Jurisdictional Rule "x" in the Conflict of Laws – Challenges of Policy and Security in Internet Torts with Business Implications

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INTRODUCTION

International litigation has remained important despite some challenges in efforts to attain solutions to conflict of laws problems. For example, the initial phase of the Hague Judgments Project was unsuccessful.[1] The revived Judgments Project succeeded and led to the Hague

[1] The Hague Judgments Project which did not succeed in 2001, was revived in 2012 and the final Convention (the Judgments Convention) was concluded in July 2019 <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> accessed 11 October 2020. The initial project, however, resulted in the Hague Choice of Court

Judgments Convention on Foreign Judgments becoming a reality.[2] This Convention focuses on jurisdiction in terms of recognition, but it offers some indication as to what grounds of direct jurisdiction may be permissible.[3] Although the current Convention covers civil and commercial matters, it excludes some subjects from its scope. One such subject is defamation.[4] No consensus could be found in this "rapidly developing area",[5] although it is fair to extend this description to the Internet generally.[6] Thus, this aspect was excluded from the scope of the Judgments Convention.[7] Although the Judgments Convention has the potential to facilitate international litigation, the exclusion of defamation is also a reality check that there is scope to maximise conflict of laws rules in effort to find solutions to challenges that litigants face. The grounds of direct jurisdiction remain a matter of practical importance in international litigation, and this is underscored by the Internet. It is difficult to agree on the appropriate forum or fora with respect to the exercise of jurisdiction in defamation cases. Furthermore, it is considerably difficult to accept any rigid rules on parallel proceedings concerning global defamation cases. This is because there is a lack of mutual trust with respect to the substantive law standards applied.[8]

The steady advancement of the Internet highlights the need to promote security which is usually covered rather tangentially in literature on the conflict of laws.[9] This article considers two major senses in which security is used with respect to the Internet. The first is ensuring that things are done as may be required.[10] The second is exploiting the inadequacies of

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Convention which has been on force since 2015 <https://www.hcch.net/en/instruments/conventions/status-table/?cid=98> accessed 11 October 2020.

[2] The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

[3] Direct jurisdiction essentially connotes bases on which courts in foreign jurisdictions hears cases, rather than the bases on which a court would recognise or enforce judgments from such foreign jurisdictions. Considering the 2005 Choice of Court Convention and the 2019 Judgments Convention, current discussions concerning direct grounds of jurisdiction and parallel proceedings have been have been described as "the last piece of the puzzle": <https://www.hcch.net/de/projects/legislative-projects/jurisdiction-project> accessed 11 October 2020.

[4] Art 2(1)(k) of the Judgments Convention.

[5] David P Stewart, 'The Hague Convention Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters' (2019) 133(4) The American Journal of International Law 772, 776. As will be discussed later, policy issues also influenced this exclusion.

[6] See generally, Thomas Schultz, "Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface (2008) 19(4) The European Journal of International Law 799. See Pedro de Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar Publishing Limited, 2020) para 1.06.

[7] The exclusion covers the defamation of both natural and legal persons. On why defamation is sensitive for many states vis-à-vis freedom of expression and constitutional implications, see Francisco Garcimartín and Geneviève Saumier, Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Text Adopted by the Twenty-Second Session): Explanatory Report Art 60 <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf> accessed 11 October 2020.

[8] Ibid. An important part of the background here is the controversy over choice of law in relation to defamation in the UK in the discussions on the Private International Law (Miscellaneous Provisions) Act 1995 and Rome II which both ended up excluding defamation, see e.g. Paul Beaumont and Peter McEleavy *Anton's Private International Law* (3rd edn, Sweet and Maxwell 2011) paras 14.42-14.47.

[9] This is so even though the relationship between public international law and private international law is now much less tenuous than may have been initially considered. In the context of the Internet, see Henry H Perritt, "The Internet is Changing International Law" (1998) 73(4) Chicago-Kent Law Review 997.

[10] There may be a need to "secure the attendance of witnesses", "secure the performance of the jurisdictional agreement contained in the contract", "secure the application of the law of a third country". Sometimes a party

complex technology to evade the performance of obligations or to cause loss to others.[11] As will be further explained shortly, the realities of the Internet compel an inquiry into the complementarity of both senses with a view to facilitating legal redress. In this context, there are challenges at global and regional levels. This paper proceeds on the basis that strictly national approaches to Internet matters are unsustainable in the long term. The focus on security in this context should be distinguished from other general meanings of security which may be also applicable to conflict of laws.[12] Secured transactions, for example, fall outside the remit of this paper even though Internet challenges clearly affect such areas.[13] Nevertheless, such areas of overlap are also instructive because they serve as a reminder that certain challenges may sometimes compel private international law actors to look beyond the traditional confines of conflict of laws. For example, security interests in intellectual property have driven a convergence of intellectual property, private international law, and security interest law.[14] Like the Internet, the issue of security challenges the traditional boundaries and approaches to conflict of laws. More cross-subject synergy is required and more international collaboration. There is currently "insufficient international coordination and coherence to address cross-border legal challenges on the internet."[15]

It is necessary to consider how much space conflict of laws is willing to cede not just to public international law, but also to government regulatory schemes in the context of local laws. For example, parties may decide to focus more on reporting regulatory breaches under regional or even national legislation rather than pursue claims in contract or tort/delict.[16] From a tort standpoint, the same set of facts may give rise to both public[17] and private law claims in defamation.[18] More than ever, the need for collaborative endeavours across jurisdictions is pertinent.[19] A central aim of this paper is to ascertain the extent to which there can be a

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may "seek instead to secure the jurisdiction of the court in breach of the arbitration agreement" in which case there may be a need for the court to restrain the claimant. See Lawrence Collins (ed),*Dicey, Morris and Collins on The Conflict of Laws* (15th edn, Sweet & Maxwell 2012) paras 16-042, 12-004,

[11] On when conflict of laws rules "become a tool to facilitate the public policy goal of cybersecurity" in the context of Chinese courts exercising "jurisdiction solely based on the location of a server", see Jeanne Huang, "Chinese Private International Law and Online Data Protection" (2019) 15(1) Journal of Private International Law 186, 196.

[12] E.g. Security in terms of securing the return of children who are wrongfully removed or retained. See Maria Caterina Baruffi, "A child-friendly area of freedom, security and justice: work in progress in international child abduction cases" (2018) 14(3) Journal of Private International Law 385; "security features" of the Apostille Certificate" <https://www.hcch.net/de/instruments/conventions/status-table/notifications/?csid=363&disp=resdn> accessed 10 October 2020.

[13] Cohen argued that the Model Law's conflict of law rules did not focus on "modern methods of disposition not connected to any particular place, such as disposition via Internet auctions". Neil B Cohen, "The Private International Law of Secured Transactions: Rules in Search of Harmonization Private International Law of Secured Transactions" (2018) 1 Law and Contemporary Problems 203, 221 see the UNCITRAL Model Law on Secured Transactions 1995.

[14] T Kono and K Kagami, "Functional Analysis of Private International Law Rules for Security Interests in Intellectual Property" (2017) Perspectives in Law Business and Innovation 119.

[15] In a recent survey, 79% of surveyed stakeholders thought so and 95% agreed that such cross-border challenges will become more acute within 3 years. See the Key Findings of Internet & Jurisdiction Policy Network "Release of the World's First Internet & Jurisdiction Global Status Report" (2019) pp 14 and 35.

[16] Anthony Gray, "Conflict of Laws and the Cloud" (2013) 29 Computer Law & Security Review 58, 62.

[17] E.g., judicial review. See *Butt v The Secretary of State for the Home Department* [2019] EWCA 933 para 3.

[18] E.g., damages and related claims ibid para 4.

[19] For the argument that "all states are co-equals in the global task" of Internet regulation, see Schultz (n 6) 815.

flexible approach to the exercise of jurisdiction in defamation cases considering business implications and competing State interests. This article, therefore, addresses what jurisdictional rule "x" might be. This is especially so as there is no agreement on what rule is ideal with respect to the Internet.

This article focuses on the breach of obligations that have business implications. In particular, the focus is on the overlaps between commercial interests and defamation from the standpoint of jurisdiction in conflict of laws. Contracts and torts have their differences, but both are included in this paper because the Internet is a common denominator. There is also a connection between defamation and business. Publication of defamatory matter may damage not only damage a person's reputation but also international business.[20] The paper, in the context of defamation, focuses on the implications of torts and commerce. Before the Internet, it may have been more understandable to maintain traditional barriers between areas of law, but this has changed. Despite the challenges that exist in adopting a collaborative effort to harmonise rules of jurisdiction in defamation cases, there should be a gradual convergence of harmonisation efforts concerning commercial implications and the effects of defamation. Conflict of laws rules in the EU, England and North America are compared because these jurisdictions are advanced in the use of the Internet from the standpoint of legal regulation. Developing countries such as those in Africa (Kenya and Nigeria are used as examples in this paper) generally have much less experience in this regard and relevant laws are often not fit for purpose. In many cases there are no modern laws on Internet defamation. This is a major legal gap that has implications for such countries and developed countries because activities on the Internet are inextricably connected. This article is also significant because, through the analysis that it undertakes, developing countries can decide what jurisdictional rules may be useful in resolving Internet disputes that concern defamation.

This paper argues that the speed of Internet evolution compels proactiveness and restraint. In this context, the middle ground should be flexibility in the exercise of jurisdiction concerning obligations via the Internet. Relevant conflict of laws rules should help to ensure that obligations are performed with reasonable certainty in the context of the Internet (one major sense in which the "**security of obligations**" is used).[21] The influence of conflict of laws is at a crossroads. Although the influence is being consolidated through the successful work of the Hague Conference, certain items are excluded during convention negotiations on a pragmatic basis to increase the chances of agreement and signatories.[22] Nevertheless, the features of the fast-evolving Internet have increased the potential to escape obligations. For example, this may be direct through fraudulent schemes in civil or commercial matters and indirectly in terms of vulnerability (considering party or even subject matter). It is critical that the increased potential to escape obligations via the Internet does not weaken the influence of conflict of laws. The first point, therefore, is to consider the policy that should underpin the exercise of jurisdiction in Internet related activities. Such a policy should be current,

[20] Trevor C Hartley, ' "Libel tourism" and conflict of laws' (2010) 59(1) ICLQ 25, 30; *CFC Stanbic Bank Limited v Consumer Federation of Kenya (COFEK)* [2014] EKLR para 31.
[21] Text to notes 10 and 11.
[22] Shultz (n 6) 815.

pragmatic, and forward looking. Such jurisdictional policy should be articulated on at least two levels. First, this paper urges a deliberate consideration of challenges that Internet activities pose to the security of obligations when parties are involved in cross-border activities with commercial implications. An example is fraud. Second, there should also be a clear articulation of how parties' individual vulnerabilities should be factored in when jurisdiction is exercised in both commercial and other civil matters. An example is the need to perform non-contractual obligations especially when there are business interests.

It is in the Interest of all jurisdictions to collaborate on activities conducted via the Internet concerning the conflict of laws. Also, it is important for developing jurisdictions such as those in Africa, to benefit from international or global collaborations for practical reasons including Internet penetration.[23] If for example, a claimant is required to sue where publication takes place or downloaded, such a claimant may find that such a place may not be the jurisdiction with which the claimant is familiar. Reputational damage may be greatest in another jurisdiction altogether and it is important to determine appropriate courts to hear cases. Business interests (e.g., financial loss) have implications for obligations in the context of this paper and it is important for conflict of laws to engage in this space considering Internet challenges. The foundational task is to first ascertain the place of policy and security with respect to the Internet in the conflict of laws.

I. Contemporary Drivers of the Internet

A) Policy and Security

The term "policy" sometimes evokes concerns that have been associated with "public policy" in the conflict of laws over many years.[24] Nevertheless, policy has become an important aspect of the Internet world regarding information ("information policy")[25] generally or more specific reference to "substantive legal policy."[26] Even the latter can be difficult to pin down.[27] As a matter of policy, for example, English courts generally favour litigation only once and in

[23] Interpret penetration refers to the percentage of a population that has access to the Internet. This should be distinguished from the number of people who have access to the Internet generally. Internet penetration is more practically useful in assessing the advancement of any jurisdiction as a whole with respect to the Internet. For example, China has the largest number of Internet users but Europe has the highest Internet penetration rate. See Joseph Johnson, "Internet Usage Worldwide – Statistics and Facts" 25 Jan 2022 https://www.statista.com/topics/1145/internet-usage-worldwide/#dossierKeyfigures accessed 30 March 2022.
[24] Robert Kramer, "Interests and Policy Clashes in Conflict of Laws" (1958) 13 Rutgers Law Review 523, 558.
[25] "Information policy". See Joel R Reidenberg, "Lex Informatica: The Formulation of Information Policy Rules through Technology" (1997) 96(3) Texas Law Review 553, 554
[26] On "Substantive legal policy", see ibid 554.
[27] Reidenberg argued that substantive legal policy was in a state of flux. Ibid.

the most appropriate forum.[28] A legal system may be hinged on a policy that calls for an end to litigation.[29]

For the purposes of this article, "policy" embodies "the adjustment of the clashing interests" between the State and individuals.[30] In this regard, a policy may not be entirely based on legislative enactments, judicial decisions, or administrative rules. Sometimes, policies may be articulated beyond such traditional contexts and may be expressed in "an edict of the market place".[31] This persuasive characterisation is relevant to this article because the Internet is a marketplace of interests. The question of policy has been a significant but much understated point regarding the Internet. Yet, this is critical to determining and streamlining policies that should shape the laws that govern the Internet. Trying to address relevant transnational policy issues may sometimes result in a legal arms race or even more conflicts.[32] Matters of policy have the potential to influence the outcome of cases.[33] It is also difficult to conduct any serious inquiry into the use of traditional conflict of laws rules in an Internet era without an understanding of the policies that underpin such rules.[34]

As a matter of policy, it is also critical to have "security and predictability in the law governing the assumption of jurisdiction by a court".[35] Such security protects legal certainty and predictability. For example, the Canadian Supreme Court considered that it was important but challenging to reconcile fairness with the need for security, stability, and efficiency.[36] This perspective was underscored by the same court in a later Internet defamation case.[37] While this perspective is clearly valid, there is considerable scope to argue for an expansive consideration of such policy in a practical and purposeful manner. In fact, the seminal report on the impact of the Internet on efforts to have unified global rules on foreign judgments recognised the need for security in the sense of legal certainty as well as the security of transactions in a more general sense.[38] In highlighting the importance of successfully regulating electronic signatures, for example, the report noted that "more advanced targeting

[28] *Du Pont v Agnew* [1987] 2 Lloyds Rep 585, 589. See also *Vitol Bahrain EC v Nasdec General Trading LLC* [2013] EWHC 3359 (Comm) para 46.

