, Belgium, 21-22 October 2005, about problems and complications in applying 'nationality' as a connecting factor – e.g. to determine in some cases what *is* the 'home country', etc.

The exercise of human rights in this way is especially but not exclusively¹¹¹ known in a situation where one Member State is confronted with a legal relationship created in a non-European legal system, which relationship may involve non-European citizens as well.

This could also concern, for example, the situation where Member State A has already recognized the repudiation of two non-European citizens, possibly on the basis of a specific interpretation of human law principles, but where Member State B takes a more strict position, also on the basis of a specific interpretation of human law principles. Seen from a European perspective, two questions arise in this hypothesis.

III.C.3.b.1. Impact of the debates on the legal position of third country nationals

First and foremost, questions involving the ‘jurisdiction’ of the European institutions to intervene in situations of this kind should be addressed; as far as this issue is concerned, up-to-date studies carried out by European migration law experts relating to the legal position of non-EU citizens¹¹² seem to be relevant to me. I am mainly interested in discussions about the question whether and to what extent arguments used in dealing with obstacles encountered by EU citizens wishing to exercise their right of free movement can also be applied to the obstacles encountered by third country nationals using the rights acquired by them under Community law, in particular in the area of mobility within Europe. It is also relevant to consider the question of who can rely on Article 12 of the EC Treaty (only EU citizens or also third country nationals?) and the question of the fields in which this Article 12 can be invoked, and the implications of such invocation. Considered in this PIL context, the question arises to what extent PIL rules relating to non-EU citizens fall under the European institutions’ power to carry out checks, where viewed from the perspective of the free movement of persons and the freedom of movement within Europe and/or ‘non-discrimination based on nationality’.¹¹³ What are, above all, the implications of

¹¹¹ As far as the relationship between Member States are concerned, see also the grounds for refusal to recognise (*inter alia* on the basis of ‘violation of public order’) included in the Brussels II Regulation and the Brussels II bis Regulation – although it must be borne in mind that these grounds for refusal are particularly restricted (on this subject, see Meeusen, system shopping); Cf. also, in patrimonial cases, the grounds for refusal as included in the Brussels Convention – now transformed into the Brussels Regulation. In this context, see also the Court of Justice’s decision in the *Crombach* case. In this context, I also refer to the debates on the concept of a ‘Community public order’ (supra, under III.B.3.).

¹¹² See P. Boeles, ‘*Burgerrechten van Europese burgers en derdelanders*’ [‘Civil Rights of European Citizens and Third Country Nationals’], in: *Europees Burgerschap*, Den Haag: TMC Asser Press 2003; P. Boeles, ‘*Europese burgers en derdelanders: wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam ?*’ [‘European citizens and third country nationals: what has been the meaning of the prohibition against discrimination based on nationality since Amsterdam?’], SEW 2005, p. 500 ff and M.K. Bulterman and P.J. Slot, ‘*Harmonisatie van wetgeving betreffende migrerende EU-burgers en derdelanders. Op weg naar een uniform toetsingskader*’ [‘Harmonisation of Legislation concerning Migrating EU Citizens and Third Country Nationals. On the road to a uniform framework for assessment’], SEW 2005, p. 348. Bulterman and Slot also propose assessing the legal position of third country nationals, or certain aspect of that, from the perspective of ‘non-discrimination based on nationality’ or the non-hindrance of free movement; even if this is not ‘immediately’ possible, the same dynamics should play a role, according to Bulterman and Slot.

¹¹³ On the issue of the permissibility of nationality as a connecting factor in PIL, see also J. Meeusen, ‘*De europeanisering van het internationaal privaatrecht. Kanttekeningen bij recente institutioneelrechtelijke ontwikkelingen en bij de impact van het communautair verbod van nationaliteitsdiscriminatie*’ [‘The Europeanisation of Private International law. Comments on Recent

the outcome of these debates on the legal position of third country nationals for the checking power and for the method of assessment of the Court of Justice in PIL matters involving non-EU citizens? To what extent can arguments and considerations in relation to non-discrimination based on nationality and freedom of movement within the Union be advanced that are also relevant to PIL matters involving third country nationals?

