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Forum of necessity in family law matters within the framework of EU and international law

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1. Introduction

In an insightful study on the case-law of the ECtHR[1] developed in the context of EU private international law regulations on family matters, P. Kinsch notes that the famous judgment of 2018 in the case Naït-Liman v. Switzerland[2] contains a reference to the forum of necessity provided for in Art. 11 of the Succession Regulation[3]. Somewhat provocatively, he points out that the Strasbourg case did not concern anything as "mundane" as the EU family regulations. Instead, "it concerned torture in Tunisia, and the denial of a forum in Switzerland for a claim for damages against the Tunisian state and its former Minister of the Interior"[4].

[1] The European Court of Human Rights, hereinafter "the ECtHR", not to be confused with the European Convention on Human Rights ("ECHR").

[2] The judgment of the ECtHR (Grand Chamber) of 15 March 2018, Naït-Liman v. Switzerland, application no. 51357/07, CE:ECHR:2018:0315JUD005135707, hereinafter the "judgment of 2018 in Naït-Liman v. Switzerland", §§84–86.

[3] Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, p. 107, as amended), hereinafter "the Succession Regulation".

[4] P. Kinsch, *Case Law of the European Court of Human Rights on the Application of (Some of) the EU Family Regulations* [in:] *Planning the Future of Cross Border Families A Path Through Coordination*, eds. I. Viarengo, F.C. Villata, Oxford 2020, p. 371.

It may be, however, that the cases on unlawful conducts that are undeniably prohibited under international law, such as the Naït-Liman v. Switzerland case (i.e. the prohibition of torture), are not perfectly suited to demonstrate how the forum of necessity operates within the framework of international and EU law. The reason why these cases are of particular interest from the perspective of international human rights law and/or EU law is somewhat ambiguous: is it due to the undisputed jus cogens nature of the prohibition of the unlawful conduct in question (the element of substance that calls for the availability of a forum) or due to the importance of the right of access to a court (the element of procedure that consists on its own on the availability of a forum)?

By contrast, the "mundanity" of matters falling within the scope of family private international law has the potential of making them better suited for discussing the *forum necessitatis*. In his course on exorbitant fora, D.P. Fernández Arroyo observes that matters of family law offer a propitious ground for the operation of the forum of necessity; in those matters, the issues resulting from the lack of access to justice present themselves to a civil judge in a manner far more crude than in other areas of law[5].

The ambition here is not to discuss in detail the operation of necessity jurisdiction under the EU private international law in matters of family law. Others have done it in a manner that does not call for revisions[6]. Consistently with that approach, although a general overview of the *forum necessitatis* across the EU private international law is presented below (section 2), the conditions for availability of necessity jurisdiction are not thoroughly examined. It seems more meaningful to differentiate, through these conditions, necessity jurisdiction from two other legal concepts that come with a certain risk of causing confusion, namely universal civil jurisdiction and *forum non conveniens*. By juxtapositioning all three legal concepts, it is possible to outline the boundaries of necessity jurisdiction and position it in the framework within which it operates in the EU Member States (section 3). In a similar manner, *forum necessitatis* can be benchmarked against international and EU law in order to fine-tune its positioning within this framework accordingly to the imperatives of public international law and to the influences of human and/or fundamental rights (section 4). Once this position is ascertained, it is possible to elaborate on the spectrum of influences that the doctrine of *forum necessitatis* may produce across various instruments of EU private international law (section 5).

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[5] D.P. Fernández Arroyo, *Compétence exclusive et compétence exorbitante dans les relations privées internationale*, "Recueil des Cours de l'Académie de Droit International de la Haye" 2009/323, p. 75, [„family law disputes provide a propitious ground for the forum of necessity because it is a matter in which the possible issues pertaining to access to justice present themselves in a manner far more crude to the judge. This may occur, for instance, in situations where the judge has jurisdiction over the divorce but not over the aspects of the dispute relating to minors. In those situations, a recourse to the forum of necessity «by extension» of a (in principle) reasonable forum might be put under consideration"] (our translation).

[6] See, among others, T. Ereciński, K. Weitz, *Internationale Notzuständigkeit im polnischen Internationalen und Europäischen Zivilverfahrensrecht* [in:] *Recht ohne Grenzen: Festschrift für Athanassios Kaissis zum 65. Geburtstag*, eds. R. Geimer, R.A. Schhütze, München 2012, p. 187 et seq.; M. Kübler-Wachendorff, *Das forum necessitatis im europäischen Zuständigkeitsrecht*, Tübingen 2021, p. 2 et seq.

2. General overview of *forum necessitatis* across EU private international law

2.1. Notion of "forum of necessity" and its basic features

In a nutshell, the *forum necessitatis*, or the forum of necessity, also referred to as „necessity" and "emergency"[7] jurisdiction, revolves around the idea that a court may be called upon to hear a case, though it lacks jurisdiction under the rules that would normally allow it to do so, on the ground that the claimant has no alternative or such alternative is not reasonably available. It is said to fulfil a complementary[8] or even corrective role[9] to the ordinary heads of jurisdiction. The richer is the array of the said heads of jurisdiction, the lesser is the need and possibility to resort to the doctrine of *forum necessitatis*[10].

Necessity jurisdiction is a form of direct jurisdiction[11]. As such, it determines whether a court or other authority of a State will adjudicate a matter involving a legally relevant foreign element. However, the doctrine of forum of necessity can also manifest itself through the rules of indirect jurisdiction. In this form, it secures unhindered recognition and enforcement of decision adopted by a court of another State exercising emergency jurisdiction[12].

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[7] Ch. Nwapi, *Necessary Look at Necessity Jurisdiction*, "UBC Law Review" 2014/47, p. 211. See also the joint dissenting opinion of judges Karakaş, Vučinić and Kūris to the ECtHR judgment of 2016 in the case Nait-Liman, §4.

[8] Ch. Nwapi, *Necessary...*, p. 211.

[9] P. Franzina, *Forum Necessitatis* [in:] *Planning the Future of Cross Border Families A Path Through Coordination*, eds. I. Viarengo, F.C. Villata, Oxford 2020, p. 325.

[10] P. Lagarde, *Le for de nécessité dans les règlements européens* [in:] *Europa als Rechts- und Lebensraum: Liber amicorum für Christian Kohler zum 75. Geburtstag am 18. Juni 2018*, eds. Ch. Kohler, B. Hess, E. Jayme, H.P. Mansel, Bielefeld 2018, p. 258.

[11] J.P. McEvoy, *Forum of necessity in Quebec Private International Law: C.c.Q. art. 3136*, „Revue générale de droit" 2005/35, p. 67. See also A. Torbus [in:] *Kodeks postępowania cywilnego. Tom V. Komentarz do art. 1096–1217*, ed. A. Marciniak, Warszawa 2020, p. 8.

[12] Article 565 of the Mexican Federal Code of Civil Procedure of 1988 provides that "notwithstanding what is prescribed in the [Article 564], the Mexican court shall recognize the jurisdiction exercised by a foreign court if, in its discretion, said court assumed the jurisdiction to avoid a denial of justice, for lack of a competent court. The Mexican court shall exercise jurisdiction in similar cases". In actuality, while the second sentence of Article 565 constructs a form of direct jurisdiction, under the first sentence the forum of necessity is accepted as a ground of indirect jurisdiction. For translation of the Code see J.A. Vargas, *Conflict of Laws in Mexico as Governed By the Rules of the Federal Code of Civil Procedure*, "San Diego Legal Studies Paper" 2007/07–93, p. 32. As far as an indirect jurisdiction is concerned see also Art. 2 of the 1985 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments, which provided that "the requirements for jurisdiction in the international sphere shall also be deemed to be satisfied if, in the opinion of the judicial or other adjudicatory authority of the State Party in which the judgment is to be given effect, the judicial or other adjudicatory authority that rendered the judgment assumed jurisdiction in order to avoid a denial of justice because of the absence of a competent judicial or other adjudicatory authority".

To date, only some States expressly provide for a rule of direct jurisdiction that ensures a forum of necessity. A 2007 EC-commissioned study directed by A. Nuyts identified ten EC (EU) Member States recognizing necessity jurisdiction[13]. A comparative study carried out by the ECtHR at the occasion of its judgment of 2016 in the case Naït-Liman v. Switzerland[14], subsequently updated at the event of its Grand Chamber judgment of 2018[15], revealed twelve European States where forum of necessity is provided by law or where it is a creation of case-law.

