JURISDICTIONAL RULE "X" IN THE CONFLICT OF LAWS: CHALLENGES OF POLICY AND SECURITY IN INTERNET TORTS WITH BUSINESS IMPLICATIONS

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I. 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 Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Hague Judgments Convention).[2] The Hague Judgments Convention focuses on jurisdiction in terms of recognition (or enforcement), but it also offers some indication as to what grounds of direct jurisdiction may be permissible.[3] Although the current Convention covers civil and commercial

[1] The Hague Judgments Project did not succeed in 2001. Joost Blom, *Special Issue: The CJPTA: A Decade of Progress: The Court Jurisdiction and Proceedings Transfer Act and The Hague Conference's Judgments and Jurisdiction Projects*, 55 OSGOODE HALL L.J. 257, 259 (2018). However, the project was revived in 2012 and the final Convention (the Hague Judgments Convention) was concluded in July 2019. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137 [hereinafter The Hague Judgments Convention]. The initial project, however, resulted in the Convention of 30 June 2005 on Choice of Court Agreements, which has been in force since 2015. Convention on Choice of Court Agreements, June 20, 2005, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 [hereinafter The Hague Choice of Court Convention].

[2] The Hague Judgments Convention, *supra* note 1.

[3] *See id.* Direct jurisdiction essentially connotes bases on which courts in foreign jurisdictions hear cases, rather than the bases on which a court would recognize 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 described as the "last piece of the puzzle." *Jurisdiction Project*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/de/projects/legislative-projects/jurisdiction-project (last visited Mar. 25, 2023). For an earlier comprehensive effort on jurisdiction regarding tort (which did not exclude defamation), see Hague Conf. on Priv. Int'l L., *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 2001: Interim Text*, art. 10 (June 20, 2001) (following "the order of the articles set out in the preliminary draft convention of October 1999"); *see also* Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 258 (not excluding defamation).

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, defamation was excluded from the scope of the Hague Judgments Convention.[7] The Judgments Convention has the potential to facilitate international litigation. However, the exclusion of defamation highlights the need to explore how conflict of laws rules can help to overcome challenges that litigants face. The grounds of direct jurisdiction remain a matter of practical importance in international litigation, but features of the Internet—especially its ubiquitous effect—emphasize why it is essential to examine online defamation in a practical manner. It is difficult to agree on the appropriate forum or fora with respect to the exercise of jurisdiction in internet 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 between States with respect to the substantive law standards that should be applied.[8]

The steady advancement of the Internet highlights the need to promote "security in law."[9] A clear articulation of this need was set out many decades ago:

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[4] The Hague Judgments Convention, *supra* note 1, at art. 2(1)(k).

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

[6] *See* PEDRO DE MIGUEL ASENSIO, CONFLICT OF LAWS AND THE INTERNET ¶ 1.06 (2020). *See generally* Thomas Schultz, *Carving Up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface*, 19 EUR. J. INT'L L. 799 (2008).

[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 & GENEVIÈVE SAUMIER, CONVENTION OF 2 JULY 2019 ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS: EXPLANATORY REPORT, ¶ 60 (2020), https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf.

[8] *Id.* ¶ 61. An important part of the background here is the controversy over choice of law in relation to defamation in the U.K. in the discussions on the Private International Law (Miscellaneous Provisions) Act 1995 and Rome II which both ultimately excluded defamation. *See, e.g.*, PAUL BEAUMONT & PETER MCELEAVY, ANTON'S PRIVATE INTERNATIONAL LAW, ¶¶ 14.299, 14.315–14.316 (3d ed. 2011).

[9] Literature on the conflict of laws, especially concerning the Internet, usually contain discussions on security (in any sense) only tangentially. This is so although the relationship between public international law and private international law is now much less tenuous than may have been initially considered. Perritt argued that "the boundary between public and private international law, though often treated as distinct, in fact, always has been indistinct." Henry H. Perritt, *The Internet is Changing International Law*, 73 CHI.-KENT L. REV. 997, 1004 (1998). This argument is important because Part IV of the Article will demonstrate how treaties should not be dismissed as irrelevant to conflict of laws merely

> The principle or policy of security is simply that, so far as possible and proper, a given situation should have equal legal treatment everywhere. Security in law has two faces: on the one hand, it implies the rule of law, or in other words the orderly settlement of disputes in accordance with general rules; on the other hand, it implies equality in the application of the rules, so that the same case will receive the same treatment everywhere.[10]

From the perspective of individuals affected, "regularity in the application of law is needed to ensure the protection of their just interests and to enable them to anticipate the consequences of their conduct, so that they can plan their affairs accordingly."[11] These explanations and application of "security in law" constitute a more holistic approach better suited to Internet defamation than "legal certainty and predictability."[12] This is because the latter approach does not necessarily cater to challenges that a strict adherence to legal certainty or predictability may pose.[13] Different, or even competing, substantive national legal approaches to defamation should not *ipso facto* mean that there is no space for coordinating conflict of laws rules. Where there are competing domestic policies concerning "individual evaluation," justice is not essentially uncertain merely because it is not always completely certain.[14] Thus, specifying the criteria for determining the forum where a party may file suit in Internet defamation cases does not translate to a scrutiny of the merits

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because they include cybersecurity in their scope. It is necessary to consider the substance of treaties that deal with Internet activities concerning individuals.

[10] Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. BAR REV. 721, 735 (1957).

[11] *Id.* at 736. This may be compared with past efforts aimed at "securing identity of rules" at the Hague. *See* Ernest Lorenzen, *Developments in the Conflict of Laws*, 40 MICH. L. REV. 781, 800 (1942).

[12] A major interest of the Hague Conference on Private International Law focuses on working towards "a high degree of legal certainty and predictability." *About the HCCH*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/about (last visited Feb. 28, 2023). Even security expressed solely in the form of legal certainty and predictability should extend to tort. Rabel noted that all countries had a "need for the security of transactions" which extended to non-commercial matters. He included examples of "family or inheritance." *See* 2 ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 552 (Ulrich Drobnig ed., 2d ed. 1960).

[13] *See* Kermit Roosevelt III, *Certainty Versus Flexibility in the Conflict of Laws*, *in* PRIVATE INTERNATIONAL LAW: CONTEMPORARY CHALLENGES AND CONTINUING RELEVANCE 6, 8–9 (2019) (arguing that "describing a system as certain or flexible still doesn't tell us much about it"—which is in part what this Article addresses in its discussions on flexibility); Paul Heinrich Neuhaus, *Legal Certainty Versus Equity in the Conflict of Laws*, 28 L. & CONTEMP. PROBS. 795, 796 (1963) (arguing that "the conflict between legal certainty and justice (equity) will never come to an end").

[14] Yntema, *supra* note 10, at 736.

of each case. At the same time, however, promoting security in law largely allows jurisdictions to determine cases according to applicable laws but with a chance to assess the extent to which resulting obligations may be enforced abroad. There is nothing objectionable about this approach especially because the Hague Judgments Convention, as an analogy, innovatively "does not prevent the recognition or enforcement of judgments under national law."[15] In other words, "the Convention sets a minimum standard for mutual recognition and enforcement of judgments but States may go further."[16] In fact, if there is a need to distinguish between adjudicative jurisdiction and enforcement jurisdiction (and that the former may be more expansive than the latter),[17] then this is all the more reason to adopt a systematically flexible approach to determining which courts can hear disputes arising from Internet defamation.

This Article considers two major senses in which security may be used with respect to the Internet. The first is ensuring that parties comply with legal procedures because compliance has an effect on how Internet defamation disputes may be resolved.[18] The second is exploiting the inadequacies of complex technology to evade the performance of obligations or to cause loss to others.[19] The realities of the Internet compel an inquiry into the complementarity of both senses with a view to facilitating legal redress. In this context,

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[15] The Hague Judgments Convention, *supra* note 1, at art. 15.

[16] GARCIMARTÍN & SAUMIER, *supra* note 7, at art. 15, ¶ 326; *see* Reid Mortensen, *Tort: Jurisdiction*, *in* A GUIDE TO GLOBAL PRIVATE INTERNATIONAL LAW 261, 279 (Paul Beaumont & Jayne Holliday eds., 2022) (arguing that "[t]he [Hague] Judgments Convention also suggests a more promising approach for negotiating international agreement around suitable adjudicative jurisdictions").

[17] Alex Mills, *Exorbitant Jurisdiction and the Common Law*, *in* ESSAYS IN INTERNATIONAL LITIGATION FOR LORD COLLINS 243, 243 (Jonathan Harris & Campbell McLachlan eds., 2022) (arguing that "the common law approach to civil jurisdiction has traditionally been based on an unfortunate conflation between adjudicative and enforcement jurisdiction as those concepts are now understood in public international law"). Whether the enforcement aspect should be first considered based on a distinction between proceedings to which the judgment debtor can enter a defense and directly seizing territorially owned assets through execution is a different matter altogether beyond the scope of this Article. *See* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 9–11 (2d ed. 2015) (arguing that "it is not surprising that in these cases, the lines between prescriptive jurisdiction, conflict of laws, and personal jurisdiction, . . . have become blurred").

[18] There may be a need to "secure the attendance of witnesses," "secure the performance of the jurisdictional agreement contained in the contract," or "secure the application of any other law in an appropriate case." Sometimes a party 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* DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS ¶¶ 16-041, 12-015, 35-032, 16-081 (Lawrence Collins & Jonathan Harris eds., 16th ed. 2022).

[19] 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

there are challenges at global and regional levels. This Article proceeds on the basis that strictly national approaches to Internet matters are unsustainable in the long term. The focus on security in law should be distinguished from other general meanings of security which may be also applicable to conflict of laws.[20] Secured transactions, for example, fall outside the remit of this Article even though challenges associated with the Internet clearly affect such areas.[21] Nevertheless, 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.[22] Like the Internet, the issue of security challenges the traditional boundaries and approaches to conflict of laws. More cross-subject synergy and international collaboration is required. There is currently "insufficient international coordination and coherence to address cross-border legal challenges on the internet."[23]

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

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the location of a server," see Jeanne Huang, *Chinese Private International Law and Online Data Protection,* 15 J. PRIV. INT'L L. 186, 196 (2019).

[20] 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*, 14 J. PRIV. INT'L L. 385 (2018). For "security features" of the Apostille Certificate, see *Declaration/Reservation/Notification*, HAGUE CONF. ON PRIV. INT'L L. – CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE, https://www.hcch.net/de/instruments/conventions/status-table/notifications/?csid=363&disp=resdn (last visited Feb. 26, 2023).

[21] 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*, 81 L. & CONTEMP. PROBS. 203, 221 (2018) (analyzing U.N. COMM'N ON INT'L TRADE L., MODEL LAW ON SECURED TRANSACTIONS, U.N. Sales No. E.17.V.1 (2016)).

[22] Toshiyuki Kono & Kazuaki Kagami, *Functional Analysis of Private International Law Rules for Security Interests in Intellectual Property*, *in* SECURITY INTERESTS IN INTELLECTUAL PROPERTY 119 (Toshiyuki Kono ed., 2017).

[23] *Release of the World's First Internet & Jurisdiction Global Status Report*, INTERNET & JURISDICTION POL'Y NETWORK (Nov. 7, 2019), https://www.internetjurisdiction.net/news/release-of-worlds-first-internet-jurisdiction-global-status-report. 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. DAN JERKER B. SVANTESSON, INTERNET & JURISDICTION POLICY NETWORK, INTERNET & JURISDICTION GLOBAL STATUS REPORT 2019, 14, 35 (2019).

more on reporting regulatory breaches under regional or even national legislation, rather than pursue claims in contract or tort.[24] From a tort standpoint, the same set of facts may give rise to both public[25] and private law claims in defamation.[26] More than ever, the need for collaborative endeavors across jurisdictions is pertinent.[27] A central aim of this Article is to ascertain the extent to which a flexible approach to the exercise of jurisdiction in defamation cases considering business implications and competing State interests can exist. The inquiry of this Article is significant partly because of a gap in specific literature on Internet defamation with respect to business implications and competing State interests, the need for (at least) international cooperation beyond traditional categorizations, and the absence of a clear policy that should drive a determination of appropriate courts to hear cases. Such issues have not been resolved, especially in a way that factors in the interests of both developed and developing countries.

This Article, therefore, addresses what jurisdictional rule "x" should be.[28] This is especially so as there is no agreement on what rule is ideal with respect to the Internet. Jurisdictional rule "x" represents the search for the most appropriate basis for courts to hear suits regarding defamation. This jurisdictional rule should be predicated on a clear articulation of policy that promotes security in law and obligations. The search for jurisdictional rule "x" using a purely formulaic, technical approach has impeded progress in this area of Internet defamation. There is a striking argument that such a "correct technical formula" actually "does not exist—the private international law rules in this area are not a question of technicality but a matter of policy in respect of fundamental values."[29] This Article will demonstrate, however, that in conflict of laws there should be a clear focus on aspects of policy that should inform legal decisions on appropriate fora to hear Internet defamation cases.

This Article focuses on the breach of obligations that arise in defamation cases especially where financial interests are evident.[30] This could be because

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[24] Anthony Gray, *Conflict of Laws and the Cloud*, 29 COMP. L. & SEC. REV. 58, 62 (2013).

[25] E.g., judicial review. *See* Butt v. Secretary of State for the Home Department [2019] EWCA (Civ) 933 [3] (Eng.).

[26] E.g., damages and related claims. *Id.* at [4].

[27] For the argument that "all states are co-equals in the global task" of Internet regulation, see Schultz, *supra* note 6, at 815.

[28] The letter "x" is commonly used to represent an unknown variable.

[29] JULIA HÖRNLE, INTERNET JURISDICTION LAW AND PRACTICE 404 (2021). Even this view concedes that "the law has to make a policy choice" between places where personality rights have been infringed. *Id.*

[30] The English statutory regime on defamation has related to financial implications. Defamation Act 2013 c. 26 (UK). Under Section 1 of the Defamation Act 2013, a defamatory statement must cause "serious harm to the reputation of the claimant." *Id.* § 1. In other words, the harm must have "caused or is likely to cause" an organization that trades

the defendant has business interests such as corporate or professional commitments that guarantee income or other pecuniary benefits. This Article therefore explores how courts should ascertain the forums in which they should hear conflicts cases. Contracts and torts have their differences, but both are included in this Article because the Internet has similar implications for both. There is also a connection between defamation and business. The publication of defamatory matter may damage not only a person's reputation but also the reputation, and therefore the revenue, of international businesses.[31] This Article focuses on the implications of torts and commerce in the context of defamation. 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 harmonize rules of jurisdiction in defamation cases, there should be a gradual convergence of harmonization efforts concerning commercial implications and the effects of defamation. This Article compares conflict of laws rules in the EU, England, and North America because these jurisdictions are advanced in the use of the legal regulation of the Internet. Developing countries, including those in Africa, generally have much less experience in this regard and relevant laws are often not fit for this comparative purpose. In many cases there are no modern laws on Internet defamation in developing countries. This is a major legal gap that has implications for developing countries and developed countries because activities on the Internet are inextricably connected. This Article attempts to provide for developing countries jurisdictional rules that may be useful in resolving Internet disputes that concern defamation.

This Article argues that the speed of Internet evolution compels proactivity 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).[32] The influence of conflict of laws on Internet defamation is at a crossroads. Although the influence is otherwise being consolidated through the successful work of the Hague Conference on Private International Law, certain items are excluded during convention ne-

for profit "serious financial loss." *Id.* But even under the previous Defamation Act of 1996, "the government of the day was keen to encourage commercial exploitation of this then relatively new medium [i.e., the Internet]." *See* Gavin Sutter, *Online Intermediaries*, *in* COMPUTER LAW 305–65, 336 (Chris Reed & John Angel eds., 7th ed. 2011).

[31] Trevor C. Hartley, *'Libel Tourism' and Conflict of Laws*, 59 INT'L & COMPAR. L.Q. 25, 30 (2010); CFC Stanbic Bank Ltd. v. Consumer Fed'n of Kenya (COFEK) (2014) eKLR, ¶ 31 (Kenya).

[32] *See supra* text accompanying notes 18–19.

gotiations on a pragmatic basis to increase the chances of agreement and signatures.[33] Nevertheless, the features of the fast-evolving Internet have increased the potential to escape obligations. For example, this may be directly through fraudulent schemes in civil or commercial matters. It is critical that the increased potential to escape obligations via the Internet does not weaken the influence of conflict of laws analysis. 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, pragmatic, and forward looking. Such jurisdictional policy should be articulated on at least two levels. First, this Article 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, like fraud. Second, there should be a clear articulation of how parties' individual vulnerabilities should be factored in when jurisdiction is exercised in both commercial and other civil matters. One example is the need to perform non-contractual obligations (as applicable to defamation), especially where parties have financial interests because of corporate or professional endeavors.