[29] The US District Court for the Eastern District of Pennsylvania went as far as stating that it was irrelevant to this policy whether a foreign court would recognise a US judgment. *Somportex Limited v Philadelphia Chewing Gum Corp*., 318 F Supp. 161 (E.D. Pa. 1970) 168.

[30] Kramer (n 24) 526.

[31] ibid

[32] See the Internet & Jurisdiction Global Status Report 2019 p 14 <https://www.internetjurisdiction.net/uploads/pdfs/GSR2019/Internet-Jurisdiction-Global-Status-Report-2019_web.pdf > accessed 11 October 2020.

[33] Todd D Leitstein, "A Solution for Personal Jurisdiction on the Internet" (1999) 59(2) Louisiana Law Review 565, 584.

[34] David Wille (1998) 87(1) Kentucky Law Journal Personal Jurisdiction and the Internet--Proposed Limits on State Jurisdiction over Data Communications in Tort Cases 95, 97

[35] *Club Resorts Ltd v Van Breda* (2012) SCC 17 para 73.

[36] ibid

[37] *Haaretz.com v Goldhar* (2018) SCC 28

[38] Avril D Haines, "The Impact of the Internet on the Judgments Project: Thoughts for the Future" (Prel. Doc. No 17) para 15

software or blocking technology may provide solutions to some of the jurisdictional issues described".[39]

Policies have a direct impact on defamation generally and in the context of the Internet. For example, the protection of reputation goes beyond the interests of individuals or their families. As the English House of Lords once observed: "Protection of reputation is conducive to the public good".[40] Relevant policies can be further illustrated through the impact of globalisation, the need for certainty and protecting freedom of speech.[41] Such freedom of expression is a major reason for considering defamation as a "sensitive matter for many States" and why it was excluded from the scope of the Hague Judgments Convention of 2019.[42] To this extent, the exclusion of defamation was a policy decision in favour of avoiding the adjustment of clashing interests.[43] However, there is no consensus whether the rationale for this decision is appropriate. For example, a leading scholar on conflict of laws relating to the Internet argued:

> *[…] Art 2(1)(k) of the 2015 draft Convention[44] excluded defamation from its scope. While such an exclusion has both advantages (e.g. avoiding having to tackle a particularly controversial area) and disadvantages (e.g. a missed opportunity to tackle a particularly controversial area), it is difficult to see why judgments rendered in defamation disputes were excluded if judgments rendered, for example, in data privacy disputes[45] were not.[46]*

Thus, there is a need for a coordination of relevant policies which is clearly challenging.[47] Nevertheless, there is a forceful argument that "a conflicts problem" arises if policies differ via-à-vis interest clashes in which case it would be necessary to investigate the rationale for the policy of States.[48] Other policies are the need to recognise foreign systems, parties' legitimate interests and practical considerations that are associated with multistate defamation.[49] Governments are typically in charge of policy making and they have been

[39] Ibid para 17 and footnote 46 on "the confidence of businesses and consumers in the security of transactions conducted electronically".
[40] *Reynolds v Times Newspapers* [2001] 2 AC 127, 201.
[41] David Rolph, "The Message, Not the Medium: Defamation: Publication and the Internet in Dow Jones & (and) Co Inc v. Gutnick' (2002) 24 Sydney L Rev 263.
[42] Para 60 of the Explanatory Report.
[43] This is primarily between States but, indirectly, with the involvement of individuals as the major focus of conflict of laws.
[44] See also Art 2(1)(k) of the Hague Judgments Convention 2019.
[45] The exclusion of privacy does "not extend to judgments ruling on contracts involving or requiring the protection of personal data in the business-to-business context". See para 63 of the Explanatory Report.
[46] Dan Jerker B Svantesson, "The (Uneasy) Relationship between the HCCH and Information Technology" in Thomas John, Rishi Gulati, and Ben Köhler (eds) The Elgar Companion to The Hague Conference on Private International Law (Edward Elgar Publishing Limited 2020) 449-463, 458.
[47] On the relationship between policy approaches to the Internet from national and international perspectives, see Haines (n 38) paras 6 and 7.
[48] Kramer (n 24) 528.
[49] ibid

moving further into the Internet space rather than ceding this space.[50] Such intervention is usually through regulatory means and oversight functions. However, conflict of laws rules have a direct relationship with regulation as well. There is a persuasive argument that "several of the HCCH's recent initiatives directly engage with regulating activities wholly or partly carried out on the Internet. It is in this context that the Internet has proven to be a significant challenge".[51] It is therefore necessary to explore how such different regulatory approaches can be compatible.

Where conflict of laws concerns are influenced by regulation, a careful navigation of relevant considerations is important in considering the exercise of jurisdiction. In considering what would amount to a closer connection with the forum for example, it is not enough to engage in an exercise of "simply counting connecting factors" since they do not have the same effect or weight.[52] This is a reality for the exercise of jurisdiction in a strict sense.[53] It is critical that conflict of laws promotes and guarantees a "sense of security for individual rights".[54]

The policy that underpins a jurisdictional rule and the jurisdictional rule itself are not necessarily the same. Both may be different.[55] In cases that concern the Internet, however, it is critical that the risk of any such disparity is reduced to a bare minimum. Given that policy has become of particular importance in Internet matters, any such disparity can easily cause potential confusion and the introduction of other regulatory considerations in a manner that significantly undermines legal certainty.

In *J McIntyre Machinery Ltd v Nicastro*,[56] the New Jersey Supreme Court was influenced by "significant policy reasons" and asserted jurisdiction over an English company.[57] There was a "strong interest in protecting its citizens from defective products".[58] In reversing the decision of the lower court, the US Supreme Court argued that the policy reason was strong but that had to be balanced with constitutional restraints.[59] In an extensive dissenting opinion, however, Justice Ginsburg argued that the majority opinion put US plaintiffs at a disadvantage when compared with similarly situated complainants elsewhere.[60] This opinion was made in

[50] See for example, James Allen and Nico Flores, "The Role of Government in the Internet" (Final Report for the Dutch Ministry of Economic Affairs 2013) <https://www.analysysmason.com/globalassets/x_migrated-media/media/analysys-mason-report-for-ministry-of-economic-affairs-230413.pdf > accessed 11 October 2020.
[51] Svantesson "The (Uneasy) Relationship between the HCCH and Information Technology" (n 46) 454
[52] Aukje AH van Hoek, "Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?" (2014) 3 Erasmus Law Review 157, 161-162.
[53] Although jurisdiction and choice of law must never be conflated, courts in practice find it necessary to refer to certain overarching considerations. For example, for a combined analysis of the Rome Convention concerning choice of law and the Brussels regime on jurisdiction, see Case C-29/10 *Koelzsch v État du Grand-Duché de Luxembourg* paras 3-10.
[54] *Somportex Limited* (n 25) 169. The court relied on a 19th century case in this regard: *Goodyear v. Brown*, 155 Pa. 514, 518, 26 A. 665, 666 (1893).
[55] In *Aspen*, the UK Supreme Court distinguished between the rationale for a ground of jurisdiction and the ground itself. See *Aspen Underwriting Ltd v Credit Europe Bank NV* [2020] UKSC 11 para 45 of *Aspen*.
[56] *J McIntyre Machinery Ltd v Nicastro* 546 US 873 (2011).
[57] Ibid 11-12.
[58] Ibid 11-12.
[59] Ibid 12.
[60] Ibid 17.

the context of the Brussels Regulation[61] that jurisdiction would be asserted where the harmful act occurred.[62] This case does not concern Internet jurisdiction. Also, the resolution of conflict of laws issues are subject to US constitutional restrictions considering due process that requires substantial connection between the defendant and the forum. Nevertheless, the case is important because there was a consideration of policy issues that underpin the conflict of laws generally. The policy that should govern the Internet should be dynamic and conflict of laws should be adapted accordingly.

B) The Effect of Policy on Internet Jurisdiction

As most conflict of laws rules were developed before the Internet age, it is only natural that the adequacy of such rules have been interrogated considering the challenges which the Internet pose. Thus, it has been argued that national laws are "inappropriate" because the Internet has an international character.[63] Closely related to this point is the argument that such laws were created in the context of the physical world.[64] This latter argument is more visible in relevant literature because it is rather glaring.[65] The former argument reflects fine details for some reasons. First, the latter argument is prone to misinterpretation because by its nature conflict of laws is traditionally anchored to national laws. Even countries which have agreed to a wider framework (e.g., at a regional level) retain national rules applicable in relevant situations.[66] Secondly, conflict of laws rules are designed to apply to activities that have an international character. I In developing conflict of laws rules that should evolve and adapt to changing situations, it is necessary to consider how national and international rules interact.[67]

The question of policy difference is reflected in the traditional perspectives from which US and English laws consider defamation.[68] The former (especially in the context of the US Constitution) has usually adopted a more liberal attitude than the latter, a development which left its mark on Internet law. For example, it was argued that the exercise of English

[61] Art 5 of Brussels 44/2001.
[62] *Nicastro* (n 56) 18.
[63] José Edgardo Muñoz-López, "Internet Conflict of Laws: A Space of Opportunities for ODR" (2009) 14 Int Law: Rev. Colomb. Drerecho Int. 163, 167.
[64] Ibid.
[65] Asensio observed that traditional rules were based on "geographical considerations". See Asensio (n 6) para 1.24.
[66] For example, the UK (subject to Brexit) has applied the Brussels regime on civil or commercial matters. Yet, it maintains jurisdictional grounds under statute and the common law.
[67] Gilles argued that the UK Parliament and courts should "re-affirm the national in international private law by adjusting the existing rules to reflect the benefits of EU [conflict of laws], or assimilating jurisdiction rules with an eye towards future legislative co-operation at the international level". Gilles considered the English Civil Procedure Rules and the Civil Jurisdiction and Judgments Act 1982 (Schedules 4 and 8 of the Act). See Lorna E Gilles, "Appropriate Adjustments Post Brexit: Residual Jurisdiction and Forum Non Conveniens in UK Courts" (2020) 3 Journal of Business Law 161, 183.
[68] This difference extends to some other major common law jurisdictions such as Australia which considers that US defamation law "leans heavily" in favour of defendants. See the Australian Internet defamation case of *Dow Jones and Company Inc v Gutnick* [2002] HCA 56 para 188.

jurisdiction considering "traditional jurisdiction principles" was unreasonable.[69] Thus, in the light of a "US policy favoring extensive protection of speech", there is a need to factor in the right of states to not only prescribe law but also adjudicate claims that concern the Internet.[70] Businesses would rather not deal with consumer protection or privacy laws to ensure maximisation of profit. For example, companies would prefer one-click agreements.[71] The need for an appropriate policy is sometimes glossed over because policy may be understood only in a socio-political or international relations context.[72] However, policy has a deeper implication than this perspective. Indeed, the lack of a clear policy with respect to jurisdiction contributed to the failure of the initial Hague Judgments Project where there were attempts to harmonise rules of jurisdiction.[73] The question of policy itself started on a broad level but did not lead to any result that could facilitate an agreement on torts such as defamation.[74]

There is considerable force in the view that the Internet does not necessarily require a radical overhaul of traditional jurisdictional rules.[75] At the turn of the 21st century, the Australian High Court adapted traditional jurisdictional rules to an Internet defamation case.[76] The appellant, an Australian businessman brought libel proceedings in the state of Victoria. The material appeared in a weekly financial magazine and the appellant's website. The appellant argued that the case should be heard in New Jersey where the material in question was uploaded even though it had online subscribers in Victoria. The appeal was dismissed, and the Victorian High Court exercised jurisdiction especially as he was claiming for damage of reputation within Victoria. At the time, this provided a much-needed precedent on how to deal with Internet defamation. The Victorian High Court also rejected the single-publication doctrine[77] which was well favoured in the US,[78] but rejected by the English House of Lords in *Berezovsky*.[79] Significantly, an interpretation of policy also influenced the court with respect to maintaining the possibility of separate claims.[80] There is a tendency to gloss over the