2.2. Forum of necessity in EU private international law

Known both to common law and civil law traditions[16], the legal concept of necessity jurisdiction found its way also into EU private international law.

Art. 7 of the Maintenance Regulation[17] was the first implementation of the doctrine of forum of necessity within the EU private international law[18]. To date, the EU legislator has openly made use of that doctrine on three further occasions[19], resulting in Art. 11 of the Succession Regulation and Arts. 11 of the twin Regulations on Matrimonial Property Regimes[20] and Registered Partnerships[21].

No other EU private international law instrument expressly provides for necessity jurisdiction. It does not mean, however, that the doctrine of *forum necessitatisis* is of no relevance in the cases falling within the material scope of these other instruments.

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[13] A. Nuyts, *Study on Residual Jurisdiction (3 September 2007): Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations'*, hereinafter "A. Nuyts Study on Residual Jurisdiction of 2007", p. 64.

[14] The judgment of the ECtHR (Chamber) of 21 June 2016, Naït-Liman v. Switzerland, application no. 51357/07, CE:ECHR:2018:0315JUD005135707, hereinafter the "judgment of 2016 in Naït-Liman v. Switzerland".

[15] The judgment of 2018 in Naït-Liman v. Switzerland, §§84–86.

[16] J.P. McEvoy, *Forum of necessity...*, p. 66. Cf. Ch. Nwapi, *Necessary...*, p. 212, who states that while the doctrine has civil-law origins, a number of common-law countries have adopted it.

[17] Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1, as amended), hereinafter "the Maintenance Regulation".

[18] K. Weitz, *Jurysdykcja krajowa w sprawach alimentacyjnych w świetle rozporządzenia nr 4/2009* [in:] *Europejskie prawo procesowe cywilne i kolizyjne*, eds. P. Grzegorczyk, K. Weitz, Warszawa 2012, p. 226.

[19] P. Lagarde, *Le for de nécessité...*, p. 255. See also M. Kübler-Wachendorff, *Das forum necessitatis...*, p. 3.

[20] Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (OJ L 183, p. 1, as amended), hereinafter "the Matrimonial Property Regimes Regulation".

[21] Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (OJ L 183, p. 30, as amended), hereinafter "the Registered Partnerships Regulation".

Faithful to its complementary role, under the four aforementioned Regulations (i.e. the Maintenance and Succession Regulations and the twin Regulations on Matrimonial Property Regimes and Registered Partnerships), the forum of necessity is "residual" in the sense that it becomes available only if no court in a Member State is entitled to hear the case[22]. Necessity jurisdiction provided for in these Regulations has to be distinguished from other "residual" heads of jurisdiction that are available for the claimants litigating in the EU. In fact, some older instruments of EU private international law tend to more frequently take a backseat to national rules on jurisdiction[23]. The latter rules can provide for a *forum necessitatis*.

First, in line with the Brussels Convention and Brussels I Regulation[24], the Brussels I bis Regulation establishes a dichotomous distinction between the disputes involving defendants domiciled in and outside of the EU. Under the Brussels I bis Regulation, the rules of jurisdiction provided for in the Regulation are, at least in principle, not applicable against non-EU-based defendants. By contrast, they are subject to national rules of jurisdiction of the Member State of the forum.

Second, Arts. 7 and 14 of the Brussels II bis Regulation[25] concern residual jurisdiction with regards to divorce, legal separation and marriage annulment and to the parental responsibility, respectively. Where no court of a Member State has jurisdiction pursuant to the rules of jurisdiction of the Regulation, (residual) jurisdiction is determined, in each State, by the national rules of jurisdiction. However, drawing inspiration from the EU/non-EU based defendant dichotomy known from the Brussels I and I bis Regulations, the Brussels II bis Regulation "immunizes" the spouses who are habitually resident in the territory of a Member State (as well as Member State nationals) against residual jurisdiction (Art. 6 of the Brussels II bis Regulation). Thus, the spouses domiciled outside the EU may still be subject to the national heads of jurisdiction, once it is established that no Member State court has jurisdiction pursuant to heads of jurisdiction provided for in the Regulation[26]. The Brussels II ter Regulation[27] does not alter the situation – it merely combines Arts. 6 and 7 into a single provision on residual jurisdiction.

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[22] P. Franzina, *Forum...*, p. 326.

[23] M. Kübler-Wachendorff, *Das forum necessitatis...*, p. 2.

[24] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), hereinafter "the Brussels I Regulation". From 10 January 2015, this Regulation has been replaced by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, p. 1, as amended), hereinafter "the Brussels I bis Regulation".

[25] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (OJ L 338, p. 1, as amended), hereinafter "the Brussels II Regulation".

[26] See the judgment of 29 November 2007, C-68/07, Kerstin Sundelind Lopez v. Miguel Enrique Lopez Lizazo, EU:C:2007:740, para. 24.

[27] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ L 178, p. 1), hereinafter "the Brussels II ter Regulation".

2.3. Conditions for availability of necessity jurisdiction

The picture that emerges from the global comparative analysis is that the forum of necessity is subject to two conditions which have to be met cumulatively: the impossibility or "unreasonableness" for the claimant of bringing the case in an alternate forum (impossibility/unreasonableness requirement), on the one hand, and the existence of a sufficient connection between the facts of the case and the requested forum State (the sufficient connection requirement)[28], on the other hand. It is noteworthy that while these two conditions are formally common to most statutory or judge-made implementations of the forum of necessity, their precise understanding does differ between States[29].

In the context of EU law, under the Regulations that explicitly provide for a forum of necessity, these two conditions are still present, although the impossibility/unreasonableness requirement is nuanced accordingly to the specificity of EU legal order. Necessity jurisdiction is available for the claimants where no court of a Member State has jurisdiction in accordance with the relevant Regulation, on the one hand, and proceedings in a third State to which the legal dispute is closely related are impossible or unreasonable, on the other hand.

Despite the nuance resulting from the specificity of EU legal order, findings pertaining to national provisions on the forum of necessity may offer some guidance as to how these conditions have to be constructed also under the four Regulations that explicitly provide for emergency jurisdiction[30]. Although the EU private international law for the most part relies on autonomous concepts sufficiently adapted to the objectives of the internal market, it does not detach itself from the private international law acquis developed through decades of efforts by legislatures, courts and scholars.

3. Necessity jurisdiction among other legal concepts on international jurisdiction

3.1. *Forum necessitatis* and universal civil jurisdiction

The forum of necessity cannot be confused with universal civil jurisdiction, although – as the judgment of 2018 in the case Naït-Liman illustrates – these two legal concepts may seem to be equally relevant in some specific circumstances.

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[28] See A. Nuyts Study on Residual Jurisdiction of 2007, p. 65–66; the judgment of 2018 in Naït-Liman v. Switzerland", §§88–89. A similar image stems from the studies not restricted to the European perspective. See, to that effect, L. Roorda, C. Ryngaert, *Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction*, "Rabels Zeitschrift für ausländisches und internationales Privatrecht" 2016/80(4), p. 794–797.

[29] L. Roorda, C. Ryngaert, *Business...*, p. 794.

[30] See, to that effect arguing that the findings pertaining to the national provisions on the forum of necessity should be used for the interpretation of the EU law provisions, M. Kübler-Wachendorff, *Das forum necessitates...*, p. 6 and 7.

First, while the forum of necessity is applied irrespective of the nature of the dispute[31], the universal civil jurisdiction is limited in its substantive scope. Its raison d'être consists in ensuring access to a court on the grounds that the unlawful conduct in question is a matter of international concern[32]. This feature of universal civil jurisdiction understandably limits its relevance to a narrow catalogue of cases.

Second, as a counterweight to its limited substantive scope, the universal civil jurisdiction offers an advantage over the forum of necessity as it does not rely on the existence of a sufficient connection between the dispute and the State of the forum[33]. Universal civil jurisdiction by no means does adhere to the paradigm of territoriality. No spatial connection between the case and the forum is required whatsoever.