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, including those in Africa, to benefit from international or global collaborations for practical reasons, including Internet penetration.[34] If, for example, a claimant is required to sue where publication takes place or where defamatory material is downloaded, such a claimant may find that jurisdiction unfamiliar. Reputational damage caused by the defamation may be greatest in another jurisdiction altogether. Business interests (e.g., financial loss) have implications for obligations in the context of this Article, and it is important for conflict of laws scholars and legislators to engage in this space considering Internet challenges.

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[33] Schultz, *supra* note 6, at 817 n.101.

[34] Internet 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* Ani Petrosyan, *Internet Usage Worldwide – Statistics and Facts*, STATISTA (Jan. 3, 2023), https://www.statista.com/topics/1145/internet-usage-worldwide/#dossierKeyfigures. In February 2023, the Nigerian President claimed that "the broadband penetration in Nigeria is 100 per cent" because Nigeria is the first African country to benefit from Starlink services. Okechukwu Nnodim, *Nigeria Broadband Penetration Now 100%, Says Buhari*, PUNCH (Feb. 1, 2023), https://punchng.com/nigeria-broadband-penetration-now-100-says-buhari. This claim is debatable because broadband coverage does not automatically translate to broadband penetration. But even assuming the claim is true, there are real access issues from the standpoint of cost and infrastructure. There is, of course, the likely argument that the cost of satellite broadband will reduce in due course. However, affordability includes affording the means to access Internet service including, crucially, electricity.

The foundational task is to first ascertain the place of policy and security with respect to the Internet in the conflict of laws. In Part I, the Article examines how policy influences Internet jurisdiction especially considering the adaptation of traditional jurisdictional rules to Internet defamation. Part II sets out analytical foundations for examining unique questions that virtual presence presents as well as how to consider relevant categories of parties. The Article provides an in-depth analysis of how courts should determine the most appropriate forums in which they should hear relevant defamation claims. In considering such questions, Part II then examines how a clear articulation of policy driving the resolution of disputes arising from Internet defamation can serve as a platform to interrogate and navigate the spaces that the adoption of different jurisdictional approaches creates or allows. Based on the analysis in Part III (which investigates the nature of cases considering the role of parties with respect to relevant torts) and Part IV (that provides an analytical basis regarding a recalibration of *forum non conveniens*), Part V examines Kenyan and Nigerian regimes in the context of African regional efforts and with a view to ascertaining necessary foundations that are sustainable from a global standpoint. The Article then draws conclusions regarding a conflict of laws agenda amid the overlaps between public international law and private international law. It calls for a policy that drives the enforcement of obligations in Internet defamation, systematic flexibility (partly building on "equal legal treatment" where it is "possible and proper")[35] that goes beyond current notions of legal certainty and predictability through a pragmatic application of *forum non conveniens*.

II. 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.[36] Nevertheless, policy has become an important aspect of the Internet world regarding information ("information policy")[37] generally or with more specific reference to "substantive legal policy."[38] Even the latter can be difficult to pin down.[39] As a matter of policy, for example, English courts generally favor litigating only

[35] Yntema, *supra* note 10, at 735.

[36] Robert Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 RUTGERS L. REV. 523, 558 (1958).

[37] For a discussion on what constitutes "information policy," see Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 96 TEX. L. REV. 553, 554 (1997).

[38] For a discussion on "substantive legal policy," see *id.*

[39] Reidenberg argued that substantive legal policy was in a state of flux. *Id.*

once, and in the most appropriate forum.[40] A legal system may hinge on a policy that calls for an end to litigation.[41]

For the purposes of this Article, "policy" embodies "an adjustment of the clashing interests" between the State and individuals.[42] 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."[43] This persuasive characterization 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. This is because any practical effort to solve Internet defamation requires a significant degree of policy engagement although there may be attempts to avoid sensitive or difficult policy questions.[44] Trying to address relevant transnational policy issues may sometimes result in a legal arms race, or even more conflicts.[45] Countries may legislate specifically to counteract liberal criteria for determining the appropriate forum to litigate.[46] Yet, this is critical to determining and streamlining policies that should shape the laws that govern the Internet. Matters of policy have the potential to influence the outcome of cases.[47] 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.[48]

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."[49] Such secu-

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[40] Du Pont v. Agnew [1987] 2 Lloyd's Rep. 585, 589 (Eng.). *See also* Vitol Bahrain EC v. Nasdec Gen. Trading LLC [2013] EWHC (Comm) 3359 [46] (Eng.).

[41] The U.S. 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 recognize a U.S. judgment. Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 168 (E.D. Pa. 1970).

[42] Kramer, *supra* note 36, at 526.

[43] *Id.*

[44] *See* GARCIMARTÍN & SAUMIER, *supra* note 7, ¶ 60 ("Defamation is a sensitive matter for many States.").

[45] BERTRAND DE LA CHAPELLE & PAUL FEHLINGER, JURISDICTION ON THE INTERNET: FROM LEGAL ARMS RACE TO TRANSNATIONAL COOPERATION 1 (2016) (Glob. Comm'n on Internet Governance, Paper Ser. No. 28) (arguing that "this legal arms race could lead to severe unintended consequences"). On "unwanted fragmentation and increasing conflicts," see Bertrand de La Chapelle & Paul Fehlinger, *Jurisdiction on the Internet: How to Move Beyond the Legal Arms Race*, 3 CYFY J. 8, 10 (2016).

[46] SVANTESSON, *supra* note 23, at 30–32.

[47] Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565, 583–84 (1999).

[48] David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 97 (1998).

[49] Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, 611–12 (Can.).

rity 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.[50] This perspective was underscored by the same court in a later Internet defamation case.[51] 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 recognized the need for security in the sense of legal certainty as well as the security of transactions in a more general sense.[52] In highlighting the importance of successfully regulating electronic signatures, for example, the report noted that "more advanced targeting software or blocking technology may provide solutions to some of the jurisdictional issues described."[53]

Policies have a direct impact on defamation generally, and in the context of the Internet specifically. 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."[54] Relevant policies can be further illustrated through the impact of globalization, the need for certainty, and protecting freedom of speech.[55] 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.[56] To this extent, the exclusion of defamation was a policy decision made in favor of avoiding the adjustment of clashing interests.[57] 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[icle] 2(1)(k) of the 2015 draft Convention excluded defamation from its scope [this is the same as Art[icle] 2(1)(k) of the Hague Judgments Convention 2019]. While such an exclusion has both advantages (e.g. avoiding having to tackle a particularly controversial area) and disadvantages (e.g. a missed opportunity

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[50] *Id.*

[51] Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3 (Can.).

[52] Avril D. Haines, Hague Conf. on Priv. Int'l L., *The Impact of the Internet on the Judgments Project: Thoughts for the Future*, ¶ 15, Prel. Doc. No. 17 (Feb. 2002).

[53] *Id.* ¶ 15 & n.46 (discussing "the confidence of businesses and consumers in the security of transactions conducted electronically").

[54] *Reynolds v. Times Newspapers* [2001] 2 AC 127, 201 (UK).

[55] David Rolph, *The Message, Not the Medium: Defamation: Publication and the Internet in* Dow Jones & Co Inc v. Gutnick*,* 24 SYDNEY L. REV. 263 (2002).

[56] GARCIMARTÍN & SAUMIER, *supra* note 7, ¶ 60.

[57] This is primarily between States but, indirectly, with the involvement of individuals as the major focus of conflict of laws.

> 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 were not.[58]

Thus, there is a need for coordination of relevant policies, which is clearly challenging.[59] Nevertheless, there is a forceful argument that "a conflicts problem" arises if policies differ vis-à-vis interest clashes, in which case it would be necessary to investigate the rationale for the policies of States.[60] Other policies relevant to the discussion of conflict of laws in internet defamation cases reflect the need to recognize foreign systems, parties' legitimate interests, and practical considerations that are associated with multistate defamation.[61] Governments are typically in charge of policymaking and they have moved further into the Internet space through their policies.[62] This 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 [Hague Conference on Private International Law'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."[63] It is therefore necessary to explore how different regulatory approaches can be compatible.

Where conflict of laws concerns are influenced by regulation, a careful navigation of relevant issues is important in considering the exercise of jurisdiction. In considering what would amount to a closer connection with the

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[58] Dan Jerker B. Svantesson, *The (Uneasy) Relationship Between the HCCH and Information Technology*, *in* THE ELGAR COMPANION TO THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW 449, 458 (Thomas John et al. eds., 2020).

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." GARCIMARTÍN & SAUMIER, *supra* note 7, ¶ 63.

[59] On the relationship between policy approaches to the Internet from national and international perspectives, see Haines, *supra* note 52, ¶¶ 6–7.

[60] Kramer, *supra* note 36, at 528.

[61] *Id.*

[62] *See*, *e.g.*, James Allen & Nico Flores, *Final Report for the Dutch Ministry of Economic Affairs: The Role of Government in the Internet*, ANALYSIS MASON (Apr. 18, 2013), https://www.analysysmason.com/globalassets/x_migrated-media/media/analysys-mason-report-for-ministry-of-economic-affairs-230413.pdf.

[63] Svantesson, *supra* note 58, at 449, 454. Furthermore, "[t]he transnational nature of the internet poses problems in enforcing regulation, including conflicts of law, confusion about which jurisdiction applies and in seeking redress against foreign actors." SELECT COMMITTEE ON COMMUNICATIONS, REGULATING IN A DIGITAL WORLD: 2D REPORT, 2017-19, HL 299, ¶ 16 (UK).

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.[64] This is a reality for the exercise of jurisdiction in a strict sense.[65] It is critical that conflict of laws rules promote and guarantee a "sense of security for individual rights."[66]

The policy that underpins a jurisdictional rule and the jurisdictional rule itself are not necessarily the same. Both may be different.[67] 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.

In *J. McIntyre Machinery Ltd. v. Nicastro*,[68] the New Jersey Supreme Court was influenced by "significant policy reasons" and asserted jurisdiction over an English company.[69] There was a "strong interest in protecting its citizens from defective products."[70] In reversing the decision of the lower court, the U.S. Supreme Court observed that the policy reason was strong but had to be balanced with constitutional restraints.[71] In an extensive dissenting opinion, however, Justice Ginsburg argued that the majority opinion put U.S. plaintiffs at a disadvantage when compared with similarly situated complainants elsewhere.[72] This opinion was made in the context of the Brussels Regulation,[73] which states that jurisdiction should be asserted where the harmful act occurred.[74] While this case does not concern Internet defamation, it is useful because it established a connection between policy considerations and determining the exercise of specific or special jurisdiction. This is relevant to

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[64] Aukje A.H. van Hoek, *Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?*, 3 ERASMUS L. REV. 157, 161–62 (2014).

[65] 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, 2011 E.C.R. I-1593 ¶¶ 3–10.

[66] Somportex Ltd. v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 169 (E.D. Pa. 1970) (citing Goodyear v. Brown, 155 Pa. 514, 518, 26 A. 665, 666 (1893)).

[67] In *Aspen*, the U.K. Supreme Court distinguished between the rationale for a ground of jurisdiction and the ground itself. *See* Aspen Underwriting Ltd. v. Credit Eur. Bank NV [2020] UKSC 11 [45].

[68] J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873 (2011).

[69] *Id.* at 886–87.

[70] *Id.* at 887.

[71] *Id.*

[72] *Id.* at 909.

[73] *See generally* Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L12) at art. 5.

[74] *Nicastro*, 564 U.S. at 910.

the policy choices that may inform courts' decisions on the appropriate forums to hear cases concerning Internet defamation. Also, the resolution of conflict of laws issues are subject to U.S. constitutional restrictions considering due process that requires substantial connection between the defendant and the forum. The case is also important because there was a consideration of policy issues that underpin the conflict of laws generally. A dynamic policy should govern the Internet, and conflict of laws rules should be adapted accordingly.

B. The Effect of Policy on Internet Jurisdiction

As most conflict of laws rules developed before the Internet age, it is only natural that scholars have interrogated the adequacy of such rules considering the challenges which the Internet pose. Thus, a scholar argued that national laws are "inappropriate" in the Internet context, because the Internet has an international character.[75] Closely related to this point is his argument that such laws were created in the context of the physical world.[76] This latter argument is more visible in relevant literature because it is rather glaring.[77] There is a need to examine certain subtle details for two 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.[78] Secondly, conflict of laws rules are designed to apply to activities that have an international character. 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.[79]

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[75] José Edgardo Muñoz-López, *Internet Conflict of Laws: A Space of Opportunities for ODR*, 14 INT'L L. REV. COLOM. DRERECHO INT'L 163, 167 (2009).

[76] *Id.*

[77] Asensio observed that traditional rules were based on "geographical considerations." *See* ASENSIO, *supra* note 6, ¶ 1.24.

[78] In the U.K., for example, "[j]urisdictional rules derived from international conventions are not affected by those provisions of the Civil Jurisdiction and Judgments Act 1982 which regulate the allocation of jurisdiction between the various parts of the United Kingdom." This is true "even where the intra-United Kingdom rule was based upon an equivalent provision in the recast Brussels I Regulation." DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 18, ¶ 15-003.

[79] Gillies argued that the U.K. 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 cooperation at the international level." Gillies considered the English Civil Procedure Rules and the Civil Jurisdiction and Judgments Act of 1982 (Schedules 4 and 8 of the Act). *See* Lorna Gillies, *Appropriate Adjustments Post Brexit: Residual Jurisdiction and* Forum Non Conveniens *in UK Courts*, 3 J. BUS. L. 161, 183 (2020).

The centrality of policy in jurisdictional issues is reflected in the traditional perspectives from which U.S. and English laws consider defamation.[80] The former has usually adopted a more liberal attitude than the latter, a development which left its mark on Internet law. For example, Wimmer argued that the exercise of English jurisdiction considering "traditional jurisdiction principles" was unreasonable.[81] Thus, in the light of a U.S. "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.[82] Businesses would rather not deal with consumer protection or privacy laws to ensure maximization of profit. For example, companies would prefer one-click agreements.[83] The need for an appropriate policy is sometimes glossed over because policy may be understood only in a socio-political or international relations context.[84] 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 harmonize rules of jurisdiction.[85] The question of policy itself started on a broad level but did not lead to any result that could facilitate an agreement on torts like defamation.[86]

The Internet does not necessarily require a radical overhaul of traditional jurisdictional rules (although this Article argues that significant adaptation is required).[87] At the turn of the 21st century, the Australian High Court adapted

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[80] This difference extends to some other major common law jurisdictions including Australia which considers that U.S. defamation law "leans heavily" in favor of defendants. See the Australian Internet defamation case of *Dow Jones and Company Inc v. Gutnick*, [2002] 210 CLR 575, ¶ 188 (Austl.).

[81] Kurt Wimmer, *International Liability for Internet Content: Publish Locally, Defend Globally*, *in* WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION 256 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2003).

[82] *Id.* at 258.

[83] *Id.* at 264.

[84] *See, e.g.*, Christopher Cox, *Establishing Global Internet Freedom: Tear Down This Firewall*, *in* WHO RULES THE NET? INTERNET GOVERNANCE AND JURISDICTION, *supra* note 81, at 3, 10 (arguing that the U.S. should adopt a "robust global internet freedom policy").

[85] On the negotiating parties' struggle with Internet issues at the time, see Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1069 (2006).

[86] E.g., the "country of origin" and "country of destination" approaches were combined in jurisdiction concerning Internet torts. *See* Hague Conf. on Priv. Int'l L., *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 2001: Interim Text*, art. 10 (June 20, 2001).