It is clear that the PIL legislation that has been issued to date could certainly involve third country nationals as well. This is evident if one looks at the formal scope of application of the 'Brussels II' and 'Brussels II bis regulations'. But the question relates to the jurisdiction of the Court of Justice and the arguments the Court of Justice were to embrace as far as third country nationals are concerned, more specifically, in relation to Articles 12, 17 and 18 of the EC Treaty.

As far as the enactment of PIL legislation is concerned, there is another crucial question that needs to be addressed for the future and that may be relevant to both third country nationals and EU citizens: to what extent is it necessary and desirable to enact common legislation in the field of the (non-)recognisability of family-law relationships created outside the Union, but subsequently 'imported' into the Union, where it will possibly start to 'circulate'?¹¹⁴ Where De Schutter¹¹⁵ says that Union interference is sometimes necessary to protect human rights, the question arises whether Union interference may also be necessary in matters involving the PIL

Institutional Developments and the Impact of the Community Prohibition against Nationality Discrimination], in *Migratie- en Migrantenrecht* no. 10, *Recente ontwikkelingen – Europa in het vreemdelingenrecht [Recent Developments, Europe in Aliens Law]*, Brugge: Die Keure 2004, pp. 248-290. As far as these aspects are concerned, it is certainly worth considering the *Grunkin* Opinion and the *García Avello* case. In *García Avello*, nationality discrimination was the central theme. But what if third country nationals are involved? In the Opinion in the *Grunkin* case, the focus was not on discrimination based on nationality, but free movement obstacles. See nos. 51 ff of the Opinion in the *Grunkin* case, which includes the following passage: '51. In *García Avello*, the Court noted in essence that Belgian practice treated in the same way those with Belgian nationality alone and those with dual Belgian and Spanish nationality, with the result that the latter would have different surnames under the two legal systems. That being likely to give rise to practical difficulties, there was discrimination on grounds of nationality. The principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way. 52. All the parties having submitted written observations consider that there is no such discrimination in the present case. At the hearing, even Mr Grunkin did not appear to argue that there was discrimination on grounds of nationality. I agree that there is none. 53 It is clear from the relevant German legislation (15) that all those who have German nationality alone are treated in the same way, and that all those who have (or whose parents have) more than one nationality are treated differently but quite without discrimination as regards their nationality. 54. Leonard Matthias is, however, from a practical point of view in a position closely comparable to that of the García Avello children if in the Member State of his nationality a different surname must be registered from that which he bears in the Member State of his birth. While the practical difficulties which he is likely to encounter may not stem from discrimination on grounds of nationality, they constitute a clear obstacle to his right as a citizen to move and reside freely within the territory of the Member States. Although such difficulties may be of a similar kind to those encountered by Mr Konstantinidis, the combined effects of Articles 17 and 18(1) EC mean that it is now unnecessary to establish any economic link in order to demonstrate an infringement of the right to freedom of movement.' What implications are we facing in similar case involving third country nationals who are hindered from exercising rights, such as migration within the Union, as a result of PIL complications?

¹¹⁴ On this subject, see also V. Van Den Eeckhout, '*Internationaal privaatrecht en migratierecht* ['Private International Law and Migration Law'] and V. Van Den Eeckhout, '*Communitarization of International Family Law as seen from a Dutch Perspective*'.

¹¹⁵ O. De Schutter, «Monitoring Human rights in the Union as a Learning Process».

assessment of family relationships created outside the Union and then ‘imported’ direct into the Union, or created outside the Union, then imported into the Union, where it turns out that these qualify or do not qualify for recognition in a specific Member State, after which their status is submitted for assessment in another Member State. In such hypotheses, one may face various ways of assessing aspects of human rights by the Member States. This observation immediately prompts the second type of question that may arise in this context.

III.C.3.b.2. Link with the problems advanced in the ‘Omega case’

As a matter of fact, a second type of question could be raised in connection with the hypothesis advanced above, in particular the question of the significance of the *Omega* case in these situations¹¹⁶, specifically in issues involving the freedom of Member States to use their own ‘interpretation’ of human rights, even if this means that an obstacle to one of the four fundamental European freedoms is created.

III.C.4. Conclusion: need of support for European incentives!?

All in all, quite complicated situations can arise in the context of international family law, and quite complicated issues can arise. But, returning to what I stated in the introduction¹¹⁷, it seems legitimate to adopt the general attitude that if human rights are to be promoted in the domain of international family law, there is mainly a need for supporting European incentives – where European incentives are to be understood as European interference with international family law as inspired by ‘European concerns’ relating to the stimulation of the internal market, in particular the stimulation of the free movement of persons.