By contrast, although the sufficient connection requirement is said not to be present in the systems of the Netherlands and of the United Kingdom[34], most *fora necessitatis* provided for in the national laws require a sufficient connection between the cause of action and the court seised[35]. This leads J.P. McEvoy to contend that the forum of necessity is clearly founded on the territoriality principle[36], while some other authors formulate more moderate contention that the *forum necessitatis* does not completely disregard considerations relating to the spatial (geographical) connection between the case and the forum[37].

Therefore, if the forum of necessity reflects the idea that every case sufficiently connected to a State must be trialed "there" in order to avoid the denial of justice, the universal civil jurisdiction reflects the idea that every unlawful conduct of sufficient gravity must be trialed "somewhere" in order to avoid impunity.

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31 See the comparative study in the judgment of 2018 in the case Naït-Liman, §87.

32 M.T. Kamminga, *Universal Civil Jurisdiction: Is It Legal? Is It Desirable?*, "Proceedings of the Annual Meeting" 2005/99, p. 123.

33 C. Kessedjian, *Questions de droit international prive de la responsabilite societale des entreprises: Rapport general* [in:] *Private International Law Aspects of Corporate Social Responsibility*, eds. C. Kessedjian, H. Cantu Rivera, Cham 2020, p. 37. In fact, according to its most common definition, universal civil jurisdiction is "the principle under which civil proceedings may be brought in a domestic courts irrespective of the location of the unlawful conduct and irrespective of the nationality of the perpetrator or the victim" (M.T. Kamminga, *Universal...*, p. 123) or a "jurisdiction exercised by a State over a civil case when there are no significant connection between the case and forum" (G. Gaja, *Foreword* [in:] *Universal Civil Jurisdiction. Which Way Forward?*, eds. S. Forlati, P. Franzina, Leiden – Boston 2021, p. 7).

34 See L. Roorda, C. Ryngaert, *Business...*, p. 803; B. Ubertazzi, *Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law*, "Marquette Intellectual Property Law Review" 2011/15(2), p. 388.

35 B. Hess, *The Private-Public Divide in International Dispute Resolution*, „Recueil des Cours de l'Académie de Droit International de la Haye" 2019/388, p. 225.

36 J.P. McEvoy, *Forum of necessity...*, p. 67.

37 G. Rossolillo, *Forum necessitatis e flessibilità dei criteri di giurisdizione nel diritto internazionale privato nazionale e dell'Unione europea*, "Cuadernos de Derecho Transnacional" 2010/1(2), p. 409, states that the forum of necessity does not completely disregard considerations relating to localization of the case, but – unlike the ordinary heads of jurisdiction – it uses the spatial connection as a parameter for evaluating the interest of the State of the forum. See also footnote 58.

As a consequence, a successful attempt to waive the requirement of a (sufficient) connection would blur the line between the forum of necessity and universal civil jurisdiction, leading to the creation of a legal concept of unrestrained universal civil jurisdiction in its absolute form (the "absolute forum of necessity"[38] or "pure" universal civil jurisdiction[39]), which would not be subject to limitations relating to its substantive scope. The implications of such waiver strengthen the relevance of sufficient connection requirement[40], even if it comes at the cost of hindering the availability of necessity jurisdiction to some claimants.

3.2. *Forum necessitatis* and *forum non conveniens*

Neither should be the *forum necessitatis* confused with another legal concept that is usually associated with the common law tradition States, namely the legal concept of the *forum non conveniens*. Put shortly, the *forum non conveniens* allows courts to decline jurisdiction on the grounds that a court in another State is a more appropriate forum to examine a dispute.

The starting points for these two legal concepts are different. The *forum non conveniens* is minimalistic in its nature – it seeks to remedy situations of illusive abundance where two (or more) courts have jurisdiction to hear the case and where one of them is better placed to hear a case. It is perfectly capable of addressing the positive conflicts of jurisdiction. In contrast, the *forum necessitatis* is oriented towards securing a previously non-existent (either completely or reasonably) access to justice[41]. It is of relevance in particular in the presence of a negative conflict of jurisdiction.

Figuratively speaking, both legal concepts oscillate around the proper administration of justice and the right to a fair trial, yet sit on opposing sides of the spectrum. Even though it is sometimes argued that with regards to the *forum non conveniens* the concept of denial of justice is relevant only for ensuring that the court before which a claim is brought does not relinquish jurisdiction without verifying that an alternative forum exists[42], such somewhat dismissive view overlooks the fact that what is at stake in a more global perspective is to provide the parties with the more appropriate ("convenient") forum.

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[38] L. Roorda, C. Ryngaert, *Business...*, p. 803, use this notion with regards to the forum of necessity as present in the Dutch and English legal orders.

[39] A. Mills, *Rethinking jurisdiction in international law*, "The British Yearbook of International Law" 2014/84(1), p. 224.

[40] See sec. 4.1.

[41] In its judgment of 2016 in the case Nait-Liman, the ECtHR Chamber juxtapositioned the forum of necessity and the *forum non conveniens* and considered that the latter is a rule which applies in similar situations, although it works in the opposite direction (§58) or even is "in a way the exact opposite of the [former]" (§76).

[42] See the judgment of 2018 in the Naït-Liman case, §90.

In the context of EU law, the *forum non conveniens* is usually being discussed in reference to the CJEU[43] judgment in the Owusu case[44]. In this case, the CJEU was called to address the preliminary question of whether, under the Brussels Convention, the court of a Contracting State is precluded from applying the *forum non conveniens* doctrine in favour of a third State court, where Art. 2 of that convention would permit that court to claim jurisdiction because the defendant is domiciled in that Contracting State. The answer, bluntly put, was in the positive[45].

Despite the recast of the Brussels I bis Regulation and introduction of the provisions taking into account the proceedings pending in a third State (Arts. 33 and 34), the authority of judgment in the Owusu case is said not to have been overruled; consequently, when the uniform European rules are applicable, no discretion exists and they must be accepted[46].

Yet, if that is the case, the question is what is the extent of the authority of the judgment in the Owusu case. The judgment can be seen as barring any recourse to mechanisms of international civil procedure not explicitly recognized by the instruments of EU private international law. If so, the doctrine of forum of necessity would also fall victim to the said authority[47], regardless of whether the necessity jurisdiction was to be derived from

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[43] The Court of Justice of the European Union, until 1 December 2009 functioning under the name of the Court of Justice of the European Communities, hereinafter "the CJEU".

[44] The judgment of the CJEU of 1 March 2005, C-281/02, Andrew Owusu v. N.B. Jackson, EU:C:2005:120.

[45] In its judgment in the Owusu case, the CJEU invoked the following arguments against the doctrine of *forum non conveniens*: firstly, the mandatory nature of the rule of jurisdiction (paragraphs 37 and 45), secondly, the lack of exception based on that doctrine in the Convention, although it has been discussed during the *travaux préparatoires* (para. 37), thirdly, the principle of legal certainty and predictability that would be undermined by a doctrine that allows for a wide discretion (paras. 37 and 41) and fourthly, the uniform application of the Convention (para. 43). For a more detailed summary and discussion see B. Ubertazzi, *Intellectual...*, p. 399–401.

[46] M. Mantovani, B. Hess, *European perspectives on human rights litigation* [in:] *Private International Law: Contemporary Challenges and Continuing Relevance*, eds. F. Ferrari, D.P. Fernández Arroyo, Cheltenham – Northampton 2019, p. 294.

[47] See, to that effect, L. Roorda, C. Ryngaert, *Business...*, p. 803–804, who, under the headline "Forum of necessity in regional legal orders: the EU and the Council of Europe", contends in line with the first argument of the CJEU in the judgment in the case Owusu (see footnote 45: the "mandatory nature of jurisdiction"), that the Brussels I Regulation established a "closed system" when it concerns a civil claim against a defendant domiciled in one of the Member States and, as a consequence, "the Member State courts can no longer resort to national rules on jurisdiction to accept or decline jurisdiction, as the [CJEU] elaborated on in [the judgment in the Owusu case]". See also, to that effect, G. Rossolillo, *Forum necessitatis...*, p. 412, who points out that the criticism that underpins the third argument of the CJEU in the judgment in the Owusu case (see footnote 45: "principle of legal certainty and predictability that would be undermined by a doctrine that allows for a wide discretion") can be made with regards to the doctrine of forum necessitatis. Cf. G. Biagioni, *Article 11: Forum necessitatis* [in:] *The EU Regulations on the Property Regimes of International Couples*, eds. I. Viarengo, P. Franzina, Cheltenham – Northampton 2020, p. 120, point 11.09, who argues that "the principle of forum *necessitatis* can be clearly distinguished from the doctrine of *forum non conveniens*, as it is similar to a traditional ground of jurisdiction in its functioning". Arts. 11 of the twin Regulations on Matrimonial Property Regimes and Registered Partnerships are said not to "allow domestic courts to exercise any discretion in assuming jurisdiction by necessity".

the *lex fori* (where EU law does not allow for a recourse to national law) or from the EU law itself (i.e. created through the interpretation of the instruments of EU private international law and operating as an autonomous legal construct of EU law).