[69] Kurt Wimmer, "International Liability for Internet Content: Publish Locally, Defend Globally" in Adam Thierer and Clyde Wayne Crews (eds), *Who Rules the Net? Internet Governance and Jurisdiction* (The Cato Institute 2003) 256.
[70] Ibid 258.
[71] Ibid 264.
[72] E.g., Cox argued that the US should adopt a "robust global internet freedom policy". See Christopher Cox, "Establishing Global Internet Freedom: Tear Down This Firewall" in Thierer and Crews (eds) (n 52) 10.
[73] On the negotiating parties' struggle with Internet issues at the time, see Michaels, "Two Paradigms of Jurisdiction" (2006) 27 Michigan Journal of International Law 1003, 1069.
[74] E.g., the "country of origin" and "country of destination" approaches were combined in jurisdiction concerning Internet torts. See s 10 of the 2001 Interim Text.
[75] Bigos argued that "a radical overhaul of jurisdictional rules" was not necessary. See Oren Bigos, "Jurisdiction over Cross-border wrongs on the Internet" (2005) 54(3) ICLQ 585. Although writing in the context of applicable law, Mills argued that "defamation online is a twenty-first-century problem which remains regulated by a nineteenth-century rule". Alex Mills, "The Law Applicable to Cross-border Defamation on Social Media: Whose Law Governs Free Speech in Facebookistan?" (2015) 7(1) Journal of Media Law 34.
[76] *Gutnick* (n 68).
[77] Essentially, that in a libel claim the claimant has only one claim for each mass publication rather than a claim for each time there is a repetition.
[78] The Uniform Single Publication Act.
[79] And variants of the "global theory" such as a single cause of action. See *Berezovsky v Michaels* [2000] UKHL 25 – issue 4. See the dicta of Lord Steyn at 1012H-1013B.
[80] It contrasted the policies that underpinned the CJEU and US positions in Case C-68/93: *Shevill v Presse Alliance S.A.*

postscript in this case –there was not enough evidence to consider the salient issues from an Internet perspective.[81] In underscoring the influence of Internet technology on the law, there was a statutory intervention more than a decade later and the single publication rule was codified in England.[82] The rule was recommended by the Law Commission of Ontario,[83] based on "strong policy reasons".[84]

The Australian case of *Gutnick* was a sterling endorsement of the "genius of the common law…to adapt the principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems".[85] As such, the peculiarities of the Internet were insufficient policy basis to doubt the pragmatism of the common law to solve such problems.[86] Allowing the place of uploading as a determining factor, for example, would allow people to upload harmful material in a place that favours that and may make a party avoid liability in any meaningful way.[87] This, however, depends on how the issue is considered especially from the standpoint of Internet ubiquity.[88] While parties can reasonably expect to be sued in a certain jurisdiction if the need arises (e.g. because it set up an active office there from which business is carried on), this presence takes on a different meaning in an online environment. The implication is that while such a defendant may have been certain of liability in one or a couple of countries, the question of liability potentially arises globally. With limited resources, a company that provides online services can set up an office in one country and have most of its transactions in other countries around the world. An individual may suffer defamation in many countries around the world through the facilitation of the Internet. The question of what technical rules should apply is important. After all, conflict of laws is based on rules. If these rules are not well articulated or they are unclear, there will be impediments to solving conflict of laws problems and ensuring an efficient resolution of disputes. In trying to attain such articulation or clarity, it may be challenging to determine the extent to which traditional jurisdictional rules may be adapted for the purposes of the Internet. The precise contextual meaning of adaptation is debatable. In England, there was a statutory intervention.[89] This statute codified a test similar to *forum non conveniens*.[90] In the EU, there was an introduction of the claimant's "centre of interests".[91] This was apparently imported from international insolvency law – an area which would otherwise have no meaningful connection with defamation. In the case of the EU, the source from which centre of interests

[81] See the "Postscript" in *Berezovsky* (n 62).
[82] S 8 of the Defamation Act 2013.
[83] Law Commission of Ontario, Defamation Law in the Internet Age (March 2020, Final Report) <https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf> p 49
[84] Ibid p 48.
[85] *Gutnick* (n 68) para 92 (Kirby J).
[86] Rolph (n 41) 280.
[87] *Gutnick* (n 68) para 130 (Kirby J).
[88] For the use of "ubiquitous" or its variants in Internet cases, see e.g., *Gutnick* (n 68) paras 78 and 80; Case C-194/16 *Bolagsupplysningen v Handel* para 48; Joined Cases C-509/09 and C-161/10 para 45 of; Collins (n…). para 11-290.
[89] The UK Defamation Act of 2013.
[90] This will be discussed in detail later.
[91] See, in the context of natural persons, Joined Cases C-509/09 and C-161/10 *eDate Advertising Gmbh v X; Martinex v MGN Limited* para 52. For the relationship between "the victim's centre of interests" and where "the damage caused by online materials occurs most significantly", see *Bolagsupplysningen* (n 88) para 33.

was imported, reflects the focus on the defendant's (main) centre of interests. If these are mere adaptations of traditional jurisdictional rules, then such adaptation is arguably strained.[92] The question, therefore, goes beyond what technical rules should apply. If there is any merit in the argument that such changes go beyond mere adaptation of traditional rules, then it is also arguable that the changes came about considering an overarching consideration of policy dynamics. In other words, policy considerations have shaped the evolution of the law and jurisdictional rules concerning the Internet.

There is a need for a policy that can drive a flexible but effective approach that factors in the speed of technological dynamism on the Internet. This need should not be restricted to what law may be applicable.[93] For example, a rule of jurisdiction entirely based on the assumption of universal access considering the borderless nature of the Internet may require deeper analysis considering geo-location technology.[94] If the accuracy rates of this technology must be applied to a case, then this application should be subject to certain specifics that concern time, location and context.[95] Less than a decade is enough time for a change in technology to have a significant impact on the outcome of a case. In interpreting Article 7(2) of Regulation EU 1215/2012, for example, the CJEU decided that a person who alleged that his personality rights[96] had been infringed by the publication of incorrect materials concerning him could not bring an action for the rectification or removal of such information in the courts of each Member State where the information published was accessible.[97] This decision has, however, been criticised.[98] This is because the CJEU reasoning was based on the premise that an application for rectification or removal was a "single and indivisible application" since the scope of online distribution was "in principle, universal".[99] Yet the epiphany was provided much earlier when it was argued that more advanced targeting software or blocking technology could provide solution to some jurisdiction issues.[100] For example, the possibility of defending court actions in several jurisdictions.[101] This reflects the influence of technology on conflict of laws. Even so, such targeting based tests that have been used by some courts have evolved through an approach driven by flexibility and the need for security of

[92] For the argument that this is "a new ground of jurisdiction" even though it is similar to residence and domicile, see Trevor C Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (3rd edn, Cambridge University Press 2020) 359.

[93] Mills argued that the choice of law concerning cross-border online defamation "is not a matter of legal 'rationality' but a matter of policy". Mills (n 75) 25. Defamation is area where it is rather difficult to consider the applicable law in addressing jurisdictional issues.

[94] Essentially, a computer functionality that can identify location. Many "accept cookies" options which are increasingly standard not only enable this but also track user behaviour.

[95] Dan Jerker B Svantesson, "European Union Claims of Jurisdiction over the Internet –An Analysis of Three Recent Key Developments" (2018) 9 JIPITEC 113 para 57.

[96] In the EU, personality rights are usually used in a broad manner to cover defamation. E.g. Art 1.2(g) of Rome II.

[97] See *Bolagsupplysningen* (n 88) para 50(2).

[98] Svantesson (n 95) para 56.

[99] *Bolagsupplysningen* (n 88) para 48.

[100] Haines (n 38) para 15.

[101] Ibid para 4.

transactions and obligations.[102] This has arguably evolved since cases such as *King v Lewis.*[103] In this case, the English Court of Appeal observed that it was not helpful to distinguish jurisdictions which the defendant targeted because the defendant had targeted every jurisdiction where the material could be downloaded.[104]

The need to secure obligations underscores the importance of adopting both a practical and flexible approach that fully factors in the inevitability of State or government intervention. A glaring example is that the State may have a legitimate interest in the subject matter and thus such interests need to be balanced with others.[105] A more subtle example is the search for a substantial connection between the subject matter and the State.[106] In China, for about two decades, the location of the server has been used as a sole basis to exercise jurisdiction.[107] The policy reasons for this include national security, economy and political stability.[108] In contrast, it has since been argued that a territorial approach to the Internet through servers would create "jurisdictional mayhem".[109]

The need to promote the security of obligations can serve as a coalescing platform to address impediments to a pragmatic jurisdictional approach. If States are reluctant to divest themselves of intervention in Internet-related matters generally, then principal actors in private international law can leverage such governmental attitude with which some consensus may be attained. The borderless nature of the Internet concerns the nature and essence of the Internet rather than undermining the sovereignty or territorial authority of States. Thus, although States generally retain the power to regulate online activities,[110] it is also true that the effects of activities via the Internet transcend national boundaries and jurisdictions.[111] An analysis of such activities requires a consideration of relevant cases in terms of subject matter and the litigants involved.

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[102] Svantesson argued that targeting in its pure form offered little guidance to businesses and courts. See Svantesson "European Union Claims of Jurisdiction over the Internet –An Analysis of Three Recent Key Developments" (n 95) para 26. Social values in the context of the Internet are "a moving target" (it is also telling that this argument was not even made in the fast-evolving Internet context). See Lyrissa B Lidsky "Defamation, Reputation and the Myth of Community" (1996) 71(1) Washington Law Review 8.

[103] [2004] EWCA Civ 1329.

[104] ibid

[105] Svantesson "European Union Claims of Jurisdiction over the Internet –An Analysis of Three Recent Key Developments" (n 95) para 8.

[106] Ibid

[107] Jie Huang, "Personal Jurisdiction based on the Location of a Server: Chinese Territorialism in the Internet Era?" (2019) 36(1) Wisconsin International Law Journal 87. This is despite the fact that the technological features of the Internet can encourage situations where jurisdictional connections are deleted in a fraudulent manner. See Dan Jerker B Svantesson, *Private International Law and the Internet* (3rd edn, Kluwer Law International B.V. 2016) 364.

[108] Huang ibid.

[109] Darrel C Menthe (1998) 4(1) Michigan Telecommunications and Technology Law Review 69.

[110] Oreste Pollicino and Marco Bassini, "Free Speech, Defamation and the Limits of Freedom of Expression in the EU: A Comparative Analysis" in Andrej Savin and Jan Trzaskowski, *Research Handbook on EU Internet Law* (Edward Elgar Publishing Limited 2014) 508, 509

[111] Ibid

2. The Case and Parties

A) The Nature of the Case

The nature of the case is particularly relevant to defamation. This is a difficult question to determine because the effects of defamation may be felt in more than one place. It is a bit easier to determine this in the context of a particular state. US case law is illuminating in this regard. In *Calder v Jones*,[112] a California claimant brought a libel action in California against the defendants in Florida.[113] The US Supreme Court rejected the argument that the defendants had no "sufficiently purposeful" contacts with California because their employer was responsible for the circulation of the publication. In summary, California was the focal point of both the story/publication and harm suffered.[114] The tort of libel generally occurs wherever the material in question is circulated.[115] The US Supreme Court has consistently held that the California court correctly assumed jurisdiction in *Calder v Jones*.[116] There was an extensive consideration of the effects of the petitioner's Florida conduct in California. It would seem unreasonable to heap further hurdles on a claimant who has already suffered intentional defamation in a California weekly newspaper with a wide readership. In a subsequent case, the claimants relied on *Fiore* in arguing that jurisdiction should be exercised over an out-of-state resident. This case concerned seizure of a large amount of cash by Walden who was a deputized DEA officer at a Georgia airport. The claim was that Walden helped draft a false forfeiture affidavit that was forwarded to a United States Attorney's Office in Georgia. However, no forfeiture order was made, and the money was returned. The claimant then filed an action in the Nevada District Court. The question was whether Walden knew his allegedly tortious conduct in Georgia would "delay the return of funds to plaintiffs with connections to Nevada".[117] In upholding the US decision of the district court and reversing the decision of the Ninth Circuit, the US Supreme Court decided that the Nevada court lacked jurisdiction. The contacts were not enough, but there are some other points worth noting. Some policy considerations were arguably relevant. The DEA officer was working for the public safety, the claimant was carrying $97,000 in cash, and the officer followed due process. The "effects rationale" of *Calder v Jones*,[118] was held to be inapplicable in this case. In any case, the respondent's warning is particularly instructive. In the opinion of the respondent, deciding that there were insufficient minimum contacts in this case would lead to "unfairness in cases where intentional torts were committed via the Internet or other electronic means (fraudulent access of financial accounts or "phishing" schemes)."[119] The US Supreme Court declined to address this point and considered that virtual "presence" presented "very different questions".[120] Given the ease with which the Supreme Court

[112] 465 US 783 (1984); see also *Walden v Fiore* 571 U.S. 2014.
[113] *Calder v Jones* ibid 785
[114] Ibid 789
[115] In an Internet case, this should translate to where the publication was read or downloaded. *King v Lewis* (n 86); *Goldhar* (n 37) para 36; *Gutnick* (n 68) 56.
[116] E.g., *Walden v Fiore* (n 112) 277.
[117] Ibid
[118] 465 U.S. 783 (1984)
[119] *Walden* (para 112) see, in particular, footnote 9.
[120] Ibid footnote 9.

applied principles that underpin necessary connection with the defendant's conduct and the forum state, it seemed clear that the Internet dimension would require an extensive and careful consideration at the Supreme Court.