[87] *See* Oren Bigos, *Jurisdiction over Cross-Border Wrongs on the Internet*, 54 INT'L & COMPAR. L.Q. 585, 619 (2005) (arguing that "[a] radical overhaul of jurisdictional rules" was not necessary). Although writing in the context of applicable law, Mills argued that "[d]efamation online . . . is a twenty first century problem which strikingly remains regulated by a nineteenth century choice of law rule." Alex Mills, *The Law Applicable to Cross-Border Defamation on Social Media: Whose Law Governs Free Speech in Facebookistan?*, 7 J. MEDIA L. 1, 34 (2015).

traditional jurisdictional rules to an Internet defamation case.[88] The appellant, an Australian businessman, brought libel proceedings against Dow Jones & Company Inc. in the state of Victoria.[89] The material appeared in a weekly financial magazine and the appellant's website.[90] 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.[91] The appeal was dismissed, and the Victorian High Court exercised jurisdiction while emphasizing the fact that the appellant was claiming damage to his reputation within Victoria.[92] At the time, this provided much-needed precedent on how to deal with Internet defamation. The Victorian High Court also rejected the single publication doctrine[93] which was well favored in the U.S.[94] but rejected by the English House of Lords in *Berezovsky*.[95] Significantly, an interpretation of policy also influenced the European Court of Justice (ECJ) at the time with respect to maintaining the possibility of separate claims.[96] There is a tendency to gloss over the postscript in this case—there was not enough evidence to consider the salient issues from an Internet perspective.[97] Therefore, proceedings in the Victorian High Court set in motion legal developments that resulted in legislative activity in some other common law jurisdictions. These developments underscored the influence of technology on Internet defamation law evident in England and Canada. There was a statutory intervention more than a decade later and the single publication rule was codified in England.[98] The rule was recommended by the Law Commission of Ontario[99] based on "strong policy reasons."[100]

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

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[88] *Dow Jones & Co. Inc. v. Gutnick*, [2002] 210 CLR 575 (Austl.).

[89] *Id.* ¶ 2.

[90] *Id.*

[91] *Id.* ¶¶ 7, 9.

[92] *Id.* ¶¶ 46–48.

[93] *Id.* ¶¶ 29–37. The single publication doctrine states, 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. *Id.* ¶ 31.

[94] UNIF. SINGLE PUBL'N ACT § 1, 14 U.L.A. 377 (1990).

[95] *See* Berezovsky v. Michaels [2000] UKHL 25, 1 WLR 1004, 1011–13 (HL) (Eng.). The court also rejected variants of the "global theory." A single cause of action is illustrative. See the dicta of Lord Steyn, *id.*

[96] *See* Case C-68/93, Shevill v. Presse Alliance SA, [1995] E.C.R. I-415. The *Shevill* court contrasted the policies that underpinned the ECJ and U.S. positions. *Id.*

[97] See the "Postscript on the Internet" in *Berezovsky*, 1WLR 1004.

[98] Defamation Act 2013, c. 26, § 8 (Eng.).

[99] LAW COMMISSION OF ONTARIO, DEFAMATION LAW IN THE INTERNET AGE: FINAL REPORT 49 (Mar. 2020), https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf.

[100] *Id.* at 48.

reasoning, to the resolution of entirely new and unforeseen problems."[101] As such, the peculiarities of the Internet were an insufficient policy basis to doubt the pragmatism of the common law to solve these problems.[102] Using the place of upload as a determining factor, for example, would allow people to upload harmful material wherever it favors them, and may make a party avoid liability.[103] Parties can exploit the ubiquitous nature of the Internet in their attempts to avoid liability.[104] 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 few, countries, the question of liability potentially arises globally when the defendant operates online. 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.[105] If conflict of laws rules are not well articulated or they are unclear, there will be impediments to solving conflict of laws problems and ensuring 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 that adapted jurisdictional rules to operate in an Internet context.[106] This statute codified a test similar to *forum non conveniens*.[107] In the EU, there was an introduction of the claimant's "centre of interests."[108] This was apparently imported from international insolvency

[101] *Dow Jones & Co. Inc v. Gutnick*, [2002] 210 CLR 575, ¶ 92 (Kirby, J) (Austl.).

[102] Rolph, *supra* note 55, at 280.

[103] *Gutnick*, 210 CLR 575, ¶ 130 (Kirby, J).

[104] For the use of "ubiquitous" or its variants in Internet cases, see, e.g., *id.* ¶¶ 78, 80; Case C-194/16, Bolagsupplysningen v Handel, ECLI:EU:C:2017:766 ¶ 48 (Oct. 17, 2017); Joined Cases C-509/09 & C-161/10 ¶ 45, 2011 E.C.R. 192; DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 18, ¶¶ 11–290.

[105] Thus, statements published via the Internet are "likely to be seen by an unlimited number of persons, thus producing stronger impacts." Rapporteur Emeric Prévost, Expert Comm. on Hum. Rts. Dimensions of Automated Data Processing & Different Forms of A.I. (MSI-AU), *Liability and Jurisdictional Issues in Online Defamation Cases*, at 7, Council of Eur. Study DGI(2019)04 (Sept. 2019). This also implies that "defamatory statement[s] can therefore produce more significant damage, possibly in several states, resulting in complex international legal disputes." *Id.*

[106] Defamation Act 2013, c. 26, § 8 (Eng.).

[107] *See* discussion *infra* Section III(A).

[108] *See* Joined Cases C-509/09 & C-161/10, eDate Advert. Gmbh v. X; Martinex v. MGN Ltd. ¶ 57, ECLI:EU:C:2011:685 (Oct. 25, 2011) (in the context of natural persons). For the relationship between "the victim's centre of interests" and where "the damage

law—an area which would otherwise have no meaningful connection with defamation.[109] The EU focuses on the defendant's (main) centre of interests. If these are mere adaptations of traditional jurisdictional rules, then such adaptation is arguably strained.[110] The question, therefore, goes beyond what technical rules should apply. In considering policy dynamics, such changes went beyond mere adaptation of jurisdictional rules. 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.[111] For example, a rule of jurisdiction entirely based on the assumption of universal access, based on the borderless nature of the Internet, may require deeper analysis considering geo-location technology.[112] 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.[113] Less than a decade is enough time for a change in technology to have a significant impact on the outcome of a

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caused by online material occurs most significantly," see *Bolagsupplysningen,* ECLI:EU:C:2017:766 ¶ 33.

[109] The EU regime on insolvency has specified "the centre of a debtor's main interests" since 2000. See Council Regulation 1346/2000, art. 3(1), 2000 O.J. (L 160) 1, which Regulation (EU) 2015/848, art. 3, 2015 O.J. (L 141) 19 (May 20, 2015) replaced. However, § 263(1)(a) of the U.K. Insolvency Act of 1986 refers to "the centre of the debtor's main interests." Insolvency Act, 1986, c. 45 § 263(1)(a) (UK).

[110] 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 359 (3d ed. 2020).

[111] 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, *supra* note 87, at 25. Defamation is an area where it is rather difficult to consider the applicable law in addressing jurisdictional issues.

[112] Essentially, geo-location is a computer functionality that can identify location. Many "accept cookies" options which are increasingly standard not only enable this but also track user behaviour. *See* Betsie Estes, *Geolocation—The Risk and Benefits of a Trending Technology*, ISACA J. (Sept. 26, 2016), https://www.isaca.org/resources/isaca-journal/issues/2016/volume-5/geolocationthe-risk-and-benefits-of-a-trending-technology. For an example of how courts apply geolocation information in judicial analysis concerning defamation, see Vardy v. Rooney [2022] EWHC (QB) 2017, ¶ 98. *See also* Dan Jerker B Svantesson, *Time for the Law to Take Internet Geolocation Technologies Seriously*, 8 J. PRIV. INT'L L. 473, 487 (2012) (noting the need to reassess "longstanding assumptions" and arguing that "geoidentification must be taken into account in every analysis of private international law issues involving the Internet. Lawyers failing to do so may be negligent").

[113] Dan Jerker B. Svantesson, *European Union Claims of Jurisdiction over the Internet: An Analysis of Three Recent Key Developments*, 9 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 113, ¶ 57 (2018).

case.[114] In interpreting Article 7(2) of Regulation EU 1215/2012, for example, the Court of Justice of the European Union (CJEU) decided that a person who alleged that his personality rights[115] 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.[116] Svantesson, however, criticized this decision.[117] Critics allege that 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."[118] Yet, the epiphany was provided much earlier when Haines argued that more advanced targeting software or blocking technology could provide solutions to some jurisdiction issues.[119] To give an instance, the possibility of defending court actions in several jurisdictions[120] 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 transactions and obligations.[121] This has arguably evolved since cases like *King v. Lewis.*[122] In that 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.[123]

The need to secure obligations underscores the importance of adopting both a practical and systematically flexible approach that fully factors in the inevitability of government intervention. A glaring example is that the State

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[114] Writing in the context of choice of law, Briggs explored "the practical point that the pace of technological advance may quickly render any [internet-specific] rule obsolete." Adrian Briggs, *The Duke of Brunswick and Defamation by the Internet*, 119 L.Q. REV. 210, 212 (2003). Nevertheless, he also argued that "[t]he view that the law had taken radio and television in its stride and would assimilate and digest the internet with equal ease may not be altogether convincing." *Id.*

[115] In the EU, personality rights are usually used in a broad manner to cover defamation. *E.g.*, Council Regulation 864/2007, art. 1.2(g), 2007 O.J. (L 199/40) (commonly known as "Rome II").

[116] Case C-194/16, Bolagsupplysningen v. Handel, ECLI:EU:C:2017:766 ¶ 50(2) (Oct. 17, 2017).

[117] Svantesson, *supra* note 113, at ¶ 56.

[118] *Bolagsupplysningen*, ECLI:EU:C:2017:766, ¶ 48.

[119] Haines, *supra* note 52, ¶ 15.

[120] *Id.* ¶ 4.

[121] Svantesson argued that targeting in its pure form offered little guidance to businesses and courts. *See* Svantesson, *supra* note 113, ¶ 26. Social values in the context of the Internet are "a moving target." *See* Lyrissa B. Lidsky, *Defamation, Reputation and the Myth of Community*, 71 WASH. L. REV. 1, 8 (1996). It is also telling that this argument was not even made in the fast-evolving Internet context.

[122] King v. Lewis [2004] EWCA (Civ) 1329 (Eng.).

[123] *Id.*

may have a legitimate interest in the subject matter, and thus, such interests need to be balanced with others.[124] A more subtle example is the search for a substantial connection between the subject matter and the State.[125] In China, for about two decades, the location of the server has been used as the sole basis to exercise jurisdiction.[126] The policy reasons for this include national security, economy, and political stability.[127] In contrast, Menthe argued that a territorial approach to the Internet through servers would create "jurisdictional mayhem."[128]

The need to promote the security of obligations, underpinned by security in law as earlier argued, can serve as a coalescing platform to address impediments to a pragmatic jurisdictional approach. If States are reluctant to stop intervening in Internet-related matters generally, then legislators and policymakers can exploit the intervention of States to set up a conflict of laws agenda especially with regards to Internet defamation. This is especially important if conflict of laws techniques "constitute a distinctive form of global governance."[129] 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,[130] it is also true that the effects of activities on the Internet transcend

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[124] Svantesson, *supra* note 113, ¶ 8.

[125] *Id.*

[126] Jie Huang, *Personal Jurisdiction based on the Location of a Server: Chinese Territorialism in the Internet Era?*, 36 WIS. INT'L L.J. 87 (2019). 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 364 (3d ed. 2016); *see also* DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 18, ¶¶ 35–120 (arguing that the place where the defendant's server is located is not a relevant place for a claim of defamation and noting that this approach has been adopted in the context of jurisdiction).

[127] Huang, *supra* note 126, at 110.

[128] Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. & TECH. L. REV. 69 (1998).

[129] Christopher A. Whytock, *Conflict of Laws, Global Governance, and Transnational Legal Order*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L, & COMPAR. L. 117, 140 (2016). *See also* Horatia Muir Watt, *Private International Law's Shadow Contribution to the Question of Informal Transnational Authority*, 25 IND. J. GLOB. LEGAL STUD. 37, 40 (2018) (arguing that "private international law has contributed very little to the global governance debate," questioning whether it is appropriate for private international law to abandon certain areas to public international law, and thus urging "a radical reappraisal of its traditional methodologies").

[130] Oreste Pollicino & Marco Bassini, *Free Speech, Defamation and the Limits of Freedom of Expression in the EU: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON EU INTERNET LAW 508, 509 (Andrej Savin & Jan Trzaskowski eds. 2014).

national boundaries and jurisdictions.[131] An analysis of such activities requires a consideration of relevant cases in terms of the subject matter concerned and the litigants involved.

III. THE CASE AND PARTIES

A. The Nature of the Case

Examining the nature of each case is relevant to Internet defamation because of the various policies that may underpin defamation in various jurisdictions. This can be a difficult issue to assess because the effects of defamation may be felt in more than one place. To give an instance, "the court's discretion may be more open-textured than otherwise" where an internet publication has a global reach.[132] It is easier to assess the nature of the case in the context of a particular state. U.S. case law is illuminating in this regard. In *Calder v. Jones*,[133] a California claimant brought a libel action in a California court against defendants located in Florida.[134] The U.S. 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.[135] In summary, California was the focal point of both the published material and harm suffered.[136] The tort of libel generally occurs wherever the material in question is circulated.[137] The U.S. Supreme Court has consistently held that the California court correctly assumed jurisdiction in *Calder v. Jones*.[138] There was an extensive consideration of the effects of the petitioner's Florida conduct in California. The court's reasoning that jurisdiction over the petitioners was proper in California considering the "'effects' of their Florida conduct in California" is instructive.[139] Arguably, it would seem unreasonable to heap further hurdles on a claimant who has already suffered intentional defamation in a California weekly newspaper with

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[131] *Id.*

[132] Soriano v. Forensic News LLC [2021] EWCA (Civ) 1952 [17] (Eng.).

[133] Calder v. Jones, 465 U.S. 783 (1984); *see also* Walden v. Fiore, 571 U.S. 277 (2014).

[134] *Calder*, 465 U.S. at 785.

[135] *Id.* at 790.

[136] *Id.* at 789.

[137] In an Internet case, this should translate to where the publication was read or downloaded. King v. Lewis, [2004] EWCA (Civ) 1329 (Eng.); Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3, para. 36 (Can.); *Dow Jones & Co Inc v Gutnick*, [2002] 210 CLR 575, ¶ 56 (Austl.).

[138] *E.g.*, *Walden*, 571 U.S. at 277.

[139] *Calder*, 465 U.S. at 789.

a wide readership. *Calder* may be compared with *Walden v. Fiore*,[140] a subsequent case where the court considered issues that differed from "the broad publication of the forum-focused story in *Calder*."[141] The major highlight of *Fiore* was the lack of a proper basis to exercise jurisdiction because the effects of the petitioner's conduct were not connected to the forum State.

Fiore concerned seizure of a large amount of cash by Walden, who was a deputized DEA officer at a Georgia airport.[142] The claim was that Walden helped draft a false forfeiture affidavit that was forwarded to a United States Attorney's Office in Georgia.[143] However, no forfeiture order was made, and the money was returned.[144] The claimant then filed an action in the Nevada District Court.[145] The question was whether Walden "knew his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada."[146] In upholding the decision of the district court and reversing the decision of the Ninth Circuit, the U.S. Supreme Court decided that the Nevada court lacked jurisdiction.[147] The contacts were not enough, but there are some other points worth noting. Some policy considerations were arguably relevant. The DEA officer was working in the interest of public safety, the claimant was carrying $97,000 in cash, and the officer's seizure was not found to be improper.[148] The "effects" rationale of *Calder v. Jones*[149] was held to be inapplicable in this case.[150] In any event, 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 are committed via the Internet or other electronic means (*e.g.*, fraudulent access of financial accounts or 'phishing' schemes)."[151] The U.S. Supreme Court declined to address this point and considered that "virtual 'presence'" presented "very different questions."[152] Given the ease with which the Supreme Court 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 by the Supreme Court.

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[140] *Walden*, 571 U.S. at 290.
[141] *Id.*
[142] *Id.* at 279.
[143] *Id.* at 280–81.
[144] *Id.* at 281.
[145] *Id.*
[146] *Id.* at 279.
[147] *Id.* at 288.
[148] *Id.* at 279–81.
[149] Calder v. Jones, 465 U.S. 783 (1984).
[150] *Walden*, 571 U.S. at 290.
[151] *Id.* at 290 n.9.
[152] *Id*.