However, the judgment in the Owusu case, it seems, can be also viewed from a more distant perspective, which reveals its consistency with a line of thought that has been developed by the CJEU through the years in its case law. From that perspective, what seems to lie at the heart of this judgment is the finding according to which the recourse to some mechanisms of international civil procedure that are not explicitly admitted by EU private international law would run against the obligation of a Member States court to exercise jurisdiction under the rules of mandatory character and – in the global picture – distort the allocation of jurisdiction within the Union that the compulsory system of jurisdiction seeks to establish[48].

Thus, the judgment in the Owusu case does not seem to completely outlaw necessity jurisdiction (derived from the *lex fori* or from the EU law itself) where it is not explicitly provided for in the relevant EU private international law instrument. As illustrated by the juxtaposition of the *forum necessitatis* and *forum non conveniens*, the allocation of jurisdiction provided for in the EU private international law and the *effet utile* of the system of jurisdiction is not at risk due to the exercise of necessity jurisdiction. In principle, the starting point for securing a forum of necessity is that there is no alternative forum available in the EU for the claimant.

Furthermore, it is true that a provision on the forum of necessity discussed during the *travaux préparatoires* for the Brussels I bis Regulation[49] has been ultimately rejected by the EU legislature. However, this specific provision was a part of a larger proposal by

[48] See the judgment of 9 December 2003, C-116/02, Erich Gasser GmbH v. MISAT Srl, EU:C:2003:657, para. 72, ["compulsory system of jurisdiction (...) which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules (...); the Convention thereby seeks to ensure legal certainty by allowing individuals to foresee with sufficient certainty which court will have jurisdiction"]. See also, by analogy, the case-law on anti-suit injunctions, namely the judgment of 27 April 2004, C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA, EU:C:2004:288, "[an anti-suit injunction prohibiting a party from commencing or continuing legal proceedings before a court of another Contracting State] undermines [the court] jurisdiction to determine the dispute" (paragraph 27) and "has the effect of limiting the application of the rules on jurisdiction laid down by the Convention" (paragraph 29)", as well as the judgment of 10 February 2009, C-185/07, Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc, EU:C:2009:69, "the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under [the Brussels I Regulation] from ruling (...) on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under [the Regulation]" (paragraph 28), while such "jurisdiction is determined directly by the rules laid down by that regulation" (paragraph 29).

[49] Proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2010) 748 final 2010/0383 (COD), hereinafter "Proposal for the Brussels I bis Regulation".

which the Commission intended to extend the rules of jurisdiction to third state defendants[50]. The rejection of the proposal did not target the forum of necessity specifically, but rather the general idea of enlarging the scope of the Regulation to cover non-EU domiciled defendants[51].

Thus, the authority of the judgment in the Owusu case does not seem to be of decisive importance in the context of the discussion on the doctrine of *forum necessitatis* in the EU. The main issue with the said doctrine lies within the fact that a situation that calls for the exercise of necessity jurisdiction in the EU is likely to be significantly connected with a third State[52]. That issue falls within the ambit of international law and should be viewed against its background.

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[50] Proposal for the Brussels I bis Regulation, p. 8, "The proposal extends the Regulation's jurisdiction rules to third country defendants (...) The proposal further harmonizes the subsidiary jurisdiction rules and creates two additional fora for disputes involving defendants domicile outside the EU (...) In addition, the courts of a Member State will be exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has sufficient connecting with the Member State concerned".

[51] See A. Mills, *Rethinking jurisdiction...*, p. 222; L. Roorda, C. Ryngaert, *Business...*, p. 807–809. It is noteworthy that the discussion on extension of the rules of jurisdiction to the defendants domiciled in the third States resurfaces today in particular in the context of the corporate due diligence and accountability for human rights violations, environmental degradation and good governance failure. See Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning the Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability], https://gedip-egpil.eu/en/2021/prague-2021-anglais/ (access 15.11.2021), p. 3.

[52] See F. Marongiu Buonaiuti, *Article 11* [in:] *The EU Succession Regulation. A Commentary*, eds. A.L. Calvo Caravaca, A. Davì, H.P. Mansel, Cambridge 2016, p. 201–202, who argues that the Member States courts should, in principle, be reluctant to exercise jurisdiction so as not to give rise to conflicts of jurisdiction with any such third State court. See also G. Biagioni, *Article 11...*, p. 120, point 11.07, who calls for the strict interpretation of the provisions on the forum of necessity "to avoid an uncontrolled expansion of the scope of jurisdiction of Member States vis-à-vis third States". In a similar vein, commenting on the proposal for the Brussels I bis Regulation, some authors expressed the view that an extension of the rules of jurisdiction allowing to establish the fora in the Member States for the defendants domiciled in third States could render it more difficult to guarantee legal protection to the EU-based claimants. According to these authors, the enforcement and recognition of the decision in the third States may cause difficulties. These difficulties may provoke a necessity of bringing the proceedings again, this time in a third State, which may entail a considerable loss of time and an increase of costs. See, to that effect, T. Bielska-Sobkowicz, *Jurysdykcja, uznawanie i wykonywanie orzeczeń w sprawach cywilnych i handlowych – nowe perspektywy* [in:] *Aurea praxis. Aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego. Tom I*, eds. J. Gudowski, K. Weitz, Warszawa 2011, p. 953. Legitimate or not, the same scepticism can be expressed with respect to the necessity jurisdiction.

4. Necessity jurisdiction and international law

4.1. International law and constraints in ensuring availability of *forum necessitatis*

From a formalistic and/or dogmatic perspective, rules of jurisdiction are considered as ordinary rules of national law, or even rules of national procedural law, emanating from the national legislatures or courts. Their harmonization through international treaties though impactful does not change their main characteristics – they still establish the criteria under which a State is exercising its judicial authority in relation to disputes in private matters. Their source may change, but their character remains mostly unaffected.

It does not mean however that the allocation of jurisdiction through private international law mechanisms is impenetrable for public international law.

In most simplified terms, jurisdiction in private international law may be shortly described in international law vocabulary as a jurisdiction in the sense of adjudicatory (judicial, curial[53]) jurisdiction. A more precise account of the relation between the private and public international law reveals that the latter acts rather as a limiting factor – it serves as a framework within which private international law mechanisms operate[54]. Obviously enough, there are some principles of customary public international law that undeniably limit the exercise of adjudicatory jurisdiction ensured through private international law mechanisms, namely the principles on immunities[55]. A question arises as to whether international law places, in a similar vein, any limits curtailing attempts to ensure the forum of necessity through the private international law mechanisms.

F. Vischer argued that the authority to decide under which condition adjudicatory jurisdiction will be granted is limited only by the tentative principles of public international law: jurisdiction should only be granted if there exists a "reasonable connection" between the forum, the case and the parties[56]. In a similar vein, for F.A. Mann the problem boils down to the question of the "sufficient connection" between the State of the forum and the facts of the dispute[57]. Provocatively speaking, it may be argued that for both

[53] F.A. Mann, *The Doctrine of International Jurisdiction Revisited after Twenty Years*, "Recueil des Cours de l'Académie de Droit International de la Haye" 1984/186, p. 32.

[54] A. Mills, *Public international law and private international law* [in:] *Encyclopedia of private international law*, eds. J. Basedow, G. Rühl, F. Schiller, F. Ferrari, P. de Miguel Asensio, Cheltenham 2017, p. 1451. See also F.A. Mann, *The Doctrine...*, p. 32, who affirms that "public international law, therefore, has a limiting function in its relation to private international law".

[55] B. Hess, *Staatenimmunität und ius cogens im geltenden Völkerrecht: Der Internationale Gerichtshof zeigt die Grenzen auf*, „IPRAX" 2012/32(3), p. 201–206.