The need for such careful consideration may be illustrated through minimum contacts. If minimum contacts were established merely because a party accessed a website in a forum, it would in theory mean that countries which use minimum contacts standards could assert personal jurisdiction over any person who has a website.[121] Thus, without a sense of "substantive fairness", States that have a smaller online presence would suffer disadvantage.[122] This is a potentially complex area that requires practical considerations of how the Internet currently works and some room to understand it is evolving vis-à-vis private international law. In *Walden v Fiore*,[123] for example, the US Supreme Court avoided the question "whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' within a particular State".[124] The court opted to leave questions about virtual contacts "for another day".[125]

B) The Parties

To encourage the prospects of securing obligations concerning the Internet, there is also a need to consider which parties should be protected and in what circumstances or how. Some degree of fairness is necessary in determining when courts should exercise jurisdiction.[126] Parties have different means and there is considerable scope for debate as to whether the Internet bridges potential gaps of inequality or accentuates them. As a background, the tendency to protect certain parties can be highlighted in the real world of obligations. There are at least two levels of analysis. One can consider the status of the parties or the nature of the subject matter itself. A useful context to understand the subject matter may be provided through an analogous consideration of contractual aspects from the perspective of obligations. With regard to the nature of the subject matter, goods that are procured for individual needs or consumption require the consumer to be deemed as a weaker party.[127] After all, it is possible for a person to be a consumer in one circumstance and or the same person to be an "economic operator" in another circumstance.[128] In considering the nature and aim of a contract however, such a party may not be regarded as a consumer if the contract was concluded with a view to pursuing a trade or profession.[129] The EU provides a clear example in terms of insurance contracts.

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[121] Michael Gilden, "Jurisdiction and the Internet: The "Real World" meets Cyberspace' (2000) 7 ILSA Journal of International and Comparative Law 149.
[122] Uta Kohl, "Eggs, Jurisdiction and the Internet" (2002) 51(3) ICLQ 555, 582.
[123] *Walden* (n 112)
[124] ibid
[125] *Walden* (n 112). See footnote 9 of the judgment.
[126] It is, however, a more complex task to determine what such fairness should be and in what circumstances.
[127] Case C-269/95 *Benincasa v Dentalkit Srl.*
[128] Para 38 of the Advocate General's Opinion ibid.
[129] *Benincasa* (n 127) para 19.

The Brussels regime illustrates the important but difficult task of considering the categorisation of parties in exercising jurisdiction. For example, recital 18 of the Brussels recast regulation provides that weaker parties should be protected by jurisdictional rules more favourable to their interests than general rules. This applies to insurance, consumer and employment contracts. In *Aspen*, the High Court and Court of Appeal decided that protection was available only to the weaker party considering the "economic imbalance between the claimant insurer and the defendant".[130] However, both courts held that the bank was not a weaker party and could not rely on the protection afforded by section 3. Thus, both courts decided that the English courts had jurisdiction to hear the misrepresentation claims under art 7(2) and the harm occurred in England. The Supreme Court reversed the decisions of the lower courts and decided that there was no "weaker party" provision that removed a policy holder, an insured or a beneficiary from the protection of art 14.[131] As a matter of policy, therefore, those parties not expressly mentioned may be protected if this would be "consistent with the policy of protecting the weaker party".[132] This case does not concern defamation or the Internet. Also, the CJEU has observed that the special jurisdictional rules concerning tort pursue different objectives compared to the rules concerning weaker parties.[133] However, it does show that a case-by-case approach to determining which parties should be protected in the exercise of jurisdiction will undermine legal certainty. Such a protection should be driven by a deliberate policy, especially with a view to ensuring that obligations are enforced. It is critical to have clarity in such areas. Rather than get caught up in the criticism that the CJEU sometimes sacrifices fairness on the altar of certainty, the CJEU avoided a case-by-case approach by defining the "weaker party" broadly. This is regardless of the "size and form".[134] This clarity has been achieved by focusing on the injured party with the implication that an employer who continues to pay salary may be regarded as the "economically weaker party".[135]

Apart from the apparent overlaps between tort and certain business interests in *Aspen*, the case highlights the import of article 7(2) that in matters of tort a person domiciled in a member state may be sued in another member state. This will be in the courts of the place where the harmful event occurred or may occur.[136] However, the Brussels regime states that these alternative grounds of jurisdiction are "based on a close connection between the court and the action" or to promote the efficient administration of justice. A major aim is to prevent the defendant being sued in a court that "he could not reasonably have foreseen" especially

[130] *Aspen* (n 55) para 32.
[131] i.e. that claims may be brought only in courts of the Member State in which the defendant is domiciled. See *Aspen* (n 55) para 43.
[132] *Aspen* (n 55) para 43 – 44.
[133] Case C-194/16 *Bolagsupplysningen* (n 88) para 39.
[134] Case 340/16 *Landeskrankenanstalten-Betriebsgesellschaft — KABEG v Mutuelles du Mans assurances — MMA IARD SA* para 34.
[135] ibid.
[136] The UK Supreme Court earlier discussed this area in the context of "policy consideration", even though not in an Internet case. See *Four Seasons v Brownlie* [2017] UKSC 80 para 29. For the argument that, post-Brexit, "the UK courts' application of the doctrine of forum non conveniens will also become more prevalent, regardless of the defendant's domicile", see Gilles (n 67) 183.

in non-contractual matters of tort such as defamation.[137] These provisions indicate flexibility in dealing with defamation, even though it fell to the CJEU to determine how such flexibility may come about. An example is the claimant's centre of interests. The point here is that although the Brussels regime specifically mentions parties that should be protected in defamation matters, providing alternative grounds to the defendant's domicile suggests a focus on the claimant's position.[138] And the CJEU jurisprudence illustrates this. In addition to being able to sue where the defendant is domiciled[139] or established,[140] the claimant can also sue where such a claimant has his centre of interests.[141] The claimant could also bring an action with respect to all the damage in each court of the MS where content has been made online or accessible.[142] Each court would have jurisdiction only concerning damage caused within its jurisdiction. However, the CJEU jurisprudence further developed to prevent situations where a claimant could sue in the courts of each Member State.[143] The centre of interests approach has been criticised because the CJEU has taken a much less expansionist approach to jurisdiction in Internet torts concerning intellectual property.[144] There is merit in this argument, but the reluctance to extend that approach to other aspects of tort suggests the need for flexibility which is a central argument in this paper.

The extent to which types or categories of parties are relevant depends on some considerations including implied or express policy. The CJEU observed that the jurisdictional flexibility of the regime regarding defamation is not necessarily to protect the applicant but to ensure that justice is dispensed efficiently.[145] Thus, there would be no need to attach much weight to any distinction between natural and legal persons.[146] This even-handed approach is persuasive in principle. Even so, the centre of interests may not always coincide with habitual residence in the case of natural persons and the registered office in the case of legal persons. In practical terms, however, the flexibility is largely designed to favour the claimant. This is based on the premise that a person who published harmful content online is in a position to know the centre of interests with respect to the subject of that content.[147] In terms of securing obligations, the flexibility should help to not only prevent the defendant from

[137] Recital 16 of Brussels Recast (1 bis).

[138] It is a different thing to argue, as Bigos did, that the focus should be on the defendant's acts because the place where the offensive material was uploaded should be determinative for jurisdiction purposes. See *Bigos* (n 75) 605.

[139] Art 4(1) Brussels Recast (1 bis).

[140] Art 7(2); In Joined Cases C-509/09 and C-161/10 *eDate Advertising Gmbh v X*; *Martinex v MGN Limited* (n 91) para 69(1).

[141] Ibid.

[142] Ibid.

[143] *Bolagsupplysningen* (n 71*)* para 50(2).

[144] See Paul Beaumont and Burcu Yuksel, "Cross-Border Civil and Commercial Disputes Before the Court of Justice of the European Union" in Paul Beaumont, Mihail Danov, Katarina Trimmings and Burcu Yuksel (eds) Cross-Border Litigation in Europe (Hart Publishing, 2017) 499, 524-535.

[145] Ibid para 38.

[146] Ibid para 38.

[147] eDate Advertising (n 91) para 50. Asensio argued that it may be difficult or even impossible to determine the centre of interests. See Asensio (n 6) para 3.133. However, it should be less difficult where a claimant is likely to bring an action concerning a defamation claim – e.g. the place of business and family life; where there is a natural interest to clear one's name. Or in the case of a business, where the threats to profits and the brand name are most real.

being sued in reasonably unforeseen courts, but also help the claimant reasonably to identify the court in which to sue.[148] In considering the balance of convenience, the focus *prima facie* should be on the party who is allegedly defamed vis-à-vis where the harm occurred. The question is who will lose more – perhaps irreparably – when a defamatory material is published. In such cases the defendant is unlikely to suffer any financial loss through such a delay.[149] On the contrary, a company against whom an individual seeks to publish such material is likely to suffer financial loss and business interests will be undermined.[150] In fact, damages may be difficult to quantify and may be inadequate.[151] This balance of convenience consideration is important in determining the type of party because convenience clearly underpins *forum non conveniens*. In applying this doctrine to conflict of laws matters, courts have sometimes impliedly or expressly considered the status of parties. There is scope for debate – whether it should make a difference that parties are natural or legal persons; and to what extent personal resources should be relevant.

3. Convenient Forums

A) *Forum Non Conveniens*

Forum non conveniens has assumed a prominent part of the analysis that takes place in determining where a matter should proceed. This can be illustrated through Canadian[152] and Australian case law.[153] In English defamation law, however, *forum non conveniens* has evolved into a jurisdictional rule.[154] In Canada, *forum non conveniens* arguments proceeded to the Supreme Court and in England, such arguments got to the Court of Appeal. In *Kennedy v The National Trust for Scotland*,[155] where an allegedly defamatory press statement was published "abroad and on the internet",[156] the High Court decision took less than two months from the hearing date.[157] However, it took nearly nine months from the hearings in the Court of Appeal to the delivery of judgment.[158] The Court of Appeal also rejected the claimant's argument that, considering the Brussels regime,[159] *forum non conveniens* could not be applied to the

[148] eDate (n 74) para 50.
[149] *British Gas Trading Limited and Centrica plc v McPherson* [2020] CSOH 61 (Outer House) para 11. This is not a conflicts case but the discussion on balance of convenience in an online world is instructive.
[150] In this case, the Court of Session (Outer House) considered that the case against the defendant was "strong". Ibid para 11.
[151] Ibid para 11.
[152] *Goldhar* (n 37).
[153] *Gutnick* (n 68)
[154] S 9(2) Defamation Act 2013. This is now subject to regulation 69 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479. From December 2020, s 9 will apply where the defendant is not domiciled in the UK.
[155] [2019] EWCA Civ 648. For a recent non-defamation *forum non conveniens* case that got to the UK Supreme Court, see *Vedanta Resources plc v Lungowe* [2019] UKSC.
[156] *Kennedy* (n 138) para 14.
[157] [2017] EWHC 3368 (QB). The newspapers mentioned in this case have an online presence and the case itself refers to Internet cases.
[158] [2019] EWCA Civ 648.
[159] Brussels Recast Regulation 2012/2015; *Owusu v Jackson* [2005] Q.B. 801.

case. The doctrine was appliable as the case concerned a Scotland-England matter rather than UK- non-UK matter.[160]

The practical importance of *forum non conveniens* is clear especially for jurisdictions influenced by the English common law. The doctrine has been invaluable in avoiding or reducing the burden on litigants in terms of convenience. In *Four Seasons v Brownlie*,[161] despite the split rationale for the extensive *obiter dicta*, the majority of the UK Supreme Court agreed that the court should retain discretion in the exercise of jurisdiction through *forum non conveniens* in tort.[162] The court cannot exercise jurisdiction merely because a forum is convenient. The court can, however, decline jurisdiction because a forum is inconvenient.[163] Clearly, the doctrine will also remain critical for the foreseeable future.[164] However, it is also necessary to consider to what extent the mechanism can promote the security of obligations considering the dynamism of the Internet in the long term. Addressing defamation issues on the Internet requires speed. In purely commercial matters, speed may be less critical. For example, a breach of contract may be resolved by adequate damages or the claimant may mitigate his loss or seek an alternative. In a defamation case for individuals, the person's name may never be repaired completely. As time passes, such defamatory material may be circulated among more people in more jurisdictions. By the time the *forum non conveniens* appeals are concluded, the claimant will probably need to have a claim that looks considerably different from the initial one. In the use of *forum non conveniens*, there should be a threshold beyond which appeals cannot go.[165] Alternatively, the use of the doctrine should be limited in such Internet cases.