III.D. Need for a more profound and broader analysis

In my opinion, it is sensible to deepen the analysis in the fields mentioned above – both international patrimonial law and international family law – and certainly to involve other fields in the analysis as well. In respect of other fields, too, attempts could be made to position the doctrine and significance of human rights in the area of tensions between European law and PIL. By pursuing this line of action, it could become easier, in my opinion, to establish the position that had best be adopted from the perspective of human rights promotion in current PIL debates, and how, from the perspective of human rights protection, the PIL discipline may attempt to represent PIL either as an obstacle to the internal market or advance it as a tool that could be helpful in the process of European integration and the encouragement of the internal market, what lessons can be learned from PIL, and, in a more general sense, what may be expected from PIL in the context of human rights promotion.

IV. Conclusion: Should PIL emerge from its cocoon and enter a new phase?

And this brings me to my initial definition of the question, in particular the question of PIL as an exotic wallflower or a well-integrated participant in various companies and more specifically, the position that PIL may have for the purposes of this project. It

¹¹⁶ ECJ 14 October 2004, C-36/02. See also, e.g., M.K. Bulterman and H.R. Kranenburg, ‘What if rules on free movement and human rights result in conflicting obligations? About laser games and human dignity: the Omega Case’, *European Law Review* 2006, no. 1 volume 31, pp. 93-101 and T. Ackermann, *Common Market Law Review* 2005, pp. 1107-1120. See also O. De Schutter, ‘Monitoring Human rights in the Union as a Learning Process’, p. 17-18 and O. De Schutter, ‘The implementation of the EU Charter of Human rights through the Open Method of Coordination’, p. 8 ff, under ‘Human rights as exception to fundamental market freedoms.’

¹¹⁷ See *supra* § III.C.1.

seems to be worth the trouble to keep an eye on some of the points mentioned above and give further substance to these.

If one examines such questions concerning PIL, human rights and European law, one finds oneself, as it were, 'at the crossroads' of various disciplines interacting with each other; in this context, attention should be paid both to 'classical' studies and to up-to-date studies concerning recent developments and dynamics, and the manner in which these interact with each other. Both studies into the interaction between human rights and European law – for recent publications on this issue, see the studies addressing the problems of the *Omega* case – and studies into the interaction between PIL and human rights (old discussions, for example those relevant in the above decision by the German Constitutional Court of 4 May 1971), and into the interaction between PIL and European law ('classical' and 'new' debates, before and after the Europeanisation of PIL) would ultimately have to be combined in an analysis of the interaction between PIL, European law and human rights. This type of analysis had been partly carried out even before the Europeanisation of PIL. For example, this could relate to analyses about the principle of non-discrimination based on nationality in the confrontation with the '*cautio judicatum solvi*', or about the principle of 'fair trial' as a ground for refusal for recognition in the Brussels Convention.¹¹⁸ At this juncture, after the Europeanisation of PIL, debates are being conducted about questions raised in the context of the *Garcia-Avello*¹¹⁹ and *Grunkin* cases¹²⁰, the legislation to be drafted in the field of international tort law, the impact of the country-of-origin principle, the concept of a 'community public order' etc.

All in all, from the perspective of this project, which is focused on the ambition to find ways of promoting human rights, the following crucial questions emerge: what role may PIL be expected to play if human rights are to be promoted? What position would lawyers wanting to promote human rights have to take in PIL issues, and how should they take account of PIL issues? And what lessons can lawyers 'learn' from PIL as a discipline or the debates in PIL that may still be conducted?

If one tries to answer such questions, one defies PIL, as it were, to emerge from the safe, snug cocoon in which the discipline has wrapped itself until now. PIL will then have the opportunity to develop into a full-fledged and worthy participant in this project.

¹¹⁸ In this context, see, e.g., ECJ 28 March 2000, Case C-7/98 Krombach, and studies thereon.

¹¹⁹ C-148/02, Judgment dated 2 October 2003.

¹²⁰ C-96/04. The Opinion dates from 30 June 2005. Judgment dated 27 April 2006.

The Promotion of Fundamental Rights by the Union as a contribution to the European legal space (III): the Role of European Private International Law.

By V. Van den Eeckhout
Universiteit Leiden, 2006.