[56] F. Vischer, *General Course on Private International Law*, "Recueil des Cours de l'Académie de Droit International de la Haye" 1991/232, p. 203–204.

[57] See F.A. Mann, *The Doctrine...*, p. 28 and 32, who focuses predominantly on the interrelation between the conflict of laws and public international law in respect of the problem of the legislation reach and observes that this problem boils down to the question of "sufficient connection" between a given set of facts and a legal system or legislator in terms of private and public international law respectively. He then goes on to admit that the situation is very similar when we consider the problem of the competence of courts or of what frequently is called curial jurisdiction.

authors, the connection requirement seems to be derived from an amalgam of the territoriality and sovereignty doctrines in their most forgiving forms, ostensibly hidden under the facade of interest balancing[58]. Furthermore, as observed by C. Kessedjian, even when described by contemporary authors as a "proximity" jurisdiction, the adjudicative jurisdiction gains flexibility but is still based on a significant link with its territory, either through the circumstances of the case, or because of the connections of the parties to the case[59].

That being said, L.R. Kiestra argues that there is little case law to support the sufficient connection requirement – the standards established in international law are said to be somewhat vague and appear not to be very restrictive[60]. In this vein, D.E. Childress notes (in his encyclopedic entry on the issue discussed here) that the view according to which international law imposes restraints on judicial jurisdiction is not universally accepted; he adds that it might be that international law does not directly constrain a national court's exercise of judicial jurisdiction[61].

Furthermore, the direct restraining influence of international law on the allocation of jurisdiction through private international law mechanisms seems to be even less pronounced in the context of EU and its Member States.

In a 2007 EU-commissioned study preceding the findings of L.R. Kiestra, A. Nuyts revealed that while the connection requirement is firmly established in legal writings, it is rarely relied upon in practice. He explained that the requirement does not seem very strict in the Member States and normally, when jurisdiction is established under national law, it means that a sufficient connection with the forum also exists[62]. In a similar vein, in the aforementioned encyclopedic entry, D.E. Childress observes that international law does not appear to constrain directly assertions of judicial jurisdiction in Europe, as the question presented is typically one of construing the Brussels Regime. As a consequence, courts in the Member States do not forthrightly engage in an international law analysis when determining their jurisdiction[63].

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[58] For F. Vischer, any analysis of adjudicatory jurisdiction has to start with the identification of the interests at issue. The interests of the community of States, of the single State, of the claimant and of the defendant are all involved. They have to be evaluated and weighed against each other. The State protects, through the courts within its territory, the legal order, peace and security of law. This interest becomes less intensive the weaker the relation of the case to the territory and community of the State. See F. Vischer, *General Course...*, p. 203. For F.A. Mann, the so-called balancing of interests is nothing but a political consideration: it is not the subjective or political interest, but the objective test of the closeness of connection, a sufficiently weighty point of contact between the facts and their legal assessment that is relevant. For this author, "the lawyer balances contacts rather than interests". See F.A. Mann, *The Doctrine...*, p. 31.

[59] C. Kessedjian, *Compétence juridictionnelle international et effets des jugements étrangers en matière civile et commerciale, Document préliminaire no 7, avril 1997*, p. 23, points 65 and 66.

[60] L.R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague 2014, p. 86.

[61] D.E. Childress, *Jurisdiction, limits under international law* [in:] *Encyclopedia of private international law*, eds. J. Basedow, G. Rühl, F. Schiller, F. Ferrari, P. de Miguel Asensio, Cheltenham 2017, p. 1053.

[62] A. Nuyts Study on Residual Jurisdiction of 2007, p. 22.

[63] D.E. Childress, *Jurisdiction...*, p. 1052.

In any case, if international law were to place any restrictions on assertions of judicial jurisdiction through the sufficient connection requirement, the said restrictions would primarily target exorbitant heads of jurisdiction (the jurisdictionally improper fora). It might be tempting to reserve the same treatment for the forum of necessity. In fact, the improper fora and *fora necessitatis* are being established notwithstanding the tenuous connections with the State of the court seized.

However, in the first place, the direct or indirect rules of jurisdiction that outlaw or sanction exorbitant heads of jurisdiction cannot serve as an irrefutable proof of the existence of the connection requirement in international law. If States are granted some discretion to decide in which situations they assert private international law jurisdiction, what the States permit or prohibit through private international law mechanisms adopted on the national level cannot be assimilated with the imperatives of international law[64]. In fact, the reluctance to permit the lawsuits under exorbitant heads of jurisdiction might be explained by the remoteness of facts and evidence and by practical considerations[65] and not necessarily the imperative of international law.

In the second place, the exorbitant fora are not unanimously outlawed in national and international private law. They continue to persist and it is their persistence that seems to refute the view according to which international law authoritatively imposes a sufficient connection requirement upon States[66].

In the EU law, the Brussels I bis Regulation outlaws the national rules of jurisdiction against EU-based defendants [Art. 5(2)] but, except for certain disputes (against consumers and employees as well as those falling within the scope of exclusive heads of jurisdiction), provides for the possibility to apply the national rules of jurisdiction against the defendants non-domiciled in the EU (Art. 6). Most scenarios in which there is a substantial connection to a Member State of the forum fall therefore within the scope of the rules of jurisdiction provided for in the Brussels I bis Regulation itself. By contrast, national rules of jurisdiction can be of relevance predominantly in the scenarios where there is only a relatively loose connection to the forum and are thus at risk of being exorbitant in nature[67]. Faithful to this logic, save for special grounds of jurisdiction provided for in the secs. 3 to 6 of the Brussels I bis Regulation [see Art. 45(1)(e)], the Regulation does not automatically condemn any head of jurisdiction, be it exorbitant or not.

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[64] See, to that effect, D.E. Childress, *Jurisdiction...*, p. 1053; L.R. Kiestra, *The Impact...*, p. 93.

[65] B. Hess, *The Private-Public Divide...*, p. 225.

[66] See, to that effect, D.E. Childress, *Jurisdiction...*, p. 1055; F. Marchadier, *L'indifférence de la Cour Européenne des Droits de l'Homme a l'égard du for de nécessite*, "Revue critique de droit international privé" 2018/3, p. 666. See also, with regards to Art. 4(2) of the Brussels I Regulation B. Hess, *The Brussels I Regulation: Recent case law of the Court of Justice and the Commission's proposed recast*, "Common Market Law Review" 2012/49(3), p. 1105.

[67] See, in that vein, M. Stürner, F. Pförtner, *Residual Jurisdiction: Back to the Future?* [in:] *EU Civil Procedure Law and Third Countries: Which Way Forward?*, eds. A. Trunk, N. Hatzimihail, Baden-Baden 2012, p. 56. E. Pataut, *The External Dimension of International Family Law* [in:] *Private Law in the External Relations of the EU*, eds. M. Cremona, H.W. Micklitz, Oxford 2016, p. 139.

The Brussels II bis Regulation also allows for the recourse to the national rules of jurisdiction, without providing corresponding grounds of refusal of recognition and enforcement. Due to the residual (subsidiary) character of that recourse[68], the heads of jurisdiction that simply repeat the heads of jurisdiction already provided for in the Brussels II bis Regulation are of no practical relevance. In contrast, the heads of jurisdiction that do matter are likely to lead to exorbitant or necessity jurisdiction.

Under the Brussels Regime, the applicability of national rules of jurisdiction that may be of exorbitant nature is – as E. Pataut puts it – a "technical necessity" resulting from the non-applicability of the heads of jurisdiction provided for in the Brussels I bis Regulation to the defendants domiciled outside the EU. Under the Brussels II bis Regulation, this is simply a question of policy: the EU legislator did not seek to outlaw the improper fora. Neither does the Brussels II ter Regulation outlaw them[69].

In the third place, exorbitant jurisdiction is sometimes described as jurisdiction of unreasonable character[70] and indeed "reasonableness" lies at heart of some authors' views on the international law restraining influence on jurisdiction in private international law.