The need for such careful consideration may be illustrated through minimum contacts. If minimum contacts were established merely by a party's access to an Internet forum, it would in theory mean that countries which use minimum contacts standards could assert personal jurisdiction over any person who has a website.[153] Thus, without a sense of "substantive fairness," States that have "a smaller online presence" would suffer disadvantage.[154] To illustrate this, parties in States with a greater online presence can exploit that by encouraging "online content providers to minimize regulatory compliance cost by avoiding a presence, for example through a subsidiary, in targeted jurisdictions."[155] It is easier to justify the avoidance of a presence where States have a smaller online presence. This also means that potential exposure to liability based on presence will be less in such States. This is a potentially complex area that requires practical considerations of how the Internet currently works and some room to understand how it is evolving vis-à-vis private international law. In *Walden v. Fiore*,[156] for example, the U.S. Supreme Court avoided the question of "whether and how a defendant's virtual 'presence' and conduct translate into 'contacts' within a particular State."[157] The court opted to leave questions about virtual contacts "for another day."[158]

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, in what circumstances, and how. Some degree of fairness is necessary in determining when courts should exercise jurisdiction.[159] Parties have different means and there is considerable scope for debate as to whether the Internet bridges potential gaps of inequality or accentuates them.[160] As 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

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[153] Michael Gilden, *Jurisdiction and the Internet: The "Real World" Meets Cyberspace*, 7 ILSA J. INT'L & COMPAR. L. 149, 152 (2000).

[154] Uta Kohl, *Eggs, Jurisdiction, and the Internet*, 51 INT'L & COMPAR. L.Q. 555, 582 (2002).

[155] *Id.*

[156] *Walden*, 571 U.S. at 290.

[157] *Id.*

[158] *Id.* at 291 n.9.

[159] It is, however, a more complex task to determine what such fairness should be and in what circumstances.

[160] For a synopsis of some such debates, see Eszter Hargittai, *Introduction to* THE HANDBOOK OF DIGITAL INEQUALITY 1, 1 (Eszter Hargittai ed., 2021) (examining how "digital inequality" impacts "people of different backgrounds").

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 the weaker party.[161] After all, it is possible for a person to be a consumer in one circumstance and for the same person to be an "economic operator" in another circumstance.[162] 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.[163] The EU provides a clear example in terms of insurance contracts.

The Brussels Regulation Recast on jurisdiction and the recognition of judgments in civil and commercial matters illustrates the important but difficult task of considering the categorization of parties in exercising jurisdiction.[164] Recital 18 of this Regulation provides that weaker parties should be protected by jurisdictional rules more favorable to their interests than general rules.[165] This applies to insurance, consumer, and employment contracts.[166] In *Aspen*, the English 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."[167] However, both courts held that the bank was not a weaker party and could not rely on the protection afforded by the Regulation with respect to jurisdiction in insurance matters.[168] Article 14 of the Regulation provides that "an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary."[169] Thus, both courts decided that the English courts had jurisdiction to hear the misrepresentation claims under Article 7(2), and the harm occurred in England.[170] Article 7(2) provides that in matters relating to tort, a person domiciled in one Member State may sue in another Member State "in the courts of the place where the harmful event occurred or may occur."[171] The Supreme Court reversed the decisions of the lower courts and decided that there was no

[161] Case C-269/95, Benincasa v. Dentalkit Srl., 1997 E.C.R. I-03767, Judgment of the Court, ¶ 17.
[162] *Id.* at Opinion of the Attorney General, ¶ 38.
[163] *Id.* ¶ 19.
[164] *See* Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU).
[165] *Id.* at 3.
[166] *Id.*
[167] Aspen Underwriting Ltd. v. Credit Eur. Bank NV, [2020] UKSC 11 [32].
[168] *Id.* ¶ 18, 43.
[169] *Id.* ¶ 31.
[170] *Id.* ¶ 18.
[171] Council Regulation 1215/2012, art. 7(2), 2012 O.J. (L 351) 1 (EU).

"weaker party" provision that removed a policy holder, an insured, or a beneficiary from the protection of Article 14.[172]

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."[173] 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.[174] 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 protection should be driven by a deliberate policy, especially with a view towards ensuring obligations are enforced. 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, regardless of the "size and legal form."[175] 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."[176]

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 where the harmful event occurred or may occur.[177] 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.[178] A major aim of the Brussels regime is to prevent the defendant being sued in a court that "he could not reasonably have foreseen," especially in non-contractual matters of tort—particularly defamation.[179] These provisions indicate flexibility in dealing

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[172] I.e., that claims may be brought only in courts of the Member State in which the defendant is domiciled. *See Aspen Underwriting*, [2020] UKSC 11 [43].

[173] *Id.* ¶¶ 43–44.

[174] Case C-194/16, Bolagsupplysningen v Handel, ECLI:EU:C:2017:766 ¶ 39 (Oct. 17, 2017).

[175] Case C-340/16, Landeskrankenanstalten-Betriebsgesellschaft — KABEG v. Mutuelles du Mans assurances — MMA IARD SA, ECLI:EU:C:2017:576, ¶¶ 34, 35 (July 20, 2017).

[176] *Id.*

[177] The U.K. Supreme Court earlier discussed this area in the context of "policy consideration," though not in an Internet case. *See* Four Seasons Holdings Inc. v. Brownlie [2017] UKSC 80, [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 Gillies, *supra* note 79, at 183.

[178] Council Regulation 1215/2012, 2012 O.J. (L 351) 1, 3 (EU).

[179] *Id.*

with defamation, even though it falls 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.[180] CJEU jurisprudence illustrates this. In addition to being able to sue where the defendant is domiciled[181] or established,[182] the claimant can also sue where such a claimant has his centre of interests.[183] The claimant could also bring an action with respect to all the damage in each court of the Member State where content has been made online or accessible.[184] Each court would have jurisdiction only concerning damage caused within its jurisdiction. However, CJEU jurisprudence further developed to prevent situations where a claimant could sue in the courts of each Member State.[185] Some scholars have criticized the centre of interests approach because the CJEU has taken a much less expansionist approach to jurisdiction in Internet torts concerning intellectual property.[186] There is merit in their argument, but the reluctance to extend that approach to other aspects of tort suggests the need for systematic flexibility. Therefore, the viability of the centre of interests as a point of departure appears to be essentially or relatively untouched by the criticism in this context. This reluctance strengthens the need for security in law to support jurisdictional rule "x" to be further based on a systematic justification of determining where Internet defamation cases should be heard. The centre of interests, as a point of departure, is itself arguably based on an appreciation of the need for a starting point. Thus, the English High Court in an Internet defamation case primarily governed by EU law observed that "[t]he evidence does not displace the general starting point that his centre of interests is Monaco, his place of residence."[187]

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

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[180] 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, *supra* note 87, at 605.

[181] Council Regulation 1215/2012, art. 4(1), 2012 O.J. (L 351) 1, 7 (EU).

[182] *Id.* at art. 7(2); Joined Cases C-509/09 & C-161/10, eDate Advert. Gmbh v X; Martinex v MGN Ltd. ¶ 69(1), ECLI:EU:C:2011:685 (Oct. 25, 2011).

[183] *eDate*, ECLI:EU:C:2011:685, ¶ 69(1).

[184] *Id.*

[185] Case C-194/16, Bolagsupplysningen v Handel, ECLI:EU:C:2017:766 ¶ 50(2) (Oct. 17, 2017).

[186] *See* Paul Beaumont & Burcu Yuksel, *Cross-Border Civil and Commercial Disputes Before the Court of Justice of the European Union*, *in* CROSS-BORDER LITIGATION IN EUROPE 499, 524–35 (Paul Beaumont et al. eds., 2017).

[187] Kumlin v. Jonsson [2022] EWHC (Admin) 1095, ¶ 219 (Eng.).

necessarily to protect the applicant but to ensure that justice is dispensed efficiently.[188] Thus, there would be no need to attach much weight to any distinction between natural and legal persons.[189] 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 favor 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.[190] In terms of securing obligations, the flexibility should help to not only prevent the defendant from being sued in reasonably unforeseen courts, but also help the claimant identify the court in which to sue.[191] In considering the balance of convenience, the focus 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 defamatory material is published. In such cases, the defendant is unlikely to suffer any financial loss through such a delay.[192] 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.[193] In fact, damages may be difficult to quantify and may be inadequate once awarded.[194] 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.[195] There is scope for debate as to whether it should make a difference that parties are natural or legal persons, as well as to what extent personal resources should be relevant.

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[188] Bolagsupplysningen, ECLI:EU:C:2017:766, ¶ 38.

[189] *Id.*

[190] *eDate*, ECLI:EU:C:2011:685, ¶ 50. Asensio argued that it may be difficult or even impossible to determine the centre of interests. *See* ASENSIO, *supra* note 6, ¶ 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.

[191] *eDate*, ECLI:EU:C:2011:685, ¶ 50.

[192] British Gas Trading Ltd. & Centrica PLC v. McPherson [2020] CSOH 61 [11] (Scot.). This is not a conflicts case, but the discussion of convenience in an online world is instructive.

[193] In this case, the Court of Session (Outer House) considered that the case against the defendant was "strong." *Id.* ¶ 11.

[194] *Id.*

[195] In considering the principles of *forum non conveniens* with respect to a non-defamation tort case, the House of Lords (now the U.K. Supreme Court) in a majority opinion observed that "the availability of financial assistance in this country, coupled with its non-availability in the appropriate forum, may exceptionally be a relevant factor in this context." Connelly v R.T.Z. Corporation Plc [1998] AC (HL) 454, ¶ 30.

IV. CONVENIENT FORUMS

A. Forum Non Conveniens

Forum non conveniens has assumed a prominent part of the analysis to determine where a matter should proceed with respect to defamation. This can be illustrated through Canadian[196] and Australian case law.[197] In English defamation law, however, *forum non conveniens* has evolved into a jurisdictional rule.[198] 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. National Trust for Scotland*,[199] where an allegedly defamatory press statement was published "abroad and on the internet,"[200] the High Court decision took less than two months from the hearing date.[201] However, it took nearly nine months from the hearings in the Court of Appeal to the delivery of judgment.[202] The Court of Appeal also rejected the claimant's argument that, considering the Brussels regime,[203] *forum non conveniens* could not be applied to the case. The doctrine was appliable as the case concerned a Scotland-England matter rather than a matter outside the U.K.[204]

The practical importance of *forum non conveniens* is especially clear 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*,[205] despite the split rationale for the extensive obiter dicta, the majority of the U.K. Supreme Court agreed that the court should retain discretion in the exercise of jurisdiction through *forum non conveniens* in tort.[206] The court cannot exercise jurisdiction merely because a fo-

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[196] Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3, para. 36 (Can.).

[197] *Dow Jones & Co. Inc v. Gutnick*, [2002] 210 CLR 575, ¶ 56 (Austl.).

[198] Defamation Act 2013, c. 26, § 9 (Eng.). This is now subject to Regulation 69 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations, SI 2019/479 (UK). From December 2020, § 9 will apply where the defendant is not domiciled in the U.K.

[199] Kennedy v. Nat'l Trust for Scotland [2019] EWCA (Civ) 648 (Eng.). For a recent non-defamation *forum non conveniens* case heard by U.K. Supreme Court, see Vedanta Resources PLC v. Lungowe [2019] UKSC 20.

[200] *Kennedy*, [2019] EWCA (Civ) 648 [14].

[201] Kennedy v. Nat'l Trust for Scotland [2017] EWHC (QB) 3368. The newspapers mentioned in this case have an online presence and the case itself refers to Internet cases.

[202] *Kennedy*, [2019] EWCA (Civ) 648 (Eng.).

[203] Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU); Owusu v. Jackson [2005] QB 801 (Eng.).

[204] *Kennedy*, [2019] EWCA (Civ) 648 [45]; DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 18, ¶¶ 12–14.

[205] Four Seasons Holdings Inc. v. Brownlie [2017] UKSC 80 (Eng.). This case offers important post-Brexit/non-EU insights because the tort took place in Egypt.

[206] *Id.* ¶ 31.

rum is convenient. The court can, however, decline jurisdiction because a forum is inconvenient.[207] Clearly, the doctrine will also remain critical for the foreseeable future.[208] 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 because "the potential for viral republication and the long-term caching of a libel is much greater on the Internet"[209] than in print. 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.[210] As time passes, such defamatory material may be circulated among more people in more jurisdictions.[211] By the time *forum non conveniens* appeals are concluded, the claimant will probably need to file 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.[212] Alternatively, the use of the doctrine should be limited in such Internet cases.

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[207] *Id.*

[208] Gillies, *supra* note 79, at 183.

[209] Sarah H. Ludington, *Aiming at the Wrong Target: The "Audience Targeting" Test for Personal Jurisdiction in Internet Defamation Cases*, 73 OHIO ST. L.J. 541, 561 (2012) (arguing that "the Internet accomplishes its job with a speed and scope not possible using print; it allows every individual with an Internet connection to become, in effect, a broadcaster").

[210] Such concerns are evident in the overlaps between defamation arguments on "the right to be forgotten." In the context of Australia, see Bruno Zeller et al, *The Right to be Forgotten – the EU and Asia Pacific Experience (Australia, Indonesia, Japan and Singapore)*, 1 EUR. HUM. RTS. L. REV. 23, 32–34 (2019); *see also* Pieter Gryffroy, *Delisting as a Part of the Decay of Information in the Digital Age: A Critical Evaluation of Google Spain (C-131/12) and the Right to Delist It Has Created*, 22 COMPUT. & TELECOMM. L. REV. 149, 149 (2016) (arguing that "the internet has equally led to a serious disturbance of the mechanism for forgetting in society").

[211] Functions such as retweeting can facilitate this. In a non-conflicts case, the English High Court observed that "Twitter is perhaps one of the most inhospitable terrains for any argument based on the context in which any particular Tweet appeared in a reader's timeline." Riley v. Murray [2020] EWHC (QB) 977 at para 28(v). It did not specifically consider effects of retweeting. *See id.* The Defamation Act 2013 does not contain specific provisions on secondary publishers, although there are exceptions where courts may exercise jurisdiction against persons who are not authors. *See* Defamation Act 2013, c. 26, § 10 (Eng.). In contrast, the Defamation and Malicious Publication (Scotland) Act 2021 contains detailed provisions concerning restriction on proceedings against secondary publishers and they seem to protect retweets. *See* Defamation and Malicious Publication (Scotland) Act 2021, (ASP 10) § 3.

[212] 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, [75] (Eng.).

In promoting the security of obligations, it should be practically and reasonably foreseeable that claimants will consider bringing actions where their lives essentially revolve. This is likely the place where the claimants reside, conduct most of their business or other professional life, and where their 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 honor. It then seems strange that such a claimant should be compelled to bring an action in another jurisdiction even where the claimant has elected to forego bringing an action in that foreign jurisdiction.[213] In such a case, jurisdiction should not be reduced to a numbers game. To give an example, there may be an artificial focus on the number, rather than quality, of witnesses to succeed in a *forum non convenien*s procedure. *Goldhar* illustrates the potential for this game from both litigant and court perspectives.[214] The claimant, a well-known Canadian businessman who owned a very popular soccer team in Israel, was allegedly libelled by the defendant Israeli newspaper.[215] The motion judge and majority of the Court of Appeal decided that Ontario courts had jurisdiction and resolved the *forum non conveniens* analysis in favor of Ontario courts. In a split decision, the Supreme Court agreed that Ontario courts had jurisdiction but resolved the *forum non conveniens* analysis in favor of Israel and allowed the defendant's appeal.[216] The defendant listed twenty-two witnesses, but the motion judge questioned the relevance of some testimony.[217] Justice Abella, who also allowed the appeal, considered that about 300 people had read the article in Canada while about 70,000 people had read the article in Israel.[218] In Justice Abella's opinion, therefore, it was "obvious from these numbers too that any reputational harm to Mr. Goldhar was overwhelmingly greater in Israel."[219] 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.[220] The allegedly defamatory article was about Goldhar's reputation in Israel and primarily addressed an Israeli audience.[221] The issue here is how the most substantial harm was arrived at

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[213] *See* Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3 (Can.).

[214] *Id.* ¶¶ 5–7.

[215] *Id.* ¶¶ 11–12.

[216] *Id.* ¶ 97.

[217] *Id.* ¶ 15.

[218] *Id.* ¶ 8.

[219] *Id.* ¶ 135.

[220] *Id.* ¶ 97. "[S]ubstantially greater harm to reputation" was favored by Abella, J., who also allowed the appeal. *See id.* ¶ 117.

[221] *Id.* ¶ 18.

rather than whether the most substantial harm rule would apply at all. The claimant's substantive interest should be considered rather than those imputed to the claimant. The most substantial harm can be defined by where the claimant's interests are damaged.