I. Introduction

I.A. The position of PIL in the project: an exotic wallflower or a well-integrated participant?

I.B. The limitations and scope of the Paper

II. PIL: Relevant to the project in at least three ways

II.A. PIL as a likely 'target' when debating the outcomes of the use of OMC: a reason to anticipate this outcome, and to include PIL aspects in the project at this moment already? (mainly about the impact of human rights on PIL)

II.A.1. OMC will sooner or later appeal to PIL (= 'direct' impact of human rights on PIL)

II.A.1.a. Point of departure: about the functions of OMC

II.A.1.b. Two reasons why PIL is a likely target

II.A.1.b.1 PIL is a discipline dealing with externalities in private law issues

II.A.1.b.2. PIL has already been communitarised

II.A.1.c. The current situation: PIL is in an interplay of forces

II.A.1.d. Ambition: instrumentalisation of PIL from the perspective of human rights promotion within the Union!?

II.A.2. Another ambition should be to examine how certain initiatives outside PIL would affect PIL ('indirect' impact of human rights on PIL)

II.A.2.a Substantive law harmonisation

II.A.2.a.1 Implications for issues of 'internationally mandatory rules'

II.A.2.a.2. Problems raised in the *Ingmar* Case: the scope of harmonised law and its effects on party autonomy

II.A.2.b Introduction and proliferation of the country-of-origin principle – mutual recognition

II.B. Introduction/maintenance of a specific type of PIL rules as one of the 'conditions of success' and 'flanking measures' of the project? (= mainly about the impact of PIL on human rights)

II.B.1. Introduction: some observations about OMC

II.B.2. Attention for PIL rules which could 'promote' human rights

II.B.2.a. PIL rules may create domino effects

II.B.2.b. Stimulating reflection on the differences between legal systems: becoming familiar with foreign rules through PIL

II.B.2.c. Harmonization of internationally mandatory rules under specific conditions?

II.B.2.d. Using specific PIL rules in defining certain ‘terms’ in Community legislation

II.B.3. Attention for PIL rules which could slow down and impede human rights protection and which could contribute to a backlash

II.B.3.a. The risk that PIL Rules may serve as an ‘excuse’ to stop further evolution

II.B.3.b. Risk of introducing principles such as ‘mutual recognition’ by using the ‘country-of-origin principle’ and present these as PIL rules

II.C. Is it useful to pay attention to PIL issues because PIL can be considered a discipline from which lessons can be learned in a more general way? (= mainly about debates on human rights within PIL)

II.C.1. Introduction

II.C.2. ‘Transferability’ issues in PIL debates

II.C.3. ‘Availability’ issues in PIL debates

II.C.4. Scope and characteristics of Community law – delimitation of intra-Community cases and the issue of reverse discrimination

III. Appendix: first explorative attempt to position, in a fragmentary way, the convergence or tension between ‘old’ (classical) and ‘new’ (European) tendencies to instrumentalise PIL and its interaction with human rights

III.A. Two preliminary and general remarks

III.A.1. Remark about ‘the essence’ of PIL and its implication in analyzing the interaction between PIL, European incentives and human rights

III.A.2. Remark about the basically ‘national’ nature of PIL and its implications in analyzing the interaction between PIL, European incentives and human rights

III.B. PIL outside family law: some patrimonial cases

III.B.1. Introduction: some aspects of international labour law and international tort law

III.B.2. International labour law

III.B.3. International tort law

III.B.4. In conclusion: need to stick to PIL principles?

III.C International family law

III.C.1. A first analysis: ‘modern’ PIL tends to concur with European incentives on PIL *and* human rights

III.C.2. First remark: implications of the predominantly national nature of international family law

III.C.3. Second remark: Sometimes, the protection of human rights means that it may be better NOT to ‘go along with European concerns’

III.C.3.a. If human rights are used as a ‘defence mechanism’, refusing to apply foreign law

III.C.3.b. If human rights are used as a ‘defence mechanism’, refusing to recognize what has been created/recognized in another Member State

III.C.3.b.1. Impact of the debates on the legal position of third country nationals

III.C.3.b.2. Link with the problems advanced in the ‘Omega case’

III.C.4. Conclusion: need of support for European incentives!?

III.D. Need for a more profound and broader analysis

IV. Conclusion: Should PIL emerge from its cocoon and enter a new phase?