Again this background, while F. Vischer argues in favour of "reasonable connection" requirement, he admits that this requirement may only be inferred from what he dubs "tentative principles of public international law"[71]. Equally inconclusively, A. Lowenfeld addresses the question whether there is a "unifying principle of judicial jurisdiction under international law, or only separate national laws addressing similar issues". In his view, there is a growing consensus that the exercise of judicial jurisdiction must be "reasonable"[72]. However, as the author openly admits, he prefers not to draw a sharp distinction between public and private international law. It is therefore impossible to identify the source of the reasonableness that A. Lowenfeld advocates for: is it an imperative of international law or a manifestation of discretionary leeway that the States enjoy when asserting judicial jurisdiction?

Therefore, the contention that international law places some limits curtailing the attempts to ensure the forum of necessity finds little support. Besides, the attempts to ensure access to the forum can hardly be seen as "unreasonable" when no alternative is reasonably available to the claimant[73].

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[68] See sec. 2.2.

[69] It has been already argued that national private international law should no longer have a residual ("subsidiary") role under the Brussels II bis Regulation and the Regulation itself should contain a forum necessitatis for situations where no court in a Member State can assume jurisdiction. T. Kruger, L. Samyn, *Brussels II bis: successes and suggested improvements*, „Journal of Private International Law" 2016/12, p. 140. The EU legislature does not follow the suggestion as the Brussels II ter Regulation does not completely abolish the residual jurisdiction. L. Válková, *The interplay between jurisdictional rules established in the EU legal instruments in the field*, "Cuadernos de Derecho Transnacional" 2017/9(2), p. 556.

[70] D.P. Fernández Arroyo, *Compétence...*, p. 197; E. Pataut, *The External...*, p. 139.

[71] F. Vischer, *General Course...*, p. 203–204.

[72] A. Lowenfeld, *International Litigation and the Quest for Reasonableness*, "Recueil des Cours de l'Académie de Droit International de la Haye" 1994/245, p. 82–83.

[73] It is a question of debate whether a forum of necessity should be qualified as an exorbitant forum or not. See D.P. Fernández Arroyo, *La tendance à la limitation de la compétence judiciaire à l'épreuve du*

In any case, maybe the most accurate explanation of connection requirement lies within the doctrine of comity. As A. Mills summarizes it, according to that doctrine a State should only exercise its judicial authority in relation to a dispute where it has a "legitimate" claim to do so. If this is not the case it should defer to another court's jurisdiction[74]. The State does this not to meet an imperative of international law, but in an act of self-restraint[75].

There seems to be a pervasive interest in advocating for such acts of self-restraint. As mentioned above[76], a successful attempt to waive the requirement of a (sufficient) connection would blur the line between the forum of necessity and universal jurisdiction. While the legal concepts of necessity jurisdiction and universal civil jurisdiction seem to be supported by the vast body of doctrine, both find less practical applications and still remain highly controversial. It is true that observations on "dynamic nature of [the] area"[77] and faith in the likelihood of future developments[78] constitute a recurring theme in the case-law dealing with the clashes between the right of access to court and many facets of international law. However, quite often the status quo remains unaffected. In order to effectively drive the change, proposals put forward should plead in favour of solutions that may find wider acceptance[79].

To illustrate this point, the reluctance to assert jurisdiction where there is no connection between the case and the forum – or where such connection is tenuous – can result,

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droit d'accès à la justice [in:] *Les relations privées internationales: mélanges en l'honneur du professeur Bernard Audit*, eds. L. d'Avout, D. Bureau, H. Muir Watt, Paris 2014, p. 293, "un for exorbitant ne saurait être considère comme un for exorbitant si l'on admet que l'idée d'exorbitance peut être comprise comme l'absence de caractère raisonnable, situation produite par l'inexistence d'un lien substantiel entre le litige et le four et/ou par le traitement inégalitaire des parties". However, further doctrinal references provided by D.P. Fernández Arroyo in his contribution illustrate opposing views as to the qualification of the *forum necessitatis*.

74 A. Mills, *Public international...*, p. 1448–1449.

75 An approach based on self-restraint ("self-limitation") is discussed in the literature also in the context of EU law, with regard to the territorial reach of the effects produced by the measures adopted by the authorities of the Union and of the Member States. See M. Szpunar, *Territoriality of Union Law in the Era of Globalisation* [in:] *Évolution des rapports entre les ordres juridiques de l'Union européenne, international et nationaux. Liber amicorum Jiří Malenovský*, eds. D. Petrlík, M. Bobek, J.M. Passer, Brussels 2020, p. 164–168.

76 See section 3.1.

77 See the judgment of 2018 in the case of Naït-Liman v. Switzerland, §220.

78 See the judgment of 3 February 2012 of the International Court of Justice, Jurisdictional Immunities of the State [Germany v. Italy: Greece intervening], ICJ Reports 2012, §104.

79 It does not mean however that it is necessary to explicitly provide for a sufficient connection requirement between the case and the forum of necessity. In its Draft Resolution on Human Rights and Private International Law, the Institute of International Law (Institut de Droit International) seemed to address that requirement in a nuanced manner. The Draft provides for a rule on necessity jurisdiction, according to which if the rules of jurisdiction may lead to a denial of justice in a given case, the right of access to a court exceptionally requires that a court declares itself competent, if there is no closer link with a foreign State where the access to justice would be available (Art. 4 of the Draft Resolution). See Human Rights and Private International Law. Draft Resolution Explanatory Report (27 January 2021), www.idi-iil.org (access 2.11.2021).

justly or not, out of concern for the rights of defendants. In his course on the principle of proximity, P. Lagarde contended that in some instances a sufficient connection requirement may be derived from Art. 6 of the ECHR, in order to target exorbitant jurisdiction. As observed by P. Lagarde, there was no precedent to substantiate that contention[80]. There still seems to be little authority to support it. A decision of the now defunct Commission of Human Rights is often cited as having laid the groundwork for a requirement of sufficient connection between the dispute and the forum[81], said to result from Art. 6 of the ECHR. However, having in mind the Strasbourg case law that followed[82], the obiter findings of this decision should rather be understood as authorizing a Contracting State to close the door on claimants in cases not connected with the forum[83]. That being said, the self-restraint in the exercise of jurisdiction, manifesting itself in reliance on the sufficient connection requirement, eliminates the concern for the rights of defendants and allows for a wider acceptance of necessity jurisdiction.

In the light of the above, rather than asking whether any restrictions as to the forum of necessity can be inferred from international law, the question is whether and, if so, under what circumstances, international law imposes an obligation to ensure emergency jurisdiction.

4.2. International law and obligation to ensure availability of *forum necessitatis*

4.2.1. International human rights law as a component of international law

It has been argued that the public international law, traditionally understood, does not seem to require that a State exercise jurisdiction in cross-border cases[84].

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[80] See P. Lagarde, *Le principe de proximité dans le droit international privé contemporain Cours général de droit international privé*, "Recueil des Cours de l'Académie de Droit International de la Haye" 1986/196, p. 156–157.

[81] Decision of the European Commission of Human Rights of 13 May 1976, application no. 6200/73. See G. Cuniberti, *Le fondement de l'effet des jugements étrangers*, "Recueil des Cours de l'Académie de Droit International de la Haye" 2018/394, p. 145.

[82] See sec. 4.2.

[83] See F. Marchadier, *L'indifférence...*, p. 667. See, to that effect, F. Marongiu Buonaiuti, *Limitations to the Exercise of Civil Jurisdiction in Areas Other Than Reparation for International Crimes* [in:] *Universal Civil Jurisdiction. Which Way Forward?*, eds. S. Forlati, P. Franzina, Leiden – Boston 2021, p. 130, who admits that "it remains questionable whether specific limitations to jurisdiction may be found in general international law", yet notes that "in the only remote case where the issue was reportedly addressed by the (then existing) European Commission of Human Rights, the latter concluded that the right of access to a court does not extend to the point of encompassing a right to bring the case before a particular court of the claimant's choice. Nonetheless, an obiter of the same decision pointed to the importance of a sufficient connection between the case and the forum for the exercise of jurisdiction to comply with the relevant general principles of international law".

[84] See M. Stürner, F. Pförtner, *Residual Jurisdiction...*, p. 53.

Contemporary doctrine tends however to consider that traditional understanding of the public international law became obsolete. At the absolute minimum, a particular consideration has to be given to the international human rights law.