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 is illustrated through *Saïd v. Groupe L'Express*.[222] This case concerned the Brussels I Regulation (Recast). Under the 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."[223] The claimant considered London to be "*an* important personal, family and business hub."[224] The court emphasized the implication of "an"—an indefinite article—whereas "the centre of interests" suggests one place with a definite article "*the*."[225] 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 [he] ha[s] in France, Monaco or Canada."[226] The court considered this to be a bare assertion in part because it may be difficult to ascertain the centre of interests of an international businessman.[227] However, he owned properties in the U.K., and his children and grandchildren all resided in the U.K.[228] His wife, also a U.K. national, owned property in the U.K. and resided there.[229] He operated bank accounts in London and lived there three to four months annually.[230] Up to fifty staff members worked for him in London at the Saïd Foundation.[231] He also showed the harm which the allegedly defamatory article caused his business interests in the U.K.[232] There were 252 website visits to the article from within the U.K.[233] and 214 copies of the magazine were sold to subscribers in the U.K.[234] The English High Court, however, decided

[222] Saïd v. Groupe L'Express [2018] EWHC (QB) 3593 (Eng.).

[223] Council Regulation 1215/2012, art. 7(2), 2012 O.J. (L 351) 1, 7 (EU). Both defendants were domiciled in France. *See Saïd*, [2018] EWHC (QB) 3593 [11].

[224] *Saïd*, [2018] EWHC (QB) 3593 [57(iii)].

[225] *Id.*

[226] *Id.* ¶ 57(v).

[227] *Id.*

[228] *Id.* ¶¶ 47(x)–(xi).

[229] *Id.* ¶¶ 47(ix)–(x).

[230] *Id.* ¶ 47(x).

[231] *Id.* ¶ 47(xii).

[232] *Id.* ¶ 47(xvi).

[233] *Id.* ¶ 7.

[234] *Id.* ¶ 6. There were actually 500–800 readers of the print article. *See id.* ¶ 50(ii).

that the claimant's centre of interests was not in England and Wales.[235] 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 if close links are established where a claimant does not habitually reside.[236] The factors provided by the claimant, including important business interests which were bolstered by the publication and complete family ties, should have been considered in his favor. Again, it seems odd that the claimant was made to pursue that claim in France where he was happy not to bring a claim in that forum. The habitual residence of an individual should not by itself be dispositive in an Internet defamation case. The English Court of Appeal's rejection of the High Court's decision in *Saïd* vindicates these arguments, especially in identifying the centre of main interests. In *Raffaele Mincione v. Gedi Gruppo Editoriale S.p.A*,[237] an Italian with acquired British citizenship and Swiss residency brought an action for damages concerning an allegedly defamatory publication in England and Wales. The Court of Appeal addressed issues of jurisdiction that the appeal raised, but also specifically rejected the *Saïd* decision as the claimant had "not shown a good arguable case that his centre of interest is in England and Wales."[238]

In *Wright v. Ver*,[239] the claimant (an Australian who had lived in the U.K. since 2015 and a citizen of Antigua and Barbuda) argued that the defendant (who was born in the U.S. but renounced that citizenship in 2014, lived in Japan, and was a citizen of St. Kitts and Nevis) libelled him in a YouTube video and in tweets.[240] The allegedly defamatory material was defendant's description of the claimant as a fraudulent Bitcoin developer.[241] The claimant appealed the English High Court's decision that England was not clearly the most appropriate place to bring the libel claim.[242] The High Court considered Section 9 of the Defamation Act 2013, under which the court will have jurisdiction if "England and Wales is clearly the most appropriate place in which to bring an action in respect of the [alleged defamatory] statement."[243] This is compared to all the places where the statement has been published. The English Court of Appeal upheld the decision of the High Court and decided that

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[235] *Id.* ¶ 73.

[236] Joined Cases C-509/09 & C-161/10, eDate Advert. Gmbh v X; Martinex v MGN Ltd. ¶ 49, ECLI:EU:C:2011:685 (Oct. 25, 2011).

[237] Raffaele Mincione v. Gedi Gruppo Editoriale S.p.A [2022] EWCA (Civ) 557 [1] (Eng.).

[238] *Saïd*, [2018] EWHC (QB) 3593 [73]. In addition to other observations in *Raffaele*, the Court of Appeal observed that it could not agree with paragraph 73 of *Saïd*. *Id.*; *Raffaele*, [2022] EWCA (Civ) 557 [64] (QB).

[239] Wright v. Ver [2020] EWCA (Civ) 672 (Eng.).

[240] *Id.* ¶¶ 4–10.

[241] *Id.* ¶ 9.

[242] *Id.* ¶ 1.

[243] *Id.* ¶ 55.

any state in the U.S. which would accept jurisdiction over the claim would be the most appropriate jurisdiction.[244] In each of the years material to the case, viewers of the YouTube channel in the U.S. were about four times as numerous as those in the U.K.[245] This was the first of eight reasons for deciding that England was not clearly the most appropriate place to bring the action.[246] 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.[247] In arguing that he had a "close, settled connection with the United Kingdom,"[248] the claimant asserted that "being labelled a fraud damaged his reputation within the UK's community of business people with whom he primarily dealt."[249] He also had most of his business peers in the U.K. even though he had a global reputation.[250] The Court rejected these arguments and decided that his "most important relationships" were in the United States.[251] For a claimant whose evidence working for a U.K. company, employing U.K. staff, and having family ties to England was not contradicted, the Court's position seemed rather narrow. The claimant was seeking redress for damage done to his reputation in England, but he was essentially being directed to bring an action for damage in the United States, where he was not claiming damage to his reputation. The requirement of the Defamation Act 2013 to sue in "clearly the most appropriate"[252] jurisdiction can be challenging (however, the courts factor in the reality that the requirement may not be an exact science in considering the claimant's centre of interests). This is especially so for "claimants who are better known outside [England and Wales], or who have global reputations"[253]

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[244] *Id.* ¶ 80. Section 19 of the Defamation and Malicious Publication (Scotland) Act 2021 mirrors the English approach in the context of jurisdiction, although it also specifically preserves the plea of *forum non conveniens*. *See* Defamation and Malicious Publication (Scotland) Act 2021, (ASP 10) § 19; *see also Defamation and Malicious Publication (Scotland) Bill: Explanatory Notes*, SCOTTISH PARLIAMENT, 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 (last visited Feb. 28, 2023).

[245] *Wright*, [2020] EWCA (Civ) 672, ¶ 10.

[246] *Id.* ¶¶ 72–79.

[247] *Id.* ¶ 72.

[248] *Id.* ¶ 18.

[249] *Id.* ¶ 20.

[250] *Id.*

[251] *Id.* ¶ 75.

[252] Defamation Act 2013, c. 26, § 9 (Eng.).

[253] Soriano v. Forensic News LLC [2021] EWCA (Civ) 1952 [44] (Eng.). For a further illustration of claimants as "international business persons with reputations in and connections to several countries," see Giustra v. Twitter, Inc., [2021] B.C.S.C. 54 para. 45 (Can. B.C.).

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 favor of the claimant.[254] 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.[255] The minority strongly contested this position and insisted that the action was limited to the claimant's damaged reputation in Ontario.[256] Apart from the split decision, there was a further split in the reasons for the majority opinion. For example, Justice Karakastanis allowed the appeal but insisted that the claimant's Israeli reputation was immaterial to the fairness factor.[257] The claimant established that Ontario was where he enjoyed and wished to clear his reputation.[258]

The way *forum non conveniens* is usually determined seems to follow an interpretation of "clearly the most appropriate place"[259] in a manner anchored to a general balance ostensibly in favor of all parties.[260] However, compelling claimants to clear their names in jurisdictions where they would rather avoid (because their lives do not revolve there) or lose everything does not address the issue. This may work for other types of claims but the policy behind defamation claims is quite different.[261] Focusing on the particular status or standing of the claimant only serves to create a lot of subjectivity and unpredictability. The U.K. Supreme Court avoided such a challenge in *Aspen* (although decided in a contract context) when it emphasized the need for a focus on subject matter rather than individuals.[262] A significant effort to steer considerations away from undue subjectivity focused on individuals is illustrated by

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[254] Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3, para. 20 (Can.).

[255] *Id.* ¶ 23 (McLachlin CJ, Moldover and Gascon JJ, dissenting).

[256] *Id.* ¶ 163.

[257] *Id.* ¶ 101.

[258] *Id.*

[259] Defamation Act 2013, c. 26, § 9 (Eng.).

[260] As seen in the English cases. In the *Goldhar* minority view, "clearly" suggests an exceptional reason and not a mere "stylistic caprice." Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3, para. 188 (Can.) (citing Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, paras. 108–09 (Can.)).

[261] This is usually more about the name and honor. 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*, 3 COLUM. L. REV. 546, 549 (1903) (writing in the context of English legal history and theory). 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. *Id.* at 547.

[262] Aspen Underwriting Ltd. v. Credit Eur. Bank NV [2020] UKSC 11 (UK).

Traxys[263] from the standpoint of *forum non conveniens*. In this case, the second defendant had relocated to Lebanon and the English High Court observed that he would not return to Nigeria.[264] However, the court decided that Nigeria was the proper place for the alleged tort.[265]

In terms of judicial cooperation and case management, the Brussels regime has generally illustrated how overlaps between legal areas may occur, and how it is important to focus on an efficient resolution of disputes. In *JSC Commercial Bank Privatbank v. Kolomoisky*,[266] the Court of Appeal agreed with the High Court that the English proceedings and other proceedings concerning fraud were "related" even if they could not be consolidated.[267] This was in the context of the Brussels Regulation.[268] Although the English proceedings were not stayed in favor of the Ukrainian defamation proceedings, since it concerned fraud on "an epic scale,"[269] the decision is instructive on the need to adopt some systematic 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* has traditionally been considered to undermine predictability and certainty in Brussels.[270] 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.[271] The term is used

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[263] Traxys Europe SA v. Sodexmines Nigeria Ltd. [2020] EWHC (Comm) 2195 (Eng.).

[264] *Id.* ¶ 23.

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

[266] JSC Commercial Bank Privatbank v. Kolomoisky [2019] EWCA (Civ) 1708 (Eng.).

[267] *Id.* ¶ 192.

[268] Council Regulation 1215/2012, art. 34(1)(a), 2012 O.J. (L 351) 1, 13 (EU).

[269] *Kolomoisky*, [2019] EWCA (Civ) 1708, ¶ 211. The Court observed that Article 28 of the Lugano Convention could be applied reflexively or by analogy. *Id.* ¶ 150.

[270] Owusu v. Jackson [2005] QB 801 [38], [41] (Eng.); FS Cairo (Nile Plaza) LLC v. Brownlie [2020] EWCA (Civ) 996 [75] (Eng.) (Arnold L.J., dissenting) (arguing 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).

[271] Clermont and Palmer noted: "Exorbitant territorial jurisdiction in civil cases comprises those classes of jurisdiction, although exercised validly under a country's rules, that nonetheless are unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute." Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 474 (2006). Thus, such jurisdiction would be regarded as internationally unacceptable. It is much more difficult to describe a

cautiously in this Article 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.[272] Practically, the list of such bases should not be closed and their application should not be cast in stone.[273] 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 claims of *forum non 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.[274]

However, an unreasonable exercise of jurisdiction in this context is not just about spatial concerns (although such form part of the matrix), but is also about predictability or reasonable expectations. In the case of defamation, predictability or reasonable expectations should be the priority. This will provide better scope to ensure the security of obligations as this Article argues. There should be a focus on the likelihood of claimants to bring actions where their lives revolve. In the case of the former, there is a presumption that defamatory material put on the Internet will be circulated widely and possibly in other jurisdictions. In the case of the latter, claimants would likely want to clear their names or the organizational name where it matters most—from the perspectives of family or business interests. Jurisdictions utilizing *forum non conveniens* can mitigate the potential harshness that may result from any exorbitance in the exercise of jurisdiction. As already argued, the doctrine has its

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ground of jurisdiction as exorbitant when that ground is tempered by *forum non conveniens*. *See* Mills, *supra* note 17, at 247 (arguing that the exercise of jurisdiction based on the defendant's mere presence when proceedings are commended in England has "been modified by considerations of fairness and comity, through the adoption of the *forum non conveniens* discretion under which proceedings . . . may be stayed if there is another clearly more appropriate forum.").

[272] About half a century ago, Winter argued that it was "difficult to give a clear definition" of "excessive or exorbitant jurisdiction." *See* L.I. de Winter, *Excessive Jurisdiction in Private International Law*, 17 INT'L & COMPAR. L.Q. 712 (1968). For insights into acceptable bases, in the context of recognition, see Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1620 (1968).

[273] 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, *supra* note 52, at 19.

[274] As long ago as 1966, the U.S. and U.K. delegations to the Extraordinary Session had proposed that direct and indirect exorbitant grounds of jurisdiction should be eliminated. *Some Reflections of the Permanent Bureau on a General Convention on Enforcement of Judgments,* HAGUE CONF. ON PRIV. INT'L L. 233 (May 1992), https://assets.hcch.net/docs/bd6dcaab-b2a4-4255-84ec-eca3b7233588.pdf.

limitations in defamation matters and there are many jurisdictions, mostly relying on civil law, that do not use *forum non conveniens*.[275]

While there is a general trajectory against extreme or classical cases of exorbitant jurisdiction,[276] 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,[277] 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 [of jurisdiction],"[278] and the question of what is exorbitant should be considered on a pragmatic level.[279] It may seem ironic that what amounts to exorbitance is fluid and any unqualified stereotype that service out of jurisdiction is exorbitant will not be a modern approach.[280] The focus should be with a view to conducting litigation efficiently in an appropriate forum,[281] 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.[282]

In England and Wales, statutory intervention means that a test similar to *forum non conveniens* has become a jurisdictional rule. Consistent with some

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[275] Beaumont observed that "France, Germany, Italy and the Benelux countries did not have the doctrine of *forum non conveniens* as part 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*, 3 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 447 (2018).

[276] E.g., French jurisdiction based on nationality or 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?*, 16 J. PRIV. INT'L L. 247, 250–51 (2020).

[277] E.g., ubiquity. *See Dow Jones & Co. Inc. v Gutnick*, [2002] 210 CLR 575, ¶¶ 78, 80 (Austl.).

[278] At least under the common law.

[279] Abela v. Baadarani [2013] UKSC 44 [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 (Comm) 1989 [21] (Eng.).

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

[281] *Id.*

[282] Four Seasons Holdings Inc. v. Brownlie [2017] UKSC 80, [28] (Eng.).

opinions at the U.K. Supreme Court before[283] and after[284] the Defamation Act, "exorbitant" jurisdiction is not inherently anathema to attaining fair outcomes in relevant cases. 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."[285] There is no conflict between this institutionalized application of *forum non conveniens* and the need to carefully factor in the "suffering of significant damage in England" as a connecting factor.[286] 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 provides foundations for security in law and the exercise of systematic flexibility. 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 systematic flexibility and which is purpose oriented. The need to rise above undue labelling is critical to attaining systematic flexibility, based on security in law, and with a view to securing obligations. The avoidance of generic rejection or undue labelling as diversionary and mechanical has been the subject of detailed discussion. To give an instance, there was an argument that "courts should be capable of looking beyond jurisdictional labels to attain substantial justice."[287] One scholar persuasively expressed a similar line of reasoning more recently:

> In the context of the jurisdiction of the English courts over non-present defendants, it is time to set the label 'exorbitant' to one side. This is not to say that the establishment and exercise of jurisdiction should be carried out without consideration of their appropriate limits, but rather that the label serves only to obscure

[283] Lord Sumption took this view in Abela v. Baadarani [2013] UKSC 44, [53]. The Defamation Act entered into force in December 2013. Defamation Act 2013, c. 26 (Eng.).

[284] About half a decade later, Lord Sumption clarified that while he remained opposed to any artificial characterization of service out as "exorbitant," he did not propose the "widest possible interpretation of the [jurisdictional] gateways." *See* Four Seasons Holdings Inc. v. Brownlie [2017] UKSC 80, [31] (Eng.) (Hughes, L., agreeing).

[285] Defamation Act 2013, c. 26, § 9 (Eng.).

[286] FS Cairo (Nile Plaza) LLC v. Brownlie [2020] EWCA (Civ) 996, [22] (Eng.). 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*. *Id.* See also the jurisdictional gateways in Civil Procedure Rules, SI 1998/3132 Practice Direction 6B, ¶ 3.1(9)(a) (UK).