In promoting the security of obligations, it should be practically and reasonably foreseeable that a claimant will consider bringing an action where his or her life essentially revolves. This will be the place where the claimant resides, conducts most business or other professional life, and where family members live. When people try to clear their names, they are often driven by a sense of obligation to defend not just their individual names (which in many cases family members adopt), but also to defend family honour. It then seems strange that such a claimant should be essentially compelled to bring an action in another jurisdiction even where the claimant has elected to forego bringing an action in that other foreign jurisdiction.[166] In such a case, jurisdiction should not be reduced to a number game – for example, the number of witnesses which may become artificial just to succeed in a *forum non conveniens* procedure. *Goldhar* illustrates the potential for this game from both litigant and court perspectives. The claimant, a well-known Canadian businessman who also owned a very popular soccer team in Israel was allegedly libelled by the defendant Israeli newspaper. The motion judge and majority of the Court of Appeal decided that Ontario courts had jurisdiction

[160] *Kennedy* (n 138) para 45; Dicey & Morris (n 71) para 12–014.
[161] *Four Seasons* (n 136) 80. This case offers important post-Brexit/non-EU insights because the tort took place in Egypt.
[162] *Four Seasons* ibid para 31.
[163] Ibid.
[164] Gilles (n 67) 183.
[165] For the argument that disputes concerning the appropriate forum are generally expensive and uncertain, see the opinion of Arnold LJ in *FS Cairo (Nile Plaza) LLC v Brownlie* [2020] EWCA Civ 996 para 75.
[166] As in *Goldhar* (n 37).

and resolved the *forum non conveniens* analysis in their favour. In a split decision, the Supreme Court agreed that Ontario courts had jurisdiction but resolved the *forum non conveniens* analysis in favour of Israel and allowed the defendant's appeal. The defendant listed 22 witnesses, but the motion judge questioned the relevance of some testimonies.[167] Abella J, who also allowed the appeal, considered that about 300 people had read the article in Canada while about 700 people had read the article in Israel. In Abela J's opinion therefore, it was "obvious from these numbers too that any reputational harm to Mr. Goldhar was overwhelmingly greater in Israel".[168] Considering such issues from a quantitative standpoint may add up but it is more purposeful to consider quality. In other words, it is important to consider where the reputation is enjoyed.

The Canadian court was divided on whether the place of the most substantial harm should be the valid consideration, even though they agreed that Israel was more appropriate than Ontario.[169] The article was about Goldhar's reputation in Israel and primarily addressed an Israeli audience. The issue here is how the most substantial harm was arrived at rather than whether the most substantial harm would apply at all. The claimant's substantive interest should be considered rather than those imputed to the claimant. For example, the most substantial harm can be defined by where the damage to the claimant's interests hold.

However, the issue may have been addressed and perhaps a middle ground found by considering the perspective from which that place should be considered. That place should be considered from the claimant's perspective considering where the damage occurred. The working of this argument may be illustrated through *Said v Groupe L'Express*,[170] a case that concerned the Brussels I Regulation: persons domiciled in a Member State may be sued in another Member State "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur."[171] The claimant considered London to be "*an* important personal, family and business hub." The court emphasised the implication of "an" – an indefinite article, whereas "the centre of interests" suggests one place with a definite article "the".[172] However, the facts which the claimants provided were significant. He tried to prove that his "personal and business links to the UK are unquestionably stronger and more important than those I have in France, Monaco or Canada".[173] The court considered this to be a bare assertion in part because it may be difficult to ascertain the centre of main interests of an international businessman.[174] However, he owned properties in the UK, and his children and grandchildren all resided in the UK. His wife, also a UK national, owned property in the UK and resided there. He operated bank accounts in London and lived 3-4 months annually. Up to 50 staff members worked for him in London

[167] *Goldhar* ibid para 15.
[168] *Goldhar* ibid para 135.
[169] Ibid "substantially greater harm to reputation" was favoured by Abella J who also allowed the appeal. See the opinion of Abella J.
[170] [2018] EWHC 3593 (QB).
[171] Art 7(2) Brussels Ia. Both defendants were domiciled in France. See *Said* ibid para 11.
[172] Ibid para 57(iii).
[173] Ibid para 57(v).
[174] Ibid para 57(v).

at the Said Foundation.[175] He also showed the harm which the allegedly defamatory article had caused his business interests in the UK.[176] There were 252 website visits to the article from within the UK,[177] and 300 copies were usually sold to subscribers in the UK.[178] The English High Court, however, decided that the claimant's centre of interest was not in England and Wales.[179] It is only a general rule that the claimant's centre of interests corresponds to the place of habitual residence. Both may not coincide especially where close links may be established where a claimant does not habitually reside.[180] The factors provided by the claimant including important business interests which had been undermined by the publication and complete family ties should have been considered in his favour. Again, it seems odd that the claimant should be made to purse that claim in France where he was happy to forego. The habitual residence of an individual should not by itself be dispositive in a defamation case with respect to the Internet.

In *Wright v Ver*,[181] the claimant claimed that the defendant libelled him in a YouTube video. The claimant appealed the English High Court's decision that England was not clearly the most appropriate place to bring the libel claim. Considering section 9 of the Defamation Act, the English Court of Appeal upheld the decision of the High Court and decided that any state in the US which would accept jurisdiction over the claim would be the most appropriate jurisdiction.[182] In each of the years material to the case, viewers of the YouTube channel in the US were about four times those in the UK.[183] This was the first of eight reasons for deciding that England was not clearly the most appropriate place to bring the action. Although the reasons are not necessarily ranked in any order of importance (and *forum non conveniens* involves a consideration of several factors), the evidence of the YouTube Channel "strongly" suggested that England was not clearly the most appropriate place.[184] In arguing that he had a "close, settled connection with the United Kingdom",[185] the claimant asserted that being labelled a fraud damaged his reputation within the UK business community with whom he primarily dealt. He also had most of his business peers in the UK even though he had a global reputation. The Court rejected these arguments and decided that his "most important relationships" were in the US.[186] For a claimant whose evidence of working for a UK company, employing UK staff and having family ties to England were not contradicted, the court's position seemed rather narrow. The claimant was seeking redress for damage done to his

[175] Ibid para 47(xii).
[176] Ibid para 47(xvi).
[177] Ibid para 7.
[178] Ibid para 6. There were actually 500-800 readers of the print article. See para 50(ii).
[179] Ibid Para 73.
[180] eDate Advertising (n 91) para 49.
[181] [2020] EWCA Civ 672
[182] *Wright v Ver* (n 181) para 80. The proposed statute (s 19 of the Defamation and Malicious Publication Bill) will mirror the English approach in the context of jurisdiction; <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/explanatory-notes-defamation-and-malicious-publication-scotland-bill.pdf> accessed 11 October 2020.
[183] *Wright* (n 181) para 10.
[184] Ibid para 72.
[185] Ibid para 18.
[186] Ibid para 75

reputation in England, but he was essentially being directed to bring an action for damage in the US in which regard he was not claiming.

The Canadian case of *Goldhar* is instructive in this regard. Even the majority opinion implies that the clear limitation of a claim to "libellous statements pertaining to his Canadian business or damage to his Canadian reputation" could have resulted in a different outcome in favour of the claimant.[187] This aspect of the majority opinion was premised on the view that the amended statement of claim was not as restricted as the minority argued.[188] The minority strongly contested this position and insisted that the action was limited to the claimant's damaged reputation in Ontario.[189] Apart from the split decision, there was a further split in the reasons for the majority opinion. For example, Karakastanis J also allowed the appeal but insisted that the claimant's Israeli reputation was immaterial to the fairness factor.[190] The claimant established that Ontario was where he enjoyed and wished to clear his reputation.[191]

The way *forum non conveniens* is usually determined seems to follow an interpretation of "clearly the most appropriate place" in a manner anchored to a general balance ostensibly in favour of all parties.[192] However, compelling claimants to clear their names in jurisdictions where they would rather forego (because their lives do not revolve there) or lose everything does not address the issue. This may work for other types of claim but the policy behind defamation claims is quite different.[193] Focusing on the particular status or standing of the claimant will only serve to create a lot of subjectivity and unpredictability. The UK Supreme Court avoided such a challenge in *Aspen* (although decided in a contract context) when it emphasised the need for a focus on subject matter rather than individuals. A significant effort to steer considerations away from undue subjectivity focused on individuals may be illustrated through *Traxys*,[194] from the standpoint of *forum non conveniens*. In this case, the second defendant had relocated to Lebanon and the English High Court clearly observed that he would not return to Nigeria.[195] However, the court decided that Nigeria was the proper place of the alleged tort.[196]

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[187] *Goldhar* (n 37) para 20

[188] Ibid para 23. I.e. the joint minority opinion of McLachlin C.J, Moldover and Gascon JJ.

[189] Ibid para 163.

[190] Ibid para 101.

[191] Ibid.

[192] As seen in the English cases; as seen in the Defamation Act. In the *Goldhar* minority view, "clearly" suggests an exceptional reason and not a mere "stylistic caprice", *Goldar* (n 37) para 188; *Van Breda* (n 35) 108-9

[193] This is usually more about the name and honour. In the 13th and 14th centuries, defamation "would be cleared before the very persons in whose presence it had been reviled". See Van Vetchten Veeder, "The History and Theory of the Law of Defamation" (1903) 3(8) Columbia Law Review 546, 549. Defamation was also such a sensitive, but practically important matter that there was a jurisdictional struggle between ecclesiastical and royal tribunals. The latter eventually absorbed the former. Veeder ibid 547.

[194] *Traxys Europe SA V Sodexmines Nigeria Limited* [2020] EWHC 2195 (Comm).

[195] Ibid para 23.

[196] Ibid para 26. This is not a defamation case, but it is instructive because of its *forum non conveniens* and tort elements. Furthermore, it demonstrates how the use of technology may be used to mitigate any undue inconvenience of litigation in an inappropriate forum.

In terms of judicial cooperation and case management, the Brussels regime has generally illustrated how overlaps between legal areas may occur, and it is important to focus on an efficient resolution of disputes. In *JSC Commercial Bank v Privatbank v Kolomoisky*, the Court of Appeal agreed with the High Court that the English proceedings and related proceedings concerning fraud were "related actions" even if they could not be consolidated. This was in the context of the Brussels Regulation.[197] Although the English proceedings were not stayed in favour of the Ukrainian defamation proceedings since it concerned fraud on "an epic scale",[198] the decision is instructive on the need to adopt some flexibility to ensure efficient administration of justice. Thus, in trying to attain such ends, the relationship between *forum non conveniens* and *lis alibi pendens* is clear. This is despite the fact that *forum non conveniens* traditionally has been considered to undermine predictability and certainty in Brussels.[199] The need for flexibility should be considered vis-à-vis the risks of exercising jurisdiction in an unreasonable manner.

B) Unreasonable Exercise of Jurisdiction and Developing Countries

"Exorbitant jurisdiction" is the term of art used to describe unreasonable or unfair exercise of jurisdiction in the conflict of laws.[200] The term is used cautiously in this paper precisely because it is a term of art which is associated with certain jurisdictional bases that have been blacklisted in jurisdiction negotiations at the global level.[201] Practically, the list of such bases should not be closed and their application should not be cast in stone.[202] Arguably, any exercise of jurisdiction that a litigant finds inconvenient is an unreasonable exercise of jurisdiction for that litigant. Therefore, litigants contest jurisdiction or try to persuade courts on *forum conveniens*. The nature of the Internet and the implications of defamation necessitate a careful consideration of an unreasonable exercise of jurisdiction. At the global level of negotiations, discussions concerning jurisdictional exorbitance have been established for more than half a century.[203] This was clearly long before the Internet took the form that

[197] Art 34(1)(a) of Regulation 1215/2012.

[198] *Traxys* (n 194) para 211. The Court observed that art 28 of the Lugano Convention could be applied reflexively or by analogy.

[199] Case C-281/02 *Owusu v Jackson* paras 37-38 and 41. Arnold LJ, in a minority opinion, argued that the "safety valve" of *forum non conveniens* was absent in the European legislation, but it was important to avoid placing too much weight on this factor *FS Cairo (Nile Plaza)* (n 147) para 75.

[200] Thus, such jurisdiction would be regarded as internationally unacceptable. It is much more difficult to describe a ground of jurisdiction as exorbitant when that ground is tempered by *forum non conveniens*.

[201] About half a century ago, Winter argued that it was "difficult to give a clear definition" of "excessive or exorbitant jurisdiction". See LI de Winter, "Excessive Jurisdiction in Private International Law" (1968) 17(3) International and Comparative Law Quarterly 712. For insights into acceptable bases, in the context of recognition, see Arthur T von Mehren and D Trautman, "Recognition of Foreign Adjudications: A Survey and Suggested Approach" (1968) 81(8) Harvard Law Review 1620.

[202] Although the initial Judgments Project failed, it was clear that what amounts to reasonableness in Internet cases "fluctuates widely from State to State and is *still changing*". Haines (n 38) p 19.

[203] As long ago as 1966, the US and UK delegations to the Extraordinary Session had proposed that direct and indirect exorbitant grounds of jurisdiction should be eliminated. P 233 of *Some reflections of the Permanent Bureau on a general convention on enforcement of judgments* (Prel. Doc. No 17 of May 1992) p233 <https://assets.hcch.net/docs/bd6dcaab-b2a4-4255-84ec-eca3b7233588.pdf> accessed 11 October 2020.

we know today.[204] The question of where a defendant should be sued is of particular importance in defamation via the Internet. The ubiquitous nature of the Internet and its evolution mean that the effects of defamation may not be localised despite the advancement of technology.[205] If the major issue is not where the mechanical act of the defendant took place (i.e. the click of a button publishing offensive material) but where the damage to reputation occurs, then it is quite often inevitable that both places may be far apart from each other.[206] The damage may also occur in several places.[207] However, an unreasonable exercise of jurisdiction in this context is not just about spatial concerns (although such form part of the matrix) but also about predictability or reasonable expectations. In the case of defamation, predictability or reasonable expectations should be the priority. This reasonableness is in terms of the nature of the Internet itself and the likelihood of the claimant to bring an action where their lives revolve. In the case of the former, there is a presumption that defamatory material put on the Internet will be circulated very widely and possibly in other jurisdictions. In the case of the latter, a claimant would likely want to clear his name or the organisational name where it matters most – from the perspectives of family or business interests respectively. Jurisdictions utilising *forum non conveniens* can mitigate the potential harshness that may result from exorbitance in the exercise of jurisdiction. As already argued, the doctrine has its limitations in defamation matters and there are many jurisdictions, mostly civil law, that do not use *forum non conveniens*.[208]

While there is a general trajectory against extreme or classical cases of exorbitant jurisdiction,[209] defamation via the Internet is inevitably surrounded by the risks of exorbitance. Unlike a product that explodes in a jurisdiction different from where it was manufactured, the victim of defamation may suffer reputational damage or financial losses in several jurisdictions at the same time. If the peculiarities of the Internet are factored in,[210]

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[204] Certain applications such as the World Wide Web came much later. See John Noughton, "The evolution of the Internet from military experiment to general purpose technology 92016) 1(1) Journal of Cyber Policy 5, 6.