4.2.2. *Forum necessitatis* and Article 6(1) of the ECHR

According to the well-established case-law of the ECtHR[85], the right to institute proceedings before courts in civil matters constitutes one particular aspect of the "right to a court" that Art. 6(1) of the ECHR embodies. The right to a court is not absolute; it is subject to limitations. These limitations, however, must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired.

Building up on these findings, in its judgment in the case Arlewin v. Sweden[86], the ECtHR ruled that where there are strong connections between a State, on the one hand, and the claim, on the other, a State has an obligation, under Art. 6 of the ECHR, to provide the applicant with an effective access to court. The obligation exists because a claimant who brings proceedings before a national court finds himself or herself within the jurisdiction of the State of forum and, accordingly, under Art. 1 of the ECHR this State has to secure the rights of individual within its jurisdiction. Consequently, based on the strong connections between the State and the claim, each Contracting Party to the ECHR is in obligation to provide such a claimant with an accessible forum.

In stark contrast with the strong connections scenario elaborated on in the judgment in the case Arlewin v. Sweden, necessity jurisdiction needs to satisfy itself with tenuous connection between the forum and the claim brought before it. It is of no relevance in a situation in which a claim presents significant connections with the forum. If this is the case, ordinary heads of jurisdiction suffice then to establish jurisdiction of the court seized.

The outcome of the confrontation between the refusal to exercise necessity jurisdiction and the right to a court embodied in Art. 6 of the ECHR is already well known. The judgment of 2018 in the case Naït-Liman v. Switzerland, by which the ECtHR ruled that Art. 6 does impose no obligation to ensure a forum of necessity and that, having regard to the specific circumstances of the case, the Swiss courts' narrow interpretation of the domestic provisions on the forum of necessity (Art. 3 Federal Statute on Private International Law of 18 December 1987), namely with reference to the requirement of the existence of a "sufficient link" with the forum State, pursued legitimate aims and was not disproportionate to them, has been extensively discussed in the literature[87]. Despite

[85] See, in particular, the ECtHR judgment of 21 February 1975, application no. 4451/70, Golder v. the United Kingdom, CE:ECHR:1975:0221JUD000445170.

[86] See the ECtHR judgment of 1 March 2016, application no. 22302/10, Arlewin v. Sweden, CE:ECHR:2016:0301JUD002230210, § 65, 72 and 73.

[87] See, among others, A. Saccucci, *The Case of Naït-Liman before the European Court of Human Rights. A Forum Non Conveniens for Asserting the Right of Access to a Court in Relation to Civil Claims for Torture Committed Abroad?* [in:] *Universal Civil Jurisdiction. Which Way Forward?*, eds. S. Forlati, P. Franzina, Leiden – Boston 2021, p. 3 et seq.

criticism[88], the judgment is the sole authority benchmarking a national provision on necessity jurisdiction against Art. 6(1) of the ECHR.

4.2.3. Relationship and parallelism between Article 6(1) of the ECHR and Articles 47 of the Charter

In the Member States the doctrine of forum of necessity may draw its authority not only from the ECHR, but also from the Charter.

That being said, at first glance, there is much to suggest that the judgment of 2018 in the case Naït-Liman v. Switzerland is of paramount importance also in the context of EU private international law. Article 3 Federal Statute on Private International Law of 18 December 1987 is said to have served as a model or at least inspiration for the EU legislature during the drafting of the Regulations that explicitly provide for necessity jurisdiction[89], on the one hand. Undeniably, there is a close relationship[90] and some parallelism[91] between the rights embodied in Art. 6(1) (and Art. 13) of the ECHR and Article 47 of the Charter, on the other hand.

However, according to Art. 52(3) of the Charter, the meaning and scope of the right to an effective remedy and to a fair trial guaranteed by Art. 47 of the Charter may not only be the same, but also more extensive, in scope of protection and its standard, than the rights laid down in Arts. 6(1) and 13 of the ECHR[92]. Even if the assertions that the ECHR is intended to provide a minimum common standard of protection, and that the ECtHR is therefore not the appropriate forum for progressively addressing issues emerging at the intersection of public and private international law were true[93], such assertions should not be unreflectively carried over to EU law and to the jurisprudential activity of its courts. In brief, the findings of the judgment in the case Naït-Liman v. Switzerland are not automatically transposable to Art. 47 of the Charter.

Furthermore, discussing the right of access to a court and accessibility of a forum of necessity for the claimants under the applicable private international law, one cannot

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88 See, among others, F. Marchadier, *L'indifférence...*, p. 663 et seq.; P.D. Mora, *Universal Civil Jurisdiction and Forum Necessitatis: The Confusion of Public and Private International Law in Naït-Liman v. Switzerland*, "Netherlands Intenational Law Review" 2018/65(2), p. 155 et seq.

89 M. Kübler-Wachendorff, *Das forum necessitatis...*, p. 8.

90 See K. Gutman, *The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best is Yet to Come?*, "German Law Journal" 2019(20), p. 887, according to whom "the close relationship between the rights contained in Article 47 of the Charter and the ECHR regime" is highlighted by the references to the case-law of the ECtHR in the judgments of the CJEU.

91 See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 32), according to which "the second paragraph [of Article 47] corresponds to Article 6(1) of the ECHR".

92 K. Gutman, *The Essence...*, p. 887.

93 See to that effect with regards to the doctrine of forum non conveniens A. Saccucci, *The Case of Naït-Liman...*, p. 4.

ignore that Art. 6 of the ECHR serves as a benchmark for rules of jurisdiction that are external to the system established by the Convention. By contrast, Art. 47 of the Charter belongs to the same legal order as the rules of jurisdiction of EU Regulations. Whenever the *forum necessitatis* doctrine relies on the authority of Art. 47 of the Charter, it has the potential to produce more tangible influences on the framework within which it operates.

The nature of such influences may vary, just as varies the role that the doctrine of *forum necessitatis* needs to assume across different instruments of EU private international law. The ambition of the final section of this paper is to present the spectrum of these influences.

5. Doctrine of *forum necessitatis* and the spectrum of its influences across EU law

The Maintenance and Succession Regulations and the twin Regulations on Matrimonial Property Regimes and Registered Partnerships explicitly provide for necessity jurisdiction. By now it should be beyond doubt that the provisions on necessity jurisdiction contained in these Regulations should be interpreted in the light of Art. 47 of the Charter. However, its impact goes far beyond that.

First, leaving aside for the moment the question of whether the doctrine of forum of necessity can – when it relies on the authority of Art. 47 of the Charter – ensure emergency jurisdiction despite the silence of EU law on that matter, it can undeniably inspire the interpretation of the existing array of the ordinary heads of jurisdiction (regardless whether the applicable EU Regulation explicitly provides for necessity jurisdiction or not) in such a way as to avoid the denial of justice[94]. Instead of becoming relevant once it is found that no court of a Member State has jurisdiction pursuant to the ordinary heads of jurisdiction, the doctrine of forum of necessity should already be reckoned with at an earlier stage of the examination of jurisdiction. The doctrine of *forum necessitatis* should not be used in order to remedy situations of denial of justice resulting from unforgiving interpretation of ordinary heads of jurisdiction[95], although it does not mean that

[94] See, to that effect with regards to an Argentinian provision on the forum of necessity, D.P. Fernández Arroyo, *A New Autonomous Dimension for the Argentinian Private International Law System*, „Yearbook of Private International Law" 2014/2015, vol. XVI, s. 418, "the *forum necessitatis* can serve not only to create a jurisdictional forum, but also to interpret an existent forum in the most favourable way, in order to avoid the denial of justice".

[95] To illustrate this point, under Arts. 6(1)(a) and 7(1)(a) of the Succession Regulation a court seised pursuant to Arts. 4 or 10 may decline jurisdiction in favour of the courts of the Member States of which the deceased was a national. In the RK case, C-422/20, the CJEU was asked to interpret these provisions and clarify to what extent a decision by which a court of the Member State in which the deceased had his habitual residence at the time of death declines jurisdiction in favour of the courts of the Member State of which the deceased was a national is binding for these courts. To hold that the decision is not binding could lead to a negative conflict of jurisdiction. A priori, such conflict could be remedied by ensuring a forum of necessity under Art. 11 of the Regulation. Nevertheless, the said negative conflict of jurisdiction would only emerge where courts of two Member States

the access-to-a-court-oriented reading of these heads of jurisdiction trumps all other methods of interpretation[96].