[287] PONTIAN N. OKOLI, PROMOTING FOREIGN JUDGMENTS: LESSONS IN LEGAL CONVERGENCE FROM SOUTH AFRICA AND NIGERIA 195 (2019). *See also id.* at 216, 237 (further arguing that "[a] refinement or contextualisation of . . . jurisdictional bases is a viable alternative to a generic rejection of any jurisdictional basis" and characterizing "mere labelling" as "particularly doubtful regarding the award of damages").

> deeper questions regarding the foundational principles of the common law rules on jurisdiction, including particularly the question of how fairness to individual defendants and respect for the authority of foreign courts and sovereigns should be balanced against the general interests of efficient dispute resolution.[288]

This perspective is instructive because, although not provided in an Internet or defamation context, it clearly applies to torts generally. Furthermore, defendants are often non-present in Internet defamation matters.

A critical aspect of exorbitance in the context of online defamation is the risk of parallel or multiple proceedings.[289] This can be mitigated by building on the single publication rule.[290] Unlike the "multiple publication rule," the single publication rule is intended "to prevent an action being brought in relation to publication of the same material by the same publisher."[291] 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,"[292] 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 (and potential for) the greatest financial loss. 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.

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[288] Mills, *supra* note 17, at 264.

[289] This risk is not peculiar to defamation cases. *See* Vedanta Res. PLC v. Lungowe [2019] UKSC 20, [75]. Coincidentally, in this case the court ensured access to justice (in such a way that the *forum non conveniens* test did not become an impediment) in favor of a developing country—Zambia—where litigation arose from toxic emissions involving about 1,826 members of very poor rural community members. *Id*.

[290] 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 Civil Procedure Rules, SI 1998/3132 Practice Direction 6B, ¶ 283 (UK). *See* Qatar Airways Group Q.C.S.C v. Middle East News FZ LLC [2020] EWHC (QB) 2975, [143] (Eng.).

[291] Defamation Act 2013, c. 26, Explanatory Notes § 8, ¶ 60. In England, there is a limitation period of one year "from the date of the first publication of that material to the public or a section of the public." *Id. See also* Defamation Act 2013, c. 26, § 8 (Eng.).

[292] Richard L Creech, *Dow Jones and the Defamatory Defendant Down Under: A Comparison of Australian and American Approaches to Libelous Language in Cyberspace*, 22 J. MARSHALL J. COMPUT. & INFO. L. 553, 558 (2004) (providing insights into this rule as argued by Dow Jones). Current reform proposals are likely to vindicate the single publication rule and mirror the English approach. *See* L. COUNCIL OF AUSTL., REVIEW OF MODEL DEFAMATION PROVISIONS 5, ¶ 5 (2019).

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.[293] However, developing countries like 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.[294] Developing countries need to consider if they want to promote international or global cooperation. These types of cooperation are sometimes conceptually conflated. Global cooperation must be international, but international cooperation 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 endeavor.

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.[295] Developing countries therefore need to consider their options on this issue. There are at least two levels of analysis in assessing an unreasonable exercise 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

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[293] Hartley argued that the U.S. 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." HARTLEY, *supra* note 110, at 374–75. *See also* ASENSIO, supra note 6, ¶ 3.114.

[294] On the tendency for manipulation, see the dissenting opinion of Chief Justice Moldaver in Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3, para. 227 (Can.).

[295] Shortly after the Hague Judgments Convention was concluded in 2019, the Hague Conference on Private International Law proceeded to work on an additional instrument concerning "jurisdiction in transnational civil or commercial litigation." *Jurisdiction Project*, *supra* note 3. The focus of the Working Group includes "acknowledging the primary role of both jurisdictional rules and the doctrine of forum non conveniens, notwithstanding other possible factors, in developing such rules." *Id.* Furthermore, reflecting the overarching policy issues raised in this Article, the Working Group is also required "to further inform policy considerations and decisions in relation to the scope and type of any new instrument." *Id.* In considering defamation and privacy exclusions under Article 2(1)(k) and (l) respectively, Goddard and Beaumont provided the following insightful argument: "The latter exclusion is broadly expressed . . . the privacy exclusion does not mean that a judgment with some connection to privacy issues, however tenuous, is excluded from the scope of the Convention." They did not extend the argument to defamation. David Goddard & Paul Beaumont, *Recognition and Enforcement of Judgments in Civil or Commercial Matters*, *in* A GUIDE TO GLOBAL PRIVATE INTERNATIONAL LAW 407, 417 (Paul Beaumont & Jayne Holliday eds., 2022).

bases. Thus, there has always been a consideration of the jurisdictional bases that would be acceptable by the countries that negotiate treaties.[296] 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 provides a good example of such negotiations. The Brussels regime reflects jurisdictional bases which EU countries agreed to use because they compromised and to promote the foundational aims of the EU.[297] 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 complies with an agreement with respect to the negotiating group. Yet, the trade-offs also imply that only the most acceptable jurisdictional ground by the negotiating countries will be accepted. 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 to 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 legislature needs to develop 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.[298] Otherwise, that would be an unjustifiable encroachment into national law-making. What

[296] Examples include indirect jurisdictional grounds as seen in successful negotiation of the Hague Judgments Convention of 2019. Apparently buoyed by that success, in 2021 the Working Group on Jurisdiction took up task of "an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims) acknowledging the primary role of both jurisdictional rules and the doctrine of forum non conveniens, notwithstanding other possible factors, in developing such rules." *Jurisdiction Project*, supra note 3. For a chronology of treaty negotiations in the Hague Conference on Private International Law since 1992, see *id.*

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

[298] There is merit in this position already contained in the Hague Judgments Convention, although from the perspective of indirect rules of jurisdiction. *See* The Hague Judgments Convention, *supra* note 1, at art. 15.

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 implicitly hope that such trends will influence law and practice. This undermines legal certainty and predictability, but it also weakens any foundation for promoting security in law as articulated in this Article. For example, reference to the Brussels legal regime or any other regime needs to be placed in the proper context. Jurisdictional rule "x" cannot be properly developed or thrive if it is not premised on security in law and if it does not factor in the contexts in which parties may seek to have their disputes resolved in certain forums. It would be unsystematic for developing countries to assume that only jurisdictional bases contained in the Brussels regime should apply even in non-Treaty cases. If African or other developing 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 there is an agreement on jurisdictional grounds in Treaty cases. The steady encroachment of the Internet into several spheres of life and law poses a challenge, but it is also an opportunity to reflect on what jurisdictional rules should 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 with 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.[299] There is scope for a direct engagement with Internet-related matters generally. Nevertheless, efforts to bridge the civil law and common law gap underscore a key argument of this Article—the need for systematic flexibility requires the cross-fertilization of ideas. This approach is critical to building on, but going beyond the traditional guiding principle of legal certainty and predictability to attaining security in the law with a view to securing obligations.

[299] Scholars have increasingly explored insightful global solutions to *forum non conveniens* and conflicts of jurisdiction. *See* Beaumont, *supra* note 275; Geert van Calster, *Lis Pendens and Third States: The Origin, DNA and Early Case-Law on Articles 33 and 34 of the Brussels Ia Regulation and Its "*Forum Non Conveniens*-Light" Rules*, 18 J. PRIV. INT'L L. 363 (2022); Neil Brannigan, *Resolving Conflicts: Establishing Forum Non Conveniens in a New Hague Jurisdiction Convention*, 18 J. PRIV. INT'L L. 83 (2022).

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, this 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 barred, from bringing actions in multiple jurisdictions. Therefore, the claimant should have agency over 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, a majority of the Court of Appeal, and a 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."[300] In fact, the material in question referred to the claimant's Canadian residency and Canadian business.[301] 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."[302] 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 substantial input on the process of ascertaining the centre of interests based on objective criteria which the court ultimately decides. 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.[303]

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[300] Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3, para. 78 (Can.).

[301] *Id.*

[302] *Id*. On reasonable expectations as to where a party would sue, see also Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, para 92 (Can.).

[303] For the argument that "the existence of the practice was clearly acknowledged in Scotland in *M'Morine v Cowie* in 1845," see Ardavan Arzandeh, *The Origins of the Scottish* Forum Non Conveniens *Doctrine*, 13 J. PRIV. INT'L L. 130, 132 (2017); *see also* M'Morine v. Cowie (1845) 7 D 270 (Scot.); ROLAND A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 7 (2007) (observing that forum non conveniens, as a term, "was not used in the early seventeenth century Scottish decisions that are credited with originating the doctrine," but also stating that in that period "discretionary authority originated as a part of the determination of jurisdiction and went by the name 'forum non competens'"); Sim v Robinow (1892) 19 R 665, 668 (observing that "something more is required than mere practical inconvenience in order to sustain the plea of forum non conveniens"). In contrast, the earliest origins of the Internet can be traced back

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 the discretionary content, of *forum non conveniens* should remain appealing even if non-common law jurisdictions are not keen to use the label. By way of illustration, a court may carefully consider a claimant's centre of interests and do so in a way that accommodates systematic flexibility by considering potentially complex financial or other interests. This is clearly not an unprincipled application of discretion if any discretion is applied. This is a practical application of jurisdictional rule "x." It is also why an equal treatment of the law is apt for Internet Defamation cases, especially considering the argument of this Article that appropriate policies should drive this approach. In a class-litigation tort case, the English High Court observed that:

> The claimants' mechanistic division between what they consider to be the matters relevant to the *forum non conveniens issues*, on the one hand, and the abuse arguments, on the other, has led to a wholly artificial analysis of the central issues raised by these applications. This unreality pervades many of the individual grounds. It is to be deprecated.[304]

This view on "artificial analysis"[305] supports earlier arguments in this Article to avoid mere labels.[306]

A flexible approach to the Defamation Act has provided a credible foundation upon which to build a purposeful distinction between flexibility and discretion with respect to Internet defamation. A scholar argued that "by contrast to the traditional *forum non conveniens* analysis, the general interests of the parties and the interests of justice play only a secondary role under section

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to the mid-20th century, although its formal introduction to most people in developed countries did not take place until the cusp of the 21st century. *See* Brian Martin Murphy, *A Critical History of the Internet*, *in* CRITICAL PERSPECTIVES ON THE INTERNET 27–45 (Greg Elmer ed., 2002).

[304] Municipio De Mariana v. BHP Group PLC [2021] EWCA (Civ) 1156 [87(7)] (Eng.).

[305] *Id.*

[306] *See* OKOLI, *supra* note 287; Mills, *supra* note 17; van Calster *supra* note 299, at 396 ("In *Municipio de Mariana*, the first instance judge argued that the lack of instruction in the [Brussels Regulation Recast] on the meaning of 'proper administration of justice' must mean it may include considerations normally discussed under *forum non conveniens*.").

9(2) of the Defamation Act 2013."[307] In the foreseeable future, it is worth seriously considering the creation of specialty courts that will focus on cases resulting from online disputes. Nearly half a decade before COVID-19, a former Chief Justice of Victoria argued that courts were "applying a 19th century model to a 21st century situation."[308] This line of reasoning, arguably seminal at the time, could only offer general foundations for specific developments concerning the resolution of online defamation. Resolving traditional disputes with the benefit of technology and resolving online disputes through specific online courts designed for that purpose should not be conflated. It does not seem realistic to ignore the need to engage with the technicalities and peculiarities of the Internet in seriously considering conflict of law rules that will be sustainable. The possibility of specialty courts focusing on the resolution of online disputes has been specifically explored in some way by China,[309] and the possibility of a "courtroom of the future" has been espoused in the United States.[310] The vision of the Hague Conference on Private International Law is to deal with "progressively more complex scenarios" in the context of how information technology can support work on Internet defamation in the future.[311] Such innovations that focus on adjudicating online disputes would reduce the practical inconvenience of litigants being sued in another forum state. In Canada, there is a strong case for encouraging witness testimonies through videoconferencing.[312] The U.K. Supreme Court reiterated this point recently.[313]

In *Traxys*, a tort and contract case that turned on a *forum non conveniens* application where the English High Court stayed proceedings in favor of Nigeria, the English High Court made a strong case for the defendant to give

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[307] HÖRNLE, *supra* note 29, at 390. *Cf.* Sandra Schmitz, *From Where Are They Casting Stones? – Determining Jurisdiction in Online Defamation Claims*, 6 MASARYK U. J.L. & TECH. 159 (2012) (considering the centre of interests approach and arguing for "a test of objective relevance rather than a mere subjective interpretation of forum conveniens").

[308] Marilyn Warren, Embracing Technology: The Way Forward for the Courts, Remarks to the 23rd Biennial Conference of District and County Court Judges Australia and New Zealand (Apr. 19, 2015), https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/31/08713f4c7/embracingtechnologythewayforwardforthecourts.pdf.

[309] Cao Yin, *Courts Ponder Platform for Overseas Suits*, CHINA DAILY (Sep. 26, 2020), http://global.chinadaily.com.cn/a/202009/26/WS5f6e83a3a31024ad0ba7bf14.html.

[310] Jardim v. Overley, 221 A.3d 593, 603 (N.J. Super. Ct. App. Div. 2019).

[311] *Strategic Plan 2019-2022*, HAGUE CONF. ON PRIV. INT'L L. (2019), https://assets.hcch.net/docs/bb7129a9-abee-46c9-ab65-7da398e51856.pdf.

[312] This is in addition to other procedural tools (e.g., 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 Haaretz.com v. Goldhar, [2018] 2 S.C.R. 3, para. 228 (Can.). See also the opinion of Côté, Brown, and Rowe JJ, *id.* ¶ 66.

[313] Vedanta Resources PLC v. Lungowe [2019] UKSC 20 [86] (a conflict of laws tort case, though defamation was not involved).

evidence by video-link.[314] The court further observed that the COVID-19 pandemic must have facilitated an improvement of such Internet facilities.[315] Determining or choosing appropriate courts that should exercise jurisdiction is critical to promoting reasonably convenient forums.[316]

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.[317] There should 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.[318] In the context of a global approach to Internet jurisdiction, however, the focus needs to be broader. Parties and

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[314] Traxys Europe SA v. Sodexmines Nigeria Ltd. [2020] EWHC (Comm) 2195 (Eng.).

[315] *Id.* ¶¶ 22–24.

[316] 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." The Hague Choice of Court Convention, *supra* note 1, at 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)." TREVOR HARTLEY & MASATO DOGAUCHI, CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURTS AGREEMENTS: EXPLANATORY REPORT ¶ 69 (2005). 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*, 5 J. PRIV. INT'L L. 125, 136–37 (2009).

[317] Kelvin L. Cope, *Reconceptualising Recognition Uniformity*, *in* FOREIGN COURT JUDGMENT AND THE UNITED STATES LEGAL SYSTEM 166, 171 (Paul B. Stephan ed., 2014).

[318] Jérémie Van Meerbeeck, *The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust*, 41 EUR. L. REV. 275, 275 (2016) (arguing "that the CJEU's inconsistent approach to the principle of legal certainty (via almost 2,500 judgments by early 2014) stems from unquestioned postulates as to what the principle actually means").

litigants need to be convinced that legal certainty and predictability promote security of obligations in matters of torts, especially defamation via the Internet. Aiming to attain security in law can more robustly help to ensure security in law as this Article argues. The need for collaboration extends to developing countries.

V. THE BRIDGE BETWEEN DEVELOPED AND DEVELOPING COUNTRIES: DEFAMATION AND SECURITY OF OBLIGATIONS IN AFRICA

The Internet has compelled a less compartmentalized way of considering disputes including conflicts cases.[319] More flexibility and innovation is required to ensure the security of obligations. In *Kim v. Lee*,[320] 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,[321] there is potentially more space for litigants to be involved in private or civil disputes.

As explained earlier, 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.[322] States can take advantage of the platforms and interest already created when 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.[323] As of February 2023, only 23 out of 55 countries had either signed or ratified the African Union Convention on Cybersecurity and Special Protection Data.[324] Nevertheless, such a forum

[319] Svantesson argued that the Hague Conference should "consider engaging more directly" in the arena where several international bodies (e.g., the Internet Governance Forum and the Internet & Jurisdiction Policy Network) operate. Svantesson, *supra* note 58, at 461.

[320] Kim v. Lee [2020] EWHC (QB) 2162 (Eng.).

[321] Coroners and Justice Act 2009, c. 25 § 73 (UK); Hoolo 'Nyane, *Abolition of Criminal Defamation and Retention of* Scandalum Magnatum *in Lesotho*, 19 AFR. HUM. RTS. J. 743 (2019); Okuta v. Attorney General (2017) eKLR ¶ 42 (Kenya). For an overview of the decriminalization of defamation in some Nigerian states (Nigeria is a federation comprising 36 states and a federal capital territory) and efforts to decriminalize defamation within the African Union, see Aviomoh v. COP [2021] LPELR-55203, 28 (SC) (Nigeria).