[205] Svantesson argued that having "already irrevocably lost its location independence", it is necessary to "srive to protect its borderlessness". See Dan Jerker B Svantesson, "Time for the Law to Take Internet Geolocation Technologies Seriously" (2015) 8(3) Journal of Private International Law 473, 474. For the involvement of individuals in identifying their "geographical location", see *Monir v Wood* [2018] EWHC 3525 (QB) para 124. For the importance of geolocation technology in Internet jurisdiction, see Asensio (n 6) para 1.26.

[206] In particular, "those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction." See *Gutnick* (n 68 at [39]); see the *Voller* cases generally: *Voller v Nationwide News Pty Ltd*; Voller v *Fairfax Media Publications Pty Ltd*; *Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766 para 102-103.

[207] As in multijurisdictional defamation cases.

[208] Beaumont observed that "France, Germany, Italy and the Benelux countries did not have the doctrine of *forum non conveniens* a spart of their private international law systems and therefore it is not surprising that the Brussels Convention did not adopt *forum non conveniens*. See Paul Beaumont, "*Forum non conveniens* and the EU rules on Conflicts of Jurisdiction: A Possible Global Solution" (2018 (3) Revue Critique de Droit International Privé 447.

[209] E.g., French jurisdiction based on nationality e.g. business relations with a French citizen, English jurisdiction based on mere or transient presence by serving a writ, and German jurisdiction based on the location of assets in the forum. Such grounds are usually available under many national laws. For a consideration of such grounds in the context of negotiations for a global instrument on direct jurisdiction, see Eva Jueptner, "The Hague Jurisdiction Project – What Options for the Hague Conference?" (2020) 16(2) Journal of Private International Law 247, 250-251.

[210] E.g. ubiquity. See (n 88).

there is a strong connection between where the tort of defamation is committed and where the damaged is caused (both overlap in Internet defamation). The need for a purpose-oriented approach may be illustrated through service out of jurisdiction in the common law. The blurred lines which the Internet has presented suggests that there is no need for the "muscular presumptions against service out"[211] and the question of what is exorbitant should be considered on a pragmatic level.[212] It may seem to be an irony that what amounts to exorbitance is fluid and any unqualified stereotype that service out is exorbitant will not be a modern approach.[213] The focus should be with a view to conducting litigation efficiently in an appropriate forum,[214] but also with a view to securing obligations. This does not mean that courts should assert "universal jurisdiction" in matters of tort under the common law.[215] In England and Wales, statutory intervention means that a test similar to *forum non conveniens* has become a jurisdictional rule. Consistent with some opinions at the UK Supreme Court before[216] and after[217] the Defamation Act, "exorbitant" jurisdiction is not inherently anathema. Rather, the question is whether it would be appropriate to serve a writ out of jurisdiction with a view to securing obligations. After all, an English court may need to serve out of jurisdiction if it decides that England would be "clearly the most appropriate place to bring an action".[218] There is no conflict between this institutionalised application of *forum non conveniens* and the need to carefully factor in the "suffering of significant damage in England" as connecting factor.[219] Such an application of *forum non conveniens* is wider but, in exercising that rule of jurisdiction, it is practical to consider the significant damage in England. This also reflects the working of defamation concerning the practical dimension to where reputation damage occurs. The argument is not that exorbitant grounds of jurisdiction should be encouraged, especially if relevant countries do not want them on a policy level. Rather, the argument is that the Internet compels a fresh and pragmatic consideration of traditional rules in a manner driven by flexibility and is purpose oriented.

[211] At least under the common law.

[212] *Abela v Baadarani* [2013] UKSC 44 para 53. For a reiteration of this position about half a decade later and insightful analysis of traditional views on this matter, see *Al Jaber v Sheikh Walid Bin* [2016] EWHC 1989 (Comm) para 21.

[213] See *Qatar Airways Group Q.C.S.C. v Middle East News FZ LLC* [2020] EWHC 2975 (QB).
143.

[214] Ibid

[215] *Four Seasons* (n 136) para 28.

[216] Lord Sumption took this view in the UKSC case decided in June 2013. The Defamation Act entered into force in December 2013.

[217] About half a decade later, Lord Sumption clarified that while he remained opposed to any artificial characterisation of service out as "exorbitant", he did not propose the "widest possible interpretation of the [jurisdictional] gateways". See *Four Seasons* (n 136) para 31 per Lord Sumption (with whom Lord Hughes agreed).

[218] S 9(2) of the Defamation Act 2013.

[219] *FS Cairo (Nile Plaza) LLC* (n 147) para 22. In this case, a split decision, the majority of the English Court of Appeal adopted the obiter views expressed by the majority in *Four Seasons*. See also the jurisdictional gateways in CPR PD 6B para.3.1(9)(a).

A critical aspect of exorbitance in the context of online defamation is the risk of parallel or multiple proceedings.[220] This can be mitigated by building on the single publication rule.[221] The claimant's possible claims can be limited to where the sting of the alleged defamation is most acute. The argument here is not that the single action must be heard in "any particular jurisdiction",[222] but that it should be in one forum rather than multiple actions in different fora. This forum should be determined in a manner that not only factors in the efficient administration of justice, but also the forbearance of the claimant with respect to claims in other jurisdictions. For natural persons, this should be where the reputational damage is greatest and for corporate persons, this should be where there is exposure to the (potential for) most financial losses. There would be significant difficulty in attaining such ends without international or global cooperation because the claimant needs to be estopped from bringing further claims.

The issue of exorbitant jurisdiction is not a matter of concern just for developing countries. In fact, it has been persuasively argued that the United States was most influential in indirectly prompting a change in the more assertive English jurisdictional attitude to defamation.[223] However, developing countries such as those in Africa are mentioned here because there is a significant Internet penetration disadvantage in such areas. Depending on what precise policy considerations apply, jurisdictions that have a greater Internet penetration will have more cases of downloads or publication. Thus, the "game of numbers" could be stacked against developing countries.[224] Developing countries need to consider if they want to promote international or global cooperation. These types of cooperation are sometimes conceptually conflated. A global cooperation must be international but an international one may not be global. It is easier to agree on any arrangement that can promote the security of obligations on an international level. However, developing countries need to be ready to negotiate on a broader and more liberal level if they want to benefit from any global endeavour.

Since defamation is excluded from the scope of the Hague Judgments Convention, there will be a dissonance between the Convention and any direct grounds of jurisdiction that include defamation. Developing countries therefore need to consider their options on this issue. There are at least two levels of considering what should amount to an unreasonable exercise

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[220] This risk is not peculiar to defamation cases. See *Vedanta* (n 155) para 75 where coincidentally, the *forum non conveniens* test evolved in favour of a developing country – Zambia where litigation arose from toxic emissions involving about 1,826 members of very poor rural community members.

[221] It is, however, unlikely to amount to abuse if there is a separate jurisdictional basis on which to claim for publication or loss outside the jurisdiction under CPR PD 6B para 283. See Qatar Airways Group Q.C.S.C (n 193)

[222] For an insight into this rule as argued by Dow Jones, see Richard L Creech, "Dow Jones and the Defamatory Defendant Down Under: A Comparison of Australian and American Approaches to Libelous Language in Cyberspace" (2004) 22 Journal of Computer and Information Law 553, 558. Current reform proposals are likely to vindicate the single publication rule and mirror the English approach. See Law Council of Australia, Review of Model Defamation Provisions para 5 <https://www.lawcouncil.asn.au/publicassets/6cbca74b-8677-e911-93fc-005056be13b5/3622%20-%20Review%20of%20Model%20Defamation%20Provisions.pdf> accessed 11 October 2020.

[223] Hartley argued that the US SPEECH Act (which essentially ensures that the foreign libel judgments would be enforced only in accordance with the First Amendment) was "principally aimed at the United Kingdom". See Hartley (n 75) 374-375. See also Asensio (n 6) para 3.114.

[224] On the tendency for manipulation, see the dissenting opinion of the Chief Justice, Moldaver and Gascon JJSC in *Goldhar* (n 37) para 227.

of jurisdiction in the context of defamation via the Internet. The first level is negotiation. Treaty negotiation by its nature requires trade-offs and this applies to jurisdictional bases. Thus, there has always been a consideration of the jurisdictional bases that would be acceptable by the countries that negotiate treaties. Such negotiation is driven not only by the countries for which the negotiation is intended to benefit, but also the purpose for which such negotiations are carried out. The EU is a good example of such negotiations. The Brussels regime reflects jurisdictional bases which EU countries agreed to use because they formed a compromise and to promote the foundational aims of the EU.[225] Such trade-offs also imply that the jurisdictional grounds agreed upon will not necessarily solve every considerable challenge that may be faced in practice. For example, a creditor may have no recourse if the debtor refuses to discharge an undisputed debt, escapes a jurisdiction and the creditor is unable to pursue the debtor to the debtor's home jurisdiction. Relevant countries will live with this because it is an agreement with respect to the negotiating group. Yet, the trade-offs also imply that only the most acceptable by the negotiating countries will be accepted. In principle therefore, an otherwise unreasonable jurisdictional ground may be accepted if negotiating countries agree that such a jurisdictional ground should be used. This is an important point because individual countries still need to decide, in relevant situations, how to address policy issues that are not necessarily covered by jurisdictional grounds agreed in the negotiation of a treaty. In an era where the Internet relentlessly claims more space, it is difficult to completely imagine all the possibilities that technological advancement will pose. The Internet has not necessarily taken the world by surprise. However, it is developing at such a fast pace that laws will either need to catch up or the legislator develops a pragmatic attitude that is driven by appropriate policies in such a way that existing legal frameworks can reasonably accommodate jurisdictional issues.

The second level is the national laws of the relevant countries. Negotiating rules of direct jurisdiction as regards the Internet does not expressly or impliedly invalidate other national rules of jurisdiction.[226] Otherwise, that would be an unjustifiable encroachment into national law-making. What countries owe the community of negotiators is to use jurisdictional rules prescribed under any agreement. Thus, there must be clarity that existing national rules of jurisdiction remain valid in other cases that do not concern the community of signatories. It is up to individual developing countries to decide whether or when existing rules of jurisdiction will be amended or expunged from their legal regimes. It is, however, counterproductive to refer to developments in other jurisdictions and impliedly hope that such trends will influence law and practice. This undermines legal certainty and predictability. For example, reference to the Brussels legal regime or any other regime needs to be placed in the proper context. It would be unsystematic for African countries to assume that only jurisdictional bases contained in the Brussels regime should apply even in non-Treaty cases. If African countries decide to retain such "unreasonable" grounds of jurisdiction in non-Treaty cases, then they should be applied in a consistent manner. There should be no automatic assumption that a judge will decline or assert jurisdiction in non-Treaty cases merely because

[225] Thus, jurisdiction based on transient presence, nationality etc are absent.

[226] There is merit in this position already contained in the Hague Judgments Convention, although from the perspective of indirect rules of jurisdiction. See art 15 of the Convention.

there is an agreement on jurisdictional grounds in Treaty cases. The steady encroachment of the Internet into several spheres of life and law is a challenge but also an opportunity to reflect on what jurisdictional rules should actually achieve. It would be ideal to achieve a situation where all parties consider relevant assertions of jurisdiction to be reasonable. In the context of the Internet, especially defamation, there is no fixed position or rigid best practice because the Internet continues to evolve. The development of jurisprudence in the jurisdictions considered should inspire international or regional cooperation if global solutions are not forthcoming. The latter should however be the preferred way forward if possible.

At any level of negotiations, it is critical to consider trade-offs not only between negotiating countries but between litigants. While this may first appear unconventional, it is relevant to defamation via the Internet. Relevant trade-offs may be illustrated through the single publication rule. There is a need to consider what a defendant loses by being unable to bring an action in different jurisdictions. After all, the defamatory materials are downloaded in different – perhaps many – jurisdictions. The claimant suffers reputational damage in all of those jurisdictions and should be somehow rewarded for the restraint or indeed bar from bringing other actions. This is why the claimant should be allowed to have a say as to where an action will be brought considering where the harm occurred. This approach should not be disregarded if the sting of the damage is considered and the venue is reasonably foreseeable. In the Canadian case of *Goldhar*, the motion judge, majority of the Court of Appeal, and majority of the Supreme Court agreed that there was "no surprise or injustice to the plaintiff's attempt to vindicate his reputation in Ontario, where he lives and works".[227] In fact, the material in question referred to the Claimant's Canadian residency and Canadian business.[228] However, the Supreme Court decided that there was no "significant unfairness" if the trial took place in Israel considering the claimant's "significant business interest and reputation".[229] Both factors can be assessed from the standpoint of where the claimant has a substantial personal or family life and conducts business for sustenance or profit. In short, it should be the "centre of interests" or "centre of gravity". However, the claimant should have a substantial say not after the fact but on an objective basis. This is an important point because there is the potential for this approach to clash with *forum non conveniens* which is designed to cater to the efficient administration of justice as a whole. *Forum non conveniens* was originally articulated when the Internet did not exist. The discretionary aspect of this doctrine poses challenges to Internet defamation cases, but its flexibility also has the potential to make it adaptable to current and evolving realities.