[322] *See supra* note 19 and accompanying text.

[323] Grace Githaiga, *A Report of the Online Debate on Africa Union Convention on Cybersecurity*, KICTANET (Dec. 2013), https://cipesa.org/?wpfb_dl=143.

[324] *List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on Cyber Security and Personal Data Protection*, AFRICAN UNION (Feb. 14, 2023), https://au.int/sites/default/files/treaties/29560-sl-AFRICAN_UNION_CONVENTION_ON_CYBER_SECURITY_AND_PERSONAL_DATA_PROTECTION_0.pdf.

represents the most significant efforts to consider security in the African Union (AU). Under the African Union Convention on Cyber Security and Personal Data Protection, the need to protect personal data and private life "requires a balance between the use of information and communication technologies and the protection of the privacy of citizens in their daily or professional lives, while guaranteeing the free flow of information."[325] The Convention provides that each State "shall ensure that any form of data processing respects the fundamental freedoms and rights of natural persons while recognizing the prerogatives of the State, the rights of local communities and the purposes for which the businesses were established."[326] These provisions are important because of the increasing overlaps between defamation and data protection, especially as there is no specific AU treaty on the tort of defamation or torts generally.

The emergent overlaps between defamation and data protection can be illustrated through the English case of *Aven v. Orbis Business Intelligence Limited*.[327] In this case, three businessmen and owners of a Russian financial investment conglomerate brought an action against the defendant, an English company. The claim concerned an article that BuzzFeed News published online, headlined: "These Reports Allege Trump Has Deep Ties to Russia."[328] Essentially, the claimant sought several remedies under the Data Protection Act of 1998, including rectification of the inaccurate personal data.[329] According to the English High Court, there was:

> [N]o room for concluding that [a former US public official] made a disclosure to the Washington Post" or Buzzfeed of the personal data contained in Memorandum 112 which amounted to processing of these data by or on behalf of Orbis, still less than the publication of those data by the *Washington Post* and Buzzfeed represented, or even resulted from, processing by or on behalf of Orbis.[330]

The court decided that the defendant company failed to take reasonable steps to verify the allegation that the first and second claimants delivered illicit cash to Russian President Putin through a senior Russian Presidential Administration official in the 1990s.[331] The court only granted a limited rectification order concerning inaccurate data. However, the personal data was relevant to

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[325] *See* African Union Convention on Cyber Security and Personal Data Protection, Recital 11, June 27, 2014, A.U. Doc. EX.CL/846 (XXV) [hereinafter AU Convention].

[326] *Id.* at art. 8(2).

[327] Aven v. Orbis Business Intelligence Limited [2020] EWHC (QB) 1812 (Eng.).

[328] *Id.* ¶ 4.

[329] *Id.* ¶ 8.

[330] *Id.* ¶ 61.

[331] *Id.* ¶ 204(1).

alleged defamatory content. It is instructive that the court struggled to maintain any clear demarcation between data protection and defamation considering the facts of the case.[332]

In Africa, the most significant international developments concerning defamation via the Internet have been in the areas of regulatory intervention and human rights.[333] This is essentially because States have dominated major legal and regulatory developments. For the avoidance of doubt, this Article does not argue that conflict of laws rules should take over regulatory functions of governments. This Article, however, argues that it is neither practical nor helpful to ignore the impact of governmental regulation on conflict of laws matters. Long before the Internet was officially established, Cheatham argued that "[t]he regulation by the federal government of international private matters has so far been effected either under the treaty-making power or by an Act of Congress."[334] Thus, although conflict of laws "is certainly a matter of *national regulation*" it may also be considered "from the point of view of the collectivity of nations, acting as the public power of mankind and able to give mankind universally working regulations."[335] It would seem contradictory to disregard these views but maintain that defamation is a sensitive matter for many states. Sensitive matters are less likely to escape some degree of regulatory influence.[336] Even if they are not sensitive, private litigants are often not in complete control of certain elements (such as the way platforms work

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[332] *See id.* ¶¶ 24, 29, 39, 40, 150, 154, 196, 197.

[333] *E.g.*, Amnesty International Togo v. The Togolese Republic [2020] ECW/CCJ/JUD 09/20, ¶ 45 (June 25). The Economic Community of West African States (ECOWAS) Court decided that it was a violation of the freedom of expression to shut down the Internet because a protest took place. *Id.* 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 in late 2020. The ECOWAS Court also decided that § 24 of the Nigeria Cybercrimes Act violated the right of expression and should be amended or repealed. *See* Inc. Trustees of Ls. & Rts. Awareness Initiatives v. Fed. Republic Nigeria [2020] ECW/CCJ/JUD/16/20, ¶ 186 (July 10). The Court also referred to Principle 1 of the Declaration of Principles of Freedom of Expression and Access to Information in Africa. *Id.* ¶ 144. Half a decade ago, there was a real possibility that the tide had turned against criminal defamation. *See* Konate v. Burkina Faso [2014] App. No. 004/2013 (Dec. 5).

[334] Elliott E. Cheatham, *Sources of Rules for Conflict of Laws*, 89 UNIV. PA. L. REV. 430, 445 (1941).

[335] See D. Josephus Jitta, *The Development of Private International Law Through Conventions*, 29 YALE L.J. 497, 499, 508 (1920) (exploring how the civil work of the Hague "can be consolidated, extended and brought to the relative perfection attainable by human power"). If these views (including that quoted in the main text) were expressed many decades before the Internet was established, it would be unjustified to ignore the regulatory influence of governments. The search for jurisdictional rule "x" therefore accommodates the practical effects of the Internet on defamation.

[336] *See* Uta Kohl, *Defamation on the Internet—Nice Decision, Shame About the Reasoning:* Dow Jones & Co Inc v Gutnick, 52 INT'L & COMPAR. L.Q. 1049, 1051 (2003).

or obligations on individual or corporate parties) that are key to the dynamics of a dispute in Internet defamation.[337]

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.[338] 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 sparse 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 not always obvious, because there is often a focus on criminal defamation. The reliance on criminal defamation is often strategic and artificial since litigants who prefer criminal prosecution do so because they find it expedient. This preference is based on whatever characterization works for them. The Nigerian Supreme Court has noted "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."[339] The court further noted that "applying pressure through criminal prosecution should be deprecated and discouraged."[340] 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[341] and regional powers.[342] Second, there are overlaps

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[337] *Id.*

[338] *See* Svantesson, *supra* note 58, at 449 (arguing 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'").

[339] Aviomoh v. COP [2021] LPELR-55203, 24 (SC) (Nigeria) (not a conflicts case, but insightful on the intersections between private law, business interests, and public law).

[340] *Id*.

[341] Daniel M. Clerman et al., *Legal Origin or Colonial History?*, 3 J. LEGAL ANALYSIS 379, 388 (2011).

[342] The U.S. Department of State described Kenya as "East Africa's most dynamic economy." Bureau of Afr. Affs., *U.S. Relations With Kenya*, U.S. DEP'T OF STATE (Oct. 24, 2022), https://www.state.gov/u-s-relations-with-kenya; *see also Nigeria Emerges as the Largest Economy in Africa*, SOVEREIGN WEALTH FUND INST. (Dec. 19, 2021), https://www.swfinstitute.org/news/90215/nigeria-emerges-as-the-largest-economy-in-africa.

between tort and contract in both countries.[343] Third, they have high Internet penetration rates[344] and very high numbers of Internet users.[345] However, there has been no sophisticated judicial attention given to defamation via the Internet, especially from the standpoint of conflict of laws.[346] 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. *Forum non conveniens* is applicable to Kenya[347] and Nigeria.[348] Therefore, there is no need to provide a separate discussion in this regard and case law on defamation will be considered.

In *Riddlesbarger v. Robson*,[349] 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) near Nairobi and the appellant company was served on the basis that it carried on business in Kenya.[350] The appellants

[343] Mohammed Ali v. Abdullahim Massai (2005) eKLR (Civ. App. No. 711 of 2002) (Kenya); Bonum Nigeria Ltd. v. Ibe [2019] LPELR-46442 (Nigeria). In Kenya and Nigeria, the offenses of sedition and criminal libel remain a possible trump card for the governments. *See* Benedict J. Anstey, *Criminal Defamation and Reputation as 'Honour': A Cross-Jurisdictional Perspective*, 9 J. MEDIA L. 132, 135 (2017).

[344] *Share of Internet Users in Africa as of January 2022, by Country*, STATISTA (July 21, 2022), https://www.statista.com/statistics/1124283/internet-penetration-in-africa-by-country.

[345] *Number of Internet Users in Selected Countries in Africa as of January 2022, by Country*, STATISTA (July 21, 2022), https://www.statista.com/statistics/505883/number-of-internet-users-in-african-countries.

[346] In several cases, litigants have sought judicial intervention to stop publication or to take down defamatory material. *See* Havi v. Headlink Publishers (2018) eKLR (Civ. Case No. 87 of 2016) (Kenya); Odera v. Ekisa (2016) eKLR (Civ. Suit No. 142 of 2014) (Kenya). In *CFC Stanbic Bank Ltd. v. Consumer Federation of Kenya (COFEK)*, (2014) eKLR (Civ. Case No. 315 of 2014), the High Court granted an interlocutory mandatory injunction and observed that "the article complained of is not only defamatory but its continued publication on the world wide web may continue to damage the Plaintiff's international business . . . the continued circulation of the article . . . may hinder or affect the Plaintiff's reputation and business operations."

[347] *See* Fairdeal UPVC Aluminium & Glass Ltd. v. Ase Europe N.V. (2020) eKLR (Civ. Suit No. 85 of 2016) (Kenya).

[348] Southwestern Law School v. President [2022] LPELR-58985 (C.A.) (Nigeria).

[349] Riddlesbarger v. Robson (1958) 1 E.A. 375 (Kenya); *see also Riddlesbarger v. Robson*, 3 J. AFR. L. 120 (1959) (providing a reproduction of the judgment). Although this is an old appellate case, it was more recently applied in the context of civil procedure. *See* Gathogo v. Ondansa (2007) eKLR (Civ. App. No. 287 of 2002) (Kenya). Many decades later in *Bharmal v. Bharmal*, a conflict of laws case on family trust, the defendant relied on *Riddlesbarger*. Bharmal v. Bharmal [2011] EWHC (Ch) 1092, [13]–[14] (Eng.).

[350] *Riddlesbarger*, 1 E.A. at 375.

appealed against the judgment of the Supreme Court of Kenya.[351] The Court of Appeal for Eastern Africa decided that where torts are committed abroad, 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.[352] 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 Article is policy vis-à-vis the security of obligations. In this regard, there is a need to ensure that conflict 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*,[353] the Kenyan High Court disapproved of the multiple-publication rule, especially because it had been supplanted by statutory development in England and the English had abandoned the multiple publication rule. In this case, the respondents alleged that they were defamed through a publication on the appellant's website and the magistrate's court applied the multiple publication rule.[354] That meant that "each individual publication gives rise to a separate cause of action subject to its own limitation period."[355] Each publication potentially gives rise to a different cause of action with the limitation running from the date of the last publication. The application of the multiple publication rule also meant that the respondents could circumvent the time bar which would otherwise deprive the court of jurisdiction.[356] The appellant disagreed and appealed to the High Court.[357] The Kenyan court observed that "it will be foolhardy for us in this country to follow those decisions [pre-statutory intervention case law in favour of the multiple publication rule] when their very basis has been found wanting to such an extent that a legislative intervention in the form of section 8 of the Defamation Act 2013 has been found necessary."[358] In allowing the appeal, the High Court essentially applied the single publication rule although it also meant that the respondents' claim was time barred.[359] Considering the facts of the case, the High Court did not consider it impossible to circumvent the time bar but that had to be based on relevant factors under the law. A good

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[351] *Id.* at 376.

[352] *Id.* at 376, 388.

[353] Royal Media Services Ltd. v. Maina [2019] eKLR (Civ. App. No. 19 of 2018) (Kenya).

[354] *Id.* at 1.

[355] *Id.*

[356] *Id. See also* Limitation of Actions Act (2012) Cap. 22 § 4(2) (Kenya). For the rigid application of the same Act in the context of defamation, see Ogero v Royal Media Services (2015) eKLR (Civ. Suit No. 292 of 2013) (Kenya).

[357] *Royal Media Services Ltd.*, [2019] eKLR at 1.

[358] *Id.* at 3.

[359] *Id.* at 4.

example would be where the delay was because the claimant did not become aware of the cause of action until after the statutory limitation period applied and he then took prompt action.[360] It is instructive that the court urged legal dynamism to keep pace with technological advancements and the necessary role of "policy makers . . . to take the initiative and act accordingly."[361] The time from which actions can no longer be brought can have implications for which courts might be appropriate. If a claimant has significant reputational interests in more than one jurisdiction and a claim is barred in one, it may be reasonable to explore the possibility of the next major centre of interests if that will help to achieve justice. Such issues can be based on objective criteria rather than subsumed under broad exercise of discretion. 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.

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. To give an instance, the double actionability rule set down by the Nigerian Supreme Court[362] more than half a century ago was based on traditional English common law at the time.[363] 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 criticized.[364] 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.[365] 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

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[360] *Id.*

[361] *Id.*

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

[363] Philips v. Eyre [1870] LR 6 QB 1 (Eng.).

[364] 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*, 2 INT'L J. HUMANITIES & CULTURAL STUD. 642, 652 (2015).

[365] Mills, *supra* note 87, at 10.

choice of jurisdiction) in tort matters poses a challenge.[366] Over time, this challenge has been compounded by inadequate specific guidance on defamation cases and further complicated by the peculiarities of the Internet.[367] 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*.[368] The claimant sued the respondent newspapers for libel.[369] 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.[370] They also argued that Enugu was not a convenient forum.[371] The argument on jurisdiction was rejected at the High Court and the Court of Appeal.[372] The court observed that the cause of action is not complete until a third party accessed or downloaded online Internet based publication.[373] This was a foundational observation. The court then decided that:

> 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.[374]

Several points are relevant to the analysis that has been undertaken so far in this Article. First, the Internet compels a search for solutions beyond traditional compartmentalizations. In determining the issue of jurisdiction, the

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[366] *See generally id*. For extensive arguments in this regard, see Lateef Ogboye & Abubakri Yekini, *Phillips v Eyre and its Application to Multi-State Torts in Nigeria: A Critique*, 4 NNAMDI AZIKIWE J. INT'L L. & JURIS. 108 (2013).

[367] 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 (Nigeria).

[368] Daily Times (Nig) Ltd. v. Arum [2021] LPELR-56893 (CA) (Nigeria) (a seminal appellate decision on specific Internet defamation).

[369] *Id.* at 1.

[370] *Id*. at 1–2.

[371] *Id.* at 2.

[372] *Id.* at 20–21.

[373] *Id*. at 20.

[374] *Id.*

Court of Appeal referred to only one English case and eleven U.S. cases.[375] The court endorsed the approach of engaging with U.S. case law because "the situation in the United States of America, a federation like Nigeria is worth examining."[376] As set out in an earlier scholarly argument, "exemplary and several significant efforts to regulate Internet jurisdiction"[377] in the U.S. further justify the need to engage with U.S. case law and draw on relevant insights. 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.[378] The reasoning also reflects valiant efforts considering the pioneering pathway of the court in Internet defamation generally. However, the U.S. case which the Nigerian Court of Appeal relied on for "the standard test in determining where personal jurisdiction resides in internet cases"[379] contained categorizations irrelevant to defamation cases.[380] Thus, there is a need to further investigate a more reliable reasoning. In any event, 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 so many U.S. 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, not merely because English case law has changed, but because it is appropriate to do so in this context. To give an example, U.S. case law may have an approach that especially suits Nigeria as a federal State.[381] Even U.S. case law does not contain all the solutions as this is a rather fluid area of law because of how the Internet works.[382] The Nigerian Court of Appeal's willingness to explore jurisprudence farther afield, and in the manner that it did, provides possible foundations for developing jurisdictional rule "x." Emerging scholarship in Nigeria also clearly suggests the need to explore how insights from other jurisdictions (especially in the U.S.) can help to solve disputes arising from Internet torts.[383] The Court of Appeal's decision also underscores the need for a deliberate effort to chart a clear path for Internet defamation in Nigeria.

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[375] The English case is King v. Lewis [2004] EWCA (Civ) 1329 (Eng.).

[376] Daily Times (Nig) Ltd. v. Arum [2021] LPELR-56893 (CA) 12 (Nigeria).

[377] OKOLI, *supra* note 287, at 210.

[378] *Arum*, [2021] LPELR-56893 (CA) at 7. Dr. Arum worked in Enugu State. *Id.*

[379] *See id.* at 13. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 119 (W.D. Pa. 1997).

[380] For the online defamation case decided by the U.S. District Court for the Western District of Arkansas, see Sioux Transportation, Inc. v. XPO Logistics, LLC, No. 5:15-CV-05265, 2015 U.S. LEXIS 171801, at 19 (8th Cir. Dec. 22, 2015).

[381] Daily Times (Nig) Ltd. v. Arum [2021] LPELR-56893 (CA) 12 (Nigeria).

[382] Questions on virtual contacts were left "for another day." *See* Walden v. Fiore, 571 U.S. 277, 291 n.9 (2014).

[383] Caroline Mbafan Ekpendu, *Challenges to the Concept of Domicile in Nigeria in the 21st Century*, 2 L. & SOC. JUST. REV. 16–17 (2021).

In *Muhammed v. Ajingi*,[384] the Nigerian Court of Appeal mentioned *in personam* jurisdictional grounds,[385] reviewed many cases including some with tortious elements,[386] and noted that "the location of the place where the cause of action arose plays no part in determining jurisdiction of a Court to hear the matter."[387] This legal position can provide some foundation for Internet defamation cases. One hurdle, however, is that several appellate cases (including at the Supreme Court) have taken a different position that focuses on bringing an action where the cause of action arose.[388] If the focus is on where the cause of action arose, it will also be important to first determine if that will be where the download took place or where the defamatory material was accessed. An Internet-focused characterization is critical to ensuring that effective outcomes that align with faced-paced technology are realized.[389] This Article argues for a non-exclusive emphasis on where reputation was damaged, especially considering the claimant's centre of interests. One way forward is to distinguish other decisions on the basis of Internet-related elements and use *Arum* as a keystone in the foundational structure for Internet defamation disputes. The reasoning in *Ajingi* can strengthen this structure. *Arum* can serve as a basis to seriously consider the claimant's centre of interests as a point of analytical departure. This, in the case of Nigeria, is likely to be where the claimant resides, does business, and accessed or downloaded defamatory material. The disjunctive conjunction "or" is critical to attaining systematic flexibility.[390]

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[384] Muhammed v. Ajingi [2013] LPELR-20372 (C.A.) (Nigeria).

[385] *Id.* at 35 (presence, submission, and assumed jurisdiction).

[386] *Id. See also, e.g.*, Zabusky & Ors. v. Israeli Aircraft Industry Ind. [2008] 2 NWLR 109 (Nigeria).

[387] *Ajingi*, LPELR-20372 at 36.

[388] *E.g.*, Dairo v. Union Bank of Nigeria Plc [2007] 16 NWLR 99 (Nigeria); Capital Bancorp Ltd. v. Shelter Savings and Loans Ltd [2006] 5 NWLR 300 (Nigeria). In reviewing several such cases, although outside an Internet context, some scholars argued against undue restriction of the court's jurisdiction as unhelpful in international commercial litigation. *See* CHUKWUMA SAMUEL ADESINA OKOLI & RICHARD FRIMPONG OPPONG, PRIVATE INTERNATIONAL LAW IN NIGERIA 95–103 (2020).

[389] By way of analogical analysis, compare this position with that in Mortensen, *supra* note 16 (arguing that "[i]n focusing on 'the act or omission' causing harm, it is more likely to fix special tort jurisdiction in one place and avoid the slippage of *Distillers*"). This argument *ipso facto* is insightful (although made in a non-Internet context), but it would be significantly challenging to apply this (without any qualification) to Internet-related matters. *Distillers* itself was decided long before the Internet was established. Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] AC 458 (Eng.). Developing countries, searching for sustainable technology-compatible solutions, need to carefully consider such nuances.

[390] This will help to guard against any unprincipled discretion. However, a position that draws on flexibility is instructive. *See* I.O. AGBEDE, THEMES ON CONFLICT OF LAWS 230 (2018) (arguing that "the ascertainment of the *locus delicti* should depend on the circumstances of particular cases and the purpose for which this is being done"). Agbede did not make this argument in the context of the Internet, but the reasoning is relevant.

The challenges that would otherwise persist can be illustrated through a later appellate case. In *Southwestern Law School v. President*,[391] the claimant sought a court order for the defendants to retract defamatory material that the claimant published in three international newspapers and two national newspapers ("soft and hard copies").[392] A key issue on appeal was whether the trial court was appropriate to hear the matter based on *forum non conveniens*.[393] The Nigerian Court of Appeal observed that the venue to bring a libel action was where the cause of action arose (i.e., "where the alleged libel was published and not necessarily where the defendant resides or carries business").[394] According to the Nigerian Court of Appeal, "the proper venue of adjudicating actions founded on libel is where the libel was published thus determining where the libel was published through the internet invariably requires taking evidence." The Court of Appeal therefore agreed that the trial court was right to hear the case and dismissed the appeal.[395] The appellant's contention that they did not reside in Nigeria, if upheld, would have effectively meant that the case would be heard outside the claimant's centre of interests. This is because the claimant resided in Edo State Nigeria and the subject matter was downloaded in Nigeria.[396] There is thus merit in the decision, but the reasoning could be more secure. The court did not engage deeply with the functioning of the Internet, but it may be reasonably extrapolated that it would have used the same method to arrive at a similar conclusion if reputation was damaged in several jurisdictions. The fact that a concurring opinion relied on a criticized case that focused on a restrictive approach to jurisdiction vis-à-vis case of action and where the tort was committed,[397] shows that the court invested a considerable degree of common-sense approach in adapting traditional conflict of laws rules. *Arum*, in contrast, adopted both a common-sense approach but also a detailed analytical approach that is critical to an appropriate development of the jurisprudence on Internet defamation. These precedents are important in the search for jurisdictional rule "x" through systematic flexibility.

In *Okoye v. Liadi*,[398] the High Court of Lagos State also introduced important legal precedent concerning internet service providers in an area where there is a dearth of relevant authorities.[399] The claimant brought an action

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[391] Southwestern Law School v. President [2022] LPELR-58985 (CA) (Nigeria).

[392] *Id.* at 1.

[393] *Id.* at 3.

[394] *Id.* at 13.

[395] *Id.* at 14.

[396] *Id.* at 7.

[397] *Id.* at 15. Orji-Abadua J.C.A. found support for this concurrence in *Dairo v. Union Bank of Nigeria Plc*, [2007] 16 NWLR 99 (Nigeria).

[398] Nicholas Okoye v. Ladun Liadi [2022] No. LD/170/2012 (High Ct. Lagos State Nov. 22, 2022) (judgment by Justice Akintoye) (Nigeria).

[399] *Id.* at 30–31 ("[T]here is a dearth of direct Nigerian case law or judicial decisions on the liability or potential liability of an internet intermediary in relation to defamatory

against the defendants. The main issue was whether Liadi (the first defendant and owner of a blog), Google Inc. (the second defendant), and Google Nigeria (the third defendant) were jointly and severally liable for libel as they published the article (*What Happened to Anabel Mobile*) via the blog.[400] Members of the public posted defamatory comments.[401] The first defendant managed, controlled, and edited contents of the blog. The second and third defendants "jointly/severally published/transmitted" the contents.[402] The court decided that the publication was defamatory to the claimant, granted damages, and issued a perpetual injunction restraining the first defendant or agents from publishing similar contents anywhere.[403] The case was not predicated on conflict of law issues, but it concerned cross-border elements and some aspects of "online defamation" (as the court itself observed)[404] are instructive. The court observed that the second and third defendants were different legal entities and described Google Inc. as "a U.S. company organized and operated in the U.S. and governed by U.S. Laws."[405] However, the circumstances of the claimant showed that the claimant's interests focused on Nigeria. His Nigerian company had presence in a couple of Nigerian states. Furthermore, a dominant narrative of the defamatory comments was expressed in the vernacular or situated in contexts best understood locally or by Nigerians. The claimant's witnesses (whose perceptions changed as a result of the defamatory comments) were Nigerians.[406] The court's decision also sets out practical realities such as the difficulty of large hosting platforms such as Google being able to monitor blogs and comments. In applying innocent dissemination in an online context, the court referred to several foreign cases including those from England and Hong Kong.[407]

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 since there was a declaration from a section of the Nigerian Supreme Court that "the law of defamation in

contents generated by third parties or interest platforms owned and operated by internet intermediaries or internet service providers.").

[400] *Id.* at 20–21.

[401] *Id.* at 22–23.

[402] *Id.* at 21.

[403] *Id.* at 46–47.

[404] *Id.* at 30.

[405] *Id.* at 40.

[406] *Id.* at 23–24.

[407] *Id.* at 36; *see also* Tamiz v. Google Inc [2013] EWCA (Civ) 68 (Eng.); Oriental Press Grp. Ltd. v. Faveword Sol. Ltd., [2013] 16 H.K.C.F.A.R. 366 (C.F.A.) (H.K.).

this country has not changed even by latest developments in law."[408] Meanwhile, there is already scope to support the single publication rule which is important in developing appropriate guidance on defamation via the Internet.[409] There is also a clear acceptance that defamation can occur in the context of "professional or business reputation."[410] The latter is also the case in Kenya.[411] Kenyan case law also favors an application of the single publication rule.[412]

In Kenya and Nigeria, the courts need to stitch rules together as relevant cases arise but, in varying degree, the foundations for a coherent approach are emerging. This general approach can be rather challenging and, of course, does not promote security of obligations. This is worsened by the fact that relevant conflict of laws rules in the United Kingdom, European Union, North America, and Australia are developing quickly, and the Internet itself continues to evolve. Practically, courts are likely to consider conflict of laws rules alongside certain substantive laws. 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 systematic flexibility for relatively easy adaptability.[413] This should be done in a way that factors in international cooperation on a realistic consideration of challenges that the Internet poses. In this way, a Kenyan will not be worried about where jurisdiction may be exercised in tort matters.[414] Global cooperation is the ideal way forward to ensure that developing countries, including those in Africa,

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[408] See the concurring opinion of Belgore, JSC, in *Din v. Afr. Newspaper of Nigeria*, [1990] 3 NWLR 392 (Pt 139) (Nigeria).

[409] See Defamation Law of Lagos State, § 4, for a version of the "single publication rule." See *id.* § 18 on "consolidation of actions for defamation."

[410] *Id.* § 2.

[411] *See* Defamation Act (1970) Cap. 36 § 8 (Kenya).

[412] *See* Royal Media Services Ltd. v. Maina [2019] eKLR (Civ. App. No. 19 of 2018) (Kenya). However, the express wording of relevant provisions does not necessarily bear this out. There are extensive provisions concerning unintentional publication and consolidation of actions in the Defamation Act. *See* Defamation Act (1970) Cap. 36 §§ 13, 17 (Kenya).

[413] 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*, 29 INT'L LAW. 555, 560 (1995). On the need for flexibility on matters of tort generally, see I. Oluwole Agbede, *Conflict of Tort Laws in Nigeria: An Analysis of the Rule in Benson v. Ashiru*, 6 NIGERIAN L.J. 103 (1972). For arguments against the double actionability rule in the Kenyan context, see RICHARD F. OPPONG, PRIVATE INTERNATIONAL LAW IN COMMONWEALTH AFRICA 152 (2013).

[414] J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873, 892 (2011) (Breyer, J., concurring) (expressing concerns about the need for "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").

maximize benefits of the Internet.[415] As argued earlier, 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.[416] 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.[417] Typically, there are competing arguments with respect to defamation. Claimants argue that they should be able to file suit in the jurisdiction where their reputation was damaged, while defendants argue that it would be a global risk to expect compliance with the laws of multiple jurisdictions.[418] However, it is clear that a solution acceptable to all would require a global treaty.[419] 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.

VI. CONCLUSION

Internet torts, especially defamation, highlight competing policy interests between States and individuals. Increasingly, governments intervene in matters concerning the Internet through regulatory and oversight roles—and in many cases, through efforts to address security concerns.[420] At the same time, harmonization 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

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[415] At the start of the 21st century, there were already hopes expressed in the Rome II proposal that there could be conflict of law rules concerning non-contractual obligations that will have "universal application." LAW COMM'N, DEFAMATION AND THE INTERNET: A PRELIMINARY INVESTIGATION (2002), https://www.lawcom.gov.uk/app/uploads/2015/03/Defamation_and_the_Internet_Scoping.pdf.

[416] *About the HCCH*, *supra* note 12.

[417] Marta Pertegás, *The Dutch-Russian Seminar on Legal Co-Operation "Better Justice, Better Business"*, HAGUE CONF. ON PRIV. INT'L L. 2 (Mar. 6, 2013), https://assets.hcch.net/docs/c8f6f762-7a14-464d-8103-0a3339c8d9c2.pdf.

[418] LAW COMM'N, *supra* note 415, ¶¶ 1.15, 4.53.

[419] This would be accompanied by accompanied by "greater harmonisation of the substantive law of defamation" which seems rather far-fetched for the foreseeable future. *Id.* ¶ 1.16.

[420] A trend not peculiar to any region. For example, the U.S. Justice Department recently brought an action against Google on an antitrust basis. *See Justice Department Sues Monopolist Google for Violating Antitrust Laws*, U.S. DEP'T OF JUST. (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

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. However, it is necessary to go beyond legal certainty and predictability by promoting systematic flexibility. Security in law requires equal legal treatment where this is possible, and with a view to ensuring obligations are met.

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. Clearly, especially as technology becomes more complex, it is crucial to reject any notion that traditional conflict of laws rules can be applied without adaptation to realities and projections concerning the Internet. This Article demonstrates why and how courts should approach Internet defamation in a deliberate and possibly incremental manner. The foregoing articulation of policies should promote the security of obligations. States can build on platforms dealing with important aspects of the Internet by including a conflict of laws agenda with respect to defamation. Such platforms provide foundations for cooperative endeavor beyond traditional jurisdictional divides and legal cultures.

While it is within the province of conflict of laws to consider technical conflicts rules that underpin Internet defamation, the most basic consideration when parties sue for defamation is to clear their names to stop reputational damage and any further financial losses that may have resulted from such damage. This point has been glossed over to a significant extent, but the impact is important in determining when courts should exercise jurisdiction considering the appropriate fora 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. These considerations inform the need for jurisdictional rule "x" and they can shape the policies that drive the resolution of disputes arising from Internet defamation. This Article has articulated the process that should lead to the rule.

Following the same process and logic also, the *substance* of centre of interests can be a practical point of departure in assessing the most appropriate basis for courts to hear suits regarding defamation.[421] Predicating such jurisdictional rule "x" searches on a clear articulation of policy that promotes security in law and obligations can help to trace possible commonalities beyond labels. To illustrate, there can be a consideration of any scope for overlaps between the rationales for the centre of interests and the clearly most appro-

[421] Schmitz's characterization of the centre of interests approach as a "solution halfway between the two jurisdictions established in Shevill," despite her criticism, underscores its potential attractiveness to jurisdictions that may wish to explore how to balance different or competing interests. Schmitz, *supra* note 307, at 168.

priate forum. The fast pace of technology strengthens the need for an innovative approach to Internet defamation which jurisdictional rule "x" represents. By way of illustration, the links between data protection and defamation suggest the need for a collaborative and practical approach to Internet defamation.[422]

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 Internet.[423] However, *forum 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 systematically flexible approach that will ensure that people 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 which can accommodate *forum non conveniens*. Clinging tenaciously to traditional approaches or dichotomous views regarding conflicts of jurisdiction is either outdated or unsustainable with respect to Internet defamation. The African countries examined in this Article apply *forum non conveniens*, but an international, regional, or global model requires a forward-looking approach.

The first step, as this Article has done, 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 Internet 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 including unequal access to the Internet even though the latter is often

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[422] *See* AU Convention, *supra* note 325, at art. 8(2); Aven v. Orbis Business Intelligence Limited [2020] EWHC (QB) 1812 (Eng.). *See also* Svantesson, *supra* note 58.

[423] Although EU law is already "rather accommodating," it is necessary to have a "a reasonable degree of foreseeability 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 v. SM, ECLI:EU:C:2021:124, ¶¶ 24, 88 (Feb. 23, 2021).

premised on a coequal status. Such core issues should set the agenda for sustainable progress.