C) Towards a Future of *Conveniens*

The flexibility, not necessarily discretionary content, of *forum non conveniens* should remain appealing even if non-common law jurisdictions are not keen to use the label. In the

[227] *Goldar* (n 37) para 78.
[228] *Goldhar* (n 37) para 78.
[229] *Goldhar* (n 37) para 78. On reasonable expectations as to where a party would sue, see also *Van Breda* (n 35) para 92.

foreseeable future, it is worth seriously considering courts that will focus on disputes resulting from online disputes. This possibility has been explored in some way by China,[230] and the possibility of a courtroom of the future has been espoused in the United States.[231] The vision of the HCCH to deal with "progressively more complex scenarios" in the context of information technology can support relevant work in the future.[232] Such innovations that focus on adjudicating online disputes would reduce the practical inconvenience of litigants being sued in another forum state. In Canada, a strong case has been made for encouraging witness testimonies through videoconferencing.[233] The UK Supreme Court reiterated this point recently.[234]

In *Traxys*, a tort/contract case that turned on a *forum non conveniens* application where the English High Court stayed proceedings in favour of Nigeria, the English High Court made a strong case for the defendant to give evidence by video-link. The court further observed that the Covid-19 pandemic must have facilitated an improvement of such Internet facilities.[235] Determining or choosing the courts that should exercise jurisdiction is critical to promoting reasonably convenient forums.[236]

It is necessary to have a pragmatic and functionalist approach to Internet defamation – one that is also anchored to a clearly articulated policy. Arguments that this approach will breed a case-by-case approach that can undermine legal certainty can be countered by another consideration. That is, litigants merely need to look at a clear articulation of the policy that underpins the legal regime on Internet jurisdiction and reasonably predict how jurisdiction may be exercised with a view to resolving relevant disputes. As a matter of policy, obligations should be secure and this security should factor in trade-offs that litigants may have or may be reflected in negotiations for appropriate legal and regulatory frameworks.

While issues such as "outcome predictability" and forum shopping may be evaluated from a policy standpoint, there should be a clear focus on the legal outcomes that will emerge.[237]

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[230] "Courts ponder platform for overseas suits" <http://english.court.gov.cn/2020-09/27/content_37539951.htm> accessed 10 October 2020.

[231] *Jardim v Overley* (Superior Court of New Jersey) (2019) p 22

[232] Strategic Plan 2019-2022 <https://assets.hcch.net/docs/bb7129a9-abee-46c9-ab65-7da398e51856.pdf>

[233] This is in addition to other procedural tools (such as written affidavits, rogatory commissions etc) used to "mitigate the practical inconvenience arising in cases where the parties are in multiple jurisdictions". In this context, see the 3-judge dissenting opinion in *Goldhar* (n 37) para 228. See also the opinion of Côté, Brown and Rowe JJ in *Godhar* (n 37) at para 66.

[234] This was in a conflict of laws tort case, although defamation was not involved. See *Verdanta* (n 138) para 86.

[235] *Traxys* (n 194) para 22-24.

[236] The Choice of Courts Convention covers civil (or commercial) matters, but it excludes "claims for personal injury brought by or on behalf of natural persons" in Art 2(2)(j). However, the Session was requested to clarify its intention: "the exclusion in sub-par. j) covers nervous shock even where this is the only injury suffered, without also covering hurt feelings or damage to one's reputation (for example, defamation). See Trevor Hartley and Masato Dogauchi, *Explanatory Report (Convention of 30 June 2005 on Choice of Courts Agreements)* para 69. On the need to abide by the personal injury exception presented to the Working Group that agreed on the interpretation of this exclusion , see Paul Beaumont, 'Hague Choice of Court Agreements Convention 2005: Background, negotiations, analysis and Current Status' (2009) 5(1) Journal of Private International Law 125, 136-137.

[237] Kelvin L Cope, "Reconceptualising Recognition Uniformity" in Paul B Stephan (ed), *Foreign Court Judgment and the United States Legal System* (Brill/Nijhoff 2014) 171.

There must also be a clear consideration of whether or why such outcomes are desirable. It is easier to convince States to join a collaborative venture if there is an agreement on why such rules should be developed. When, for example, the English common law is considered to be pragmatic, this is not because all possibilities have been foreseen. On the contrary, this is because there is a willingness to respond to all possibilities in a pragmatic manner. Legal certainty and predictability have justifiably driven a lot of EU jurisprudence. In the context of a global approach to Internet jurisdiction, however, the focus needs to be practically broader. Parties/litigants need to be convinced that legal certainty and predictability promote security of obligations in matters of torts, especially defamation via the Internet. The collaborative need extends to developing countries.

4. The Bridge between Developed and Developing Countries: Defamation and Security of Obligations in Africa

The Internet has compelled a less compartmentalised way of considering disputes including conflicts cases.[238] More flexibility and innovation is required to ensure the security of obligations. In *Kim v Lee*,[239] the English High Court decided that the fact that the South Korean authorities declined to bring a criminal prosecution against the defendant did not mean that the claimant could not also bring civil proceedings concerning defamation in England. As more countries move away from criminal defamation,[240] there is potentially more space for litigants to be involved in private or civil disputes.

As earlier explained, a major sense in which security is used concerns exploiting the inadequacies of complex technology to evade the performance of obligations or to cause loss to others.[241] States can take advantage of the platforms and interest already created with respect to resolving Internet disputes. This strategy involves building on existing foundations that support cooperation among States. In Africa, there is already a clear potential to use security as a coalescing platform to promote the security of obligations. Concerns about the redress for defamation of natural or legal persons have been expressed in the context of security for nearly a decade.[242] As at May 2020, only 19 out of 55 countries had either signed or ratified the African Union Convention on Cybersecurity and Special Protection Data. Nevertheless, such a forum represents the most significant efforts to consider security in the African Union.

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[238] Svantesson argued for the need for the Hague Conference to "consider engaging more directly" in the arena where several international bodies (e.g., the Internet Governance Forum and the Internet & Jurisdiction Policy Network) operate. See Svantesson (n 46) 161-3

[239] [2020] EWHC 2162 (QB).

[240] S 73 of the UK Coroners and Justice Act 2009; Hoolo 'Nyane, Abolition of Criminal Defamation and retention of scandalum magnatum in Lesotho (2019) 19(2) African Human Rights Journal 743; *Okuta v Attorney General* eKLR para 42. For an overview of the decriminalisation of defamation in some Nigerian states (Nigeria is a federation comprising 36 states and a federal capital territory) and efforts to decriminalise defamation within the African Union, see *Aviomoh v COP* (2021) LPELR-55203 (SC) at 28.

[241] See text to n 11.

[242] Grace Githaiga, *A Report of the Online Debate on Africa Union Convention on Cybersecurity (AUCC)* December 2013 <https://cipesa.org/?wpfb_dl=143> accessed 10 October 2020.

In Africa, the most significant international developments concerning defamation via the Internet have been in the areas of regulatory intervention and human rights.[243] This is essentially because States have dominated major developments concerning legal and regulatory developments. Two points are clear: States are giving attention to the Internet through substantial governmental intervention and regulation. However, inadequate attention has been given to the "role and impact of the Internet" in the conflict of laws.[244] The same level of attention can serve both governmental and private interests in an efficient manner. This point can be briefly illustrated through the examples of Kenya and Nigeria.

The focus of this section is to highlight the need for modern laws and the development of relevant jurisprudence on Internet defamation. This is because both are either inadequate or spare in Kenya and Nigeria (thus the discussions are relatively brief) despite the importance of the subject from a conflict of laws standpoint. However, taking Nigeria as an example, this importance is sometimes not always obvious because there is often a focus on criminal defamation. However, the reliance on criminal defamation is often strategic and artificial because litigants who prefer criminal prosecution do so because they find it expedient to do so. This preference is based on whatever characterisation works for them. The Nigerian Supreme Court has noted the need to observe "a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors".[245] The court further noted that "applying pressure through criminal prosecution should be deprecated and discouraged".[246] This underscores the need to reflect on what civil law may be appropriate and conflict of laws rules inevitably constitute an essential part of this reflection.

There are some similarities between Kenya and Nigeria. First, both are common law countries and regional powers. Second, there are overlaps between tort and contract in both

[243] E.g. The ECOWAS Court decided that it was a violation of the freedom of expression to shut down the Internet because a protest took place. See *Amnesty International Togo v The Togolese Republic* (Suit No app/61/18 and ECW/CCJ/JUD 09/20– decided on 25 June 2020) para 45. Interestingly, Nigeria and Kenya intervened as *amici curiae* in this case, even though the former has been considering a clamp down on the Internet after the "end SARS" protest late 2020. The ECOWAS Court also decided that s 24 of the Nigeria Cybercrimes Act violated the right of expression and should be amended or repealed. See *The Incorporated Trustees of Laws and Rights Awareness Initiatives v The Federal Republic of Nigeria* (Suit No ECW/CCJ/APP/53/2018; Judgment No ECW/CCJ/JUD/16/20). The Court also referred to Principle 1 of the Declaration of Principles of Freedom of Expression and Access to Information in Africa 2019 para 144 of the judgment. Half a decade ago, there was a real possibility that the tide had turned against criminal defamation. See *Konate v Burkina Faso* App No 004/2013.

[244] Svantesson argued that "the role and impact of the Internet has rather consistently been treated as a 'side dish' with the offline world implications very clearly being the 'main course' ". See Svantesson "The (Uneasy) Relationship between the HCCH and Information Technology" (n 46) 449

[245] This is not a conflicts case, but it is insightful on the intersections between private law, business interests, and public law. See *Aviomoh* (n 240) 24.

[246] *Aviomoh* (n 240) 24.

countries.[247] Third, they have high Internet penetration rates[248] and very high numbers of Internet users.[249] However, there has been no sophisticated judicial attention given to defamation via the Internet especially from the standpoint of conflict of laws. Consequently, it is necessary to work through common law principles which, in several cases, have been overtaken by developments in England. This does not mean that relevant rules concerning defamation should be changed automatically merely because the rules have changed in England. Changes should be considered carefully and effected because they help to solve contemporary problems.

In *Riddlesbarger v Robson*,[250] the offensive publications were made in California and New York. The appellant was served while he was in transit at Eastleigh Airport (now Moi Air Base) and the appellant company was served on the basis that it carried on business in Kenya. The appellants appealed against the judgment of the Supreme Court of Kenya. The Court of Appeal for Eastern Africa decided that where torts are committed abroad: the Kenyan courts will have jurisdiction if the act is wrongful under Kenyan law, the act is wrong in the foreign country where it was committed, and service has been properly effected.[251] This is evidently a rather patchy area and connections need to be made between such jurisdictional rules and other aspects of the conflict of laws concerning defamation. One important consideration relevant to this paper is policy vis-à-vis the security of obligations. In this regard, there is a need to ensure that conflicts of laws rules remain pivotal in resolving disputes between international litigants if there is any realistic prospect of encouraging international cooperation.

In *Royal Media Services Ltd v Maina*,[252] the Kenyan High Court disapproved of the multiple-publication rule especially because it had been changed in England. However, the court did not apply the single-publication rule in the absence of any enabling law. It urged a reform from a policy and legislative standpoint – otherwise the law had to be applied to Internet cases. Each publication potentially gives rise to a different cause of action with the limitation running from the date of the last publication. The single publication rule is critical to striking a balance between the security of obligations and achieving the efficient administration of justice. Such considerations are relevant to Nigeria.

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[247] *Ali v Massai* [2005] EKLR (Civ Appeal 711 of 2002); *Bonum Nigeria Limited v Ibe* [2019] LPELR – 46442 (CA). In Kenya and Nigeria, the offences of sedition and criminal libel remain a possible trump card for the governments. See Beedict J Anstey, "Criminal defamation and reputation as 'honour': a cross-jurisdictional perspective" (2017) 9(1) Journal of Media Law 132, 135.

[248]< https://www.statista.com/statistics/1124283/internet-penetration-in-africa-by-country/#:~:text=As%20of%202020%2C%20Kenya%20had,payment%20system%20encourages%20internet%20access >10 October 2020

[249] <https://www.statista.com/statistics/505883/number-of-internet-users-in-african-countries/>accessed 10 October 2020.

[250] Civ App No 20 of 1958. Although this is an old appellate case, it was more recently applied in the context of civil procedure. See *Kimemia v Unilever Tea Limited* [2007] ekLR; *Gathogo v Ondansa* [2007] eKLR (Civ App 287 of 2002).

[251] [1958] EA 375.

[252] [2019] EKLR (Civ App No 19 of 2018).

In Nigeria, Internet discussions have been largely driven by security in the context of State interests and cyber fraud especially financial crimes. There remains a need for judicial engagement with modern issues of tort in a manner that factors in the Internet. Both needs have yet to be met at any significant level. For example, the double actionability rule set down by the Nigerian Supreme Court[253] more than half a century ago was based on traditional English common law at the time.[254] As such, this rule – that the forum would have jurisdiction if the act would have been unlawful if committed in the forum and not justifiable under the law of the place where it was committed – has been persuasively criticised.[255] The fact that the law has since changed in England is a different matter altogether. The double actionability rule should be largely irrelevant to defamation as there is no evidence that it was designed for defamation cases.[256] And the matter should have ended there in the case of Nigeria. However, its apparent adoption of the double actionability rule as one of jurisdiction (thus conflating choice of law and choice of jurisdiction) in tort matters poses a challenge.[257] Over time, this challenge has been compounded by inadequate specific guidance on defamation cases and further complicated by the peculiarities of the Internet.[258] Both realities should embolden lower courts to distinguish the cases and chart a much-needed path for themselves. This is especially so in the absence of legislation. Nevertheless, the Nigerian Court of Appeal has taken up the challenge and set some foundations for how Internet defamation rules may develop. This can be illustrated through *Daily Times (Nig) Ltd v Arum*.[259] The respondent/claimant sued the respondent newspapers for libel. Through a preliminary objection, the appellants/defendants argued that the Enugu High Court lacked jurisdiction because the appellants did not reside or carry on business in Enugu.[260] They also argued that Enugu was not a convenient forum.[261] The argument on jurisdiction was rejected at the High Court and the Court of Appeal. The court observed that the cause of action is not complete until a third party accessed or downloaded online Internet based publication.[262] This was a foundational observation. The court then decided that:

[253] *Benson v Ashiru* [1967] NSCC 198. Several appellate cases on tort in conflict of laws have not provided relevant illumination in the context of this paper especially. See for e.g. *Zabusky & Ors. v Israeli Aircraft Industry Ind.*, [2008] 2NWLR (Pt 1070) 109. *Herb v Devimco* [2001] 52 WRN 19. The *lex delicti* rule application requires clarification.

[254] *Philips v Eyre* [1870] LR6 QB 1.

[255] Temple C Williams, "The American and European Revolutions on Choice of Law in Tort with Foreign Element: Case Studies for the Practice of Conflict of Laws in Nigeria" (2015) 2(1) International Journal of Humanities and Cultural Studies 642, 652.

[256] Mills (n 75) 10.

[257] Ibid, see generally; for extensive arguments in this regard, see Lateef Ogboye and Abubakri Yekini, "Phillips v Eyre and its Application to Multi-State Torts in Nigeria: A Critique" (2013) 4 Nnamdi Azikiwe Journal of International Law and Jurisprudence 108.

[258] Cases that essentially focus on choice of law concerning torts generally may provide some indicative insights on what forum may be appropriate. Typically, however, they are not specifically helpful on what the appropriate fora for litigation on defamation should be. Importantly, the cases were not decided in an Internet context. E.g., *Amanambu v Okafor* [1966] 1 All NLR 205

[259] (2021) LPELR-56893 (CA)

[260] *Arum* (n 259) 1-2

[261] Ibid 2

[262] Ibid 20

> *For the High Court of a State other than where the defendant resides or carries on business to have jurisdiction for libel in respect of online or internet based publications therefore, the publication must have been accessed or downloaded in that State by the plaintiff or claimant who ordinarily resides or carries on business in that State and the publication must equally have been accessed or downloaded in that State by the witnesses of the Plaintiff or Claimant*.[263]

Several points are relevant to the analysis that has been undertaken so far in this paper. First, the Internet compels a search for solutions beyond traditional compartmentalisations. In determining the issue of jurisdiction, the Court of Appeal referred to only one English case and 11 US cases.[264] This approach of engaging with US case law because of their "exemplary and several significant efforts to regulate Internet jurisdiction" is consistent with an earlier scholarly argument.[265] The decision is commendable to the extent that the claimant was based in Enugu State, and it was the right decision to deliver on the facts.[266] The reasoning also reflects valiant efforts considering the pioneering pathway of the court in Internet defamation generally. However, the US case which the Nigerian Court of Appeal relied on for "the standard test in determining where personal jurisdiction resides in internet cases"[267] contained categorizations irrelevant to defamation cases.[268] Thus, there is a need to further investigate a more reliable reasoning. In any case, one lesson that can be drawn from the court's approach is that any jurisdiction that offers practical guidance on the Internet is important. It is very rare for Nigerian courts to rely on to so many US cases to decide a legal issue. The second point flows from the last argument. The approach of the court in reaching a commendable outcome highlights how Nigerian case law should change merely because English case law has changed but change because it is appropriate to do so in the context. For example, US case law may have an approach that suits Nigeria especially as a federal State.[269] Even US case law does not contain all the solutions as this is a rather fluid area of law because of how the Internet works.[270]

While there remains an option to adapt traditional common law rules of jurisdiction, this option may not achieve any quick resolution of jurisdictional issues in a manner that will factor in the peculiarities of the Internet. The Internet has changed a lot in the last three decades when there was a declaration from a section of the Nigerian Supreme Court that "the law of defamation in this country has not changed even by latest developments in law".[271] Meanwhile, there is already scope to support the single publication rule which is important

[263] *Arum* (n 259) 20
[264] The English case is King v Lewis [2004] EWCA Civ 1329.
[265] Pontian N Okoli, Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria (Kluwer 2019) 210
[266] *Arum* (n 259) 7 Dr Arum worked in Enugu State.
[267] Zippo Manufacturing Co v Zippo Dot Com, Inc 952 F. Supp. 119 (W.D. Pa. 1997). See Arum (n 259) 13.
[268] See the online defamation case decided by the U.S. District Court for the Western District of Arkansas: Sioux Transportation, Inc v XPO Logistics, Inc [2015] U.S. Dist. LEXIS 171801 p 19.
[269] *Arum* (n 259) p 12.
[270] Questions on virtual contacts were left "for another day". See n 125
[271] See the concurring opinion of Belgore JSC in *Din v African Newspaper of Nigeria* [1990] 3 NWLR (Pt 139) 392.

in developing appropriate guidance on defamation via the Internet.[272] There is also a clear acceptance that defamation can occur in the context of "professional or business reputation."[273] The latter is also the case in Kenya,[274] although the relevant statute does not clearly show any scope for a single publication rule.[275]

In Kenya and Nigeria, the courts need to stitch rules together as relevant cases arise. This approach is rather challenging and, of course, does not promote security of obligations. This is worsened by the fact that relevant conflict of laws in the UK, EU, North America and Australia are developing quickly and the Internet itself continues to evolve. There will also be a navigation between substantive law and conflict of laws to arrive at solutions. One way for such developing countries to avoid this convoluted and unpredictable process is statutory intervention. Such statutory regimes can contain relevant rules driven by flexibility for relatively easy adaptability.[276] This should be done in a way that factors in international cooperation on a realistic consideration of challenges that the Internet pose. In this way, a Kenyan will not be worried about where jurisdiction may be exercised in tort matters.[277] The ideal way forward would-be global cooperation to ensure that developing countries such as those in Africa maximise the benefits that the Internet community presents.[278] As earlier argued, developing countries should be ready in either international or global cases to engage pragmatically in trade-off processes. Indeed, the "ultimate goal" of the Hague Conference on Private International Law is to promote a "high degree of legal security" for individuals and companies regardless of differences between legal systems.[279] This, for example, requires not only creating certainty in instituting legal proceedings, but also ensuring environments that support international trade and investment as well as improve efficiency when parties try to enforce their rights.[280] Typically, there are competing arguments with respect to defamation. : Claimants argue that they should be able to claim in the jurisdiction where their reputation

[272] See s 4 on a version of the "single publication rule" and s 18 on "consolidation of actions for defamation". The Defamation Law of Lagos State.
[273] Ibid s 2.
[274] See s 8 of the Kenyan Defamation Act Cap 36 [Rev 2012].
[275] Although there are extensive provisions concerning unintentional publication and consolidation of actions. See s 13 and s 17 of the Kenyan Defamation Act respectively.
[276] As long ago as 1995, Bamodu argued for flexibility in issues of conflict of laws where there are business implications. Gbenga Bamodu, "Jurisdiction and Applicable Law" in Transnational Dispute Resolution before the Nigerian Courts (1995) 29(3) The International Lawyer 555, 560. On the need for flexibility on matters of tort generally, see "Conflict of Tort Laws in Nigeria: An Analysis of the Rule in Benson v Ashiru" (1972) 6 Nigerian Law Journal 103. For arguments against the double actionability rule in the Kenyan context, see Richard F Oppong, *Private International Law in Commonwealth Africa* (Cambridge University Press, 2013) 152.
[277] *J McIntyre Machinery Ltd v Nicastro* (n 56) *10,* Breyer J, concurring in SC judgment, expressed concerns about "*a* Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good."
[278] At the start of the 21st century, there were already hopes expressed that there could be conflict of law rules concerning non-contractual obligations that will have "universal application". This hope was expressed in the context of Rome II proposal at the time. <http://www.lawcom.gov.uk/app/uploads/2015/03/Defamation_and_the_Internet_Scoping.pdf
[279] https://www.hcch.net/en/about> accessed 10 October 2020.
[280] Marta Pertegás, First Secretary, at The Dutch-Russian Seminar on Legal Co-Operation "Better Justice, Better Business" p 2; held in The Hague on 6 March 2013 <https://assets.hcch.net/docs/c8f6f762-7a14-464d-8103-0a3339c8d9c2.pdf>accessed 10 October 2020.

was damaged while defendants argue that it would be a global risk to expect compliance with the laws of multiple jurisdictions.[281] However, it is clear that a solution acceptable to all would require a global treaty.[282] If this global solution is not practicable, then countries – including those that are developing – need to chart a path on an international basis or from an international standpoint at least.

Conclusions

Internet torts especially defamation highlight competing policy interests between States and individuals. Increasingly, governments intervened in matters concerning the Internet through regulatory and oversight roles – and in many cases, through efforts to address security concerns.[283] At the same time, harmonisation of conflict of laws rules has been rather challenging vis-à-vis the impact of free speech and to what extent resultant judgments may be enforced. Vast governmental interests in security and regulation afford an opportunity to focus on the Internet, but it is necessary to promote the security of obligations. In other words, relevant conflict of laws rules in the Internet era should help to ensure that obligations are performed with reasonable certainty. This is one understanding of security in this article. In principle, issues that concern the defamation of persons can be distinguished from national or public security issues. However, this article has also highlighted how litigants can use the inadequacies of complex technology to evade the performance of obligations or to cause loss to others including financial loss. There is a need to articulate a clear policy basis that promotes the security of obligations. States can build on the foundations created by platforms dealing with important aspects of the Internet by including a conflict of laws agenda with respect to defamation.

While it is within the province of conflict of laws to consider technical conflicts rules that underpin Internet defamation, a most basic consideration when parties sue for defamation is to clear their names to stop reputational damage and (further) financial losses that may have resulted from such damage. This seemingly trivial point has been glossed over to a significant extent, but the impact is important in determining when courts should exercise jurisdiction considering the appropriate for a where claims may be brought. Where business interests are involved, the focus should be on the subject matter in question and how much impact it may have on parties.

Developing countries need appropriate rules on conflict of laws concerning online defamation. The centre of interests of the victim provides good foundations for developing countries to determine appropriate conflict of laws rules concerning defamation via the

[281] (n 278) para 1.15; 4.53

[282] Which would be accompanied by accompanied by "greater harmonisation of the substantive law of defamation" which seems rather far-fetched for the foreseeable future (n 278) para 1.16 <http://www.lawcom.gov.uk/app/uploads/2015/03/Defamation_and_the_Internet_Scoping.pdf> accessed 10 October 2020.

[283] A trend not peculiar to any region. For example, the US Justice Department recently brought an action against Google on an antitrust basis. See <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 20 October 2020. However, the fact that the participating Attorneys General are from 11 Republican states does not inspire any confidence in the real motive of the Trump administration.

Internet.[284] However, for*um non conveniens* should be included to mitigate any undue inconvenience that parties may face. *Forum non conveniens* was designed to promote pragmatic solutions but it is also necessary for the rule to be applied in a pragmatic manner to ensure effective solutions. Otherwise, the evolution of the Internet may outpace conflict of law rules with the risk of undue encroachment by governments in a way that does not promote solutions for private litigants. Whether it is by essentially converting *forum non conveniens* into a jurisdictional rule or applying *forum non conveniens* in innovative ways, the real question should be the search for a practically flexible approach that will ensure that businesspeople who are defamed via the Internet have a remedy. In trying to determine such an approach, due consideration should be given to factors that ensure the efficient administration of justice. The first step is to be clear on what policy or set of policies should form the basis for ensuring the security of obligations in the sphere of defamation. This focus will help to redress defamatory wrongs as soon as possible and promote the possibility of the Internet itself as a platform for resolving or adjudicating relevant defamatory conflicts. There is considerable potential to explore such possibilities in efforts to ensure the efficient administration of justice in a manner that both developed and developing countries will find useful. For developing countries working from a largely foundational level, determining the way forward also requires a clear understanding of contextual realities such as unequal access to the Internet even though the latter is often premised on a coequal status. Such core issues should set the agenda for sustainable progress.

[284] Although EU law is already "rather accommodating", it is necessary to have a "a reasonable degree of foreseeability in terms of the potential forum in terms of the place where the damage resulting from such material may occur" see Case C-800/19 *Mittelbayerischer Verlag KG*, Opinion of AG Bobek paras 24 and 88.