Second, the Brussels II bis Regulation – and the Brussels I bis Regulation – mandate for a recourse to national rules on direct jurisdiction. It is through such recourse that a forum of necessity can be made available to the claimant under applicable national law[97]. The question arises as to whether the Member States are still in obligation to respect the requirements resulting from Art. 47 of the Charter where their courts exercise jurisdiction under the rules provided for in national law?

In this regard, the situation in EU law is quite different from that of the ECHR. As illustrated by the judgment in the case Arlewin v. Sweden, the obligation to ensure protection of the rights embodied in Art. 6(1) of the ECHR results from the fact that claimant who brings proceedings before a national court falls within "jurisdiction" – within the sense of Art. 1 – of the State of forum. In principle, the rules of jurisdiction can be benchmarked against Art. 6(1) of the ECHR regardless of their source.

By contrast, under the EU law, the provisions of the Charter are addressed to the Member States only when they are implementing Union law [Art. 51(1) of the Charter]. Pursuant to the Explanations to the Charter, the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act within the scope of Union law.

Nonetheless, taking into account the application of the national rules on jurisdiction against non-EU defendant under the Brussels Regime, it may be inferred from the Opinion 1/03 on the competence of the Community to conclude the new Lugano Convention[98] that the proceedings against the non-EU defendants remain covered by the Brussels I Regulation and that in the course of this proceedings the Member States cannot disregard

somewhat connected to the succession have already considered themselves lacking jurisdiction. Given that Art. 11 poses a sufficient connection requirement, it is highly probable that no other Member States would be sufficiently connected to the case. In any case, it is possible to eliminate the risk of negative conflicts of jurisdiction and avoid the very need to resort to the forum of necessity by interpreting the Regulation in a way as to consider that the decision is binding for the courts of the Member States of which the deceased was a national. See Opinion of AG Szpunar in the RK case, C-422/20, EU:C:2021:565, point 60 and footnote 35. See also judgment of 9 September 2021, C,-422/20, RK, EU:C:2021:718, para. 51.

96 See G. Biagioni, *Jurisdiction in Matters of Parental Responsibility Between Legal Certainty and Children's Fundamental Rights*, "European Papers" 2019/4(1), p. 294 and 295, who notes that in the judgment of 17 October 2018, C-393/18 PPU, UD v. XB, EU:C:2018:835, the CJEU refused to "stretch the notion of habitual residence so far as to include a place where the child had never been physically present, since such a broad interpretation was not required by the principle of the best interests of the child". Remarking also about the forum of necessity that could became applicable under Art. 14 of the Brussels II bis Regulation as a head for residual jurisdiction (p. 294), he ultimately seems to appraise the refusal to interpret the notion of habitual residence in a broad manner by stating that "an excessive emphasis on the protection of fundamental rights can turn out to be a disintegrating factor for the smooth functioning of judicial cooperation in civil matters" (p. 295).

97 See M. Kübler-Wachendorff, *Das forum necessitatis...*, p. 2. See also sec. 3.1.

98 The opinion of the CJEU of 7 February 2006, 1/03, EU:C:2006:81, para. 148.

the requirements resulting from the Charter[99]. The recourse to national rules of jurisdiction does not remove a case against a non-EU defendant from the scope of the Regulation. Besides, such recourse is mandated by EU law itself. Furthermore, a judgment that rests on the heads of jurisdiction provided for in national law still belongs to the EU system of recognition and enforcement.

A fortiori, this is even more true under the Brussels II bis Regulation. In each single case[100], the national rules of jurisdiction become of relevance only where no court of a Member State has jurisdiction pursuant to the rules of jurisdiction of the Regulation. These national rules are part of a cascade that also includes EU rules of jurisdiction. It would be artificial to contend that only some parts of that cascade fall within the ambit of the Charter.

In the light of the above, a Member State is in obligation to respect the requirements resulting from Art. 47 of the Charter also in the situation where its court has jurisdiction under national law to deal with the cases falling within the scope of the Brussels I bis and II bis Regulations. The national rules of jurisdiction also need to be interpreted as to avoid the denial of justice.

Third, comprehensive judicial settlement of family matters may often require the conduct of multiple proceedings on different subject matters (divorce, matrimonial property, parental responsibility, maintenance). The EU legislator is well aware of this particularity. The EU private international law instruments aim to ensure some coordination between proceedings on these subject matters[101]. However, if it were to happen that due to some unique circumstances of a particular case, some discoordination would occur and a court of a Member State would lack jurisdiction to rule on one of such subject matters, the situation would call for a necessity jurisdiction "by extension" of a (in principle) reasonable forum[102].

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[99] M. La Manna, *Residual Jurisdiction under the Brussels I bis Regulation* [in:] *Universal Civil Jurisdiction. Which Way Forward?*, eds. S. Forlati, P. Franzina, Leiden – Boston 2021, p. 148, "acting under Article 6 of the Brussels I bis Regulation, [the Member States cannot] completely disregard the requirement of primary EU law, including the Charter"; J. Meeusen, *The Brussels I bis Regulation and the prohibition of discrimination* [in:] *Research Handbook on the Brussels I bis Regulation*, ed. P. Mankowski, Cheltenham – Northampton 2020, p. 307, "the residual jurisdiction rules [are referred to] as 'delegated' rules [that] belong to a single and complete system, stemming from both EU and national sources (...) this does not mean that the Member States escape their duties and responsibilities, for example as regards the ECHR and also in respect of the [Charter]".

[100] In each single case where the Brussels II bis Regulation provides for the residual application of national heads of jurisdiction, i.e. such recourse is excluded in the cases against spouses who are habitually resident in the territory of a Member State or are Member States nationals.

[101] See, for instance, Art. 3(d) of the Maintenance Regulation, as well as Arts. 4 of the twin Regulations on Matrimonial Property Regimes and Registered Partnerships.

[102] D.P. Fernández Arroyo, *Compétence...*, p. 75, "Cela peut avoir lieu par exemple dans les cas où le juge est compétent pour le divorce mais non pas pour les aspects du litige relatifs aux mineurs. Il s'agirait ici d'un for de nécessité « par extension » d'un for (en principe) raisonnable".

The hypothetical scenario could concern a subject matter covered by the Brussels II bis Regulation[103]. Under the Brussels II bis Regulation, a forum of necessity may be based on the residual application of national rules of jurisdiction. However, not all Member States provide for the forum of necessity[104]. Can then necessity jurisdiction be ensured "by extension", despite the silence of the law of the forum?

It is difficult to answer such a question in the abstract. However, it is tempting to formulate a few general considerations pertaining to such hypothetical scenario.

The starting point for further considerations is that even where all the possibilities provided under the Brussels II bis Regulation through the cascade of rules of jurisdiction have been exhausted (EU rules of jurisdiction and national rules for residual jurisdiction), the case still falls within the scope of Regulation and the Member States needs to respect the requirements stemming from Art. 47 of the Charter.

In the doctrine of international civil procedure, necessity jurisdiction is defined as jurisdiction not based on rules of internal or convention law but accepted only out of necessity to avoid the denial of justice[105]. It can be argued that the absence of an explicit provision on necessity jurisdiction should not stand in the way of its availability for the claimants facing the situations the denial of justice[106]. In the context of EU law, at least in its more recent case-law, the CJEU held that there was no requirement for a right embodied in Art. 47 of the Charter to be given specific expression in secondary legislation[107].

Next, even within the scope of private international law instruments that do not contain a rule on necessity jurisdiction, the authority of the judgment in the Owusu case does not completely outlaw such jurisdiction[108].

Then, once the obstacle supposedly created by the judgment in the Owusu case is removed, the reluctance to provide and/or exercise necessity jurisdiction may result from the fact that a situation that calls for it is likely to be significantly connected with a third State[109]. Following this logic, some may argue that the broadly or vaguely defined and judge-made necessity jurisdiction comes dangerously close to interfering with sovereignty and creates tensions in the realm of international law. Under EU law, that line of argument cannot be accepted uncritically. International law takes precedence over secondary EU law. This even finds an echo in recital 14 of the Brussels II bis Regulation according to which it should have effect without prejudice to the application of public international law

[103] The other EU Family Regulations explicitly provide for the forum of necessity. See sec. 2.2.

[104] See sec. 2.2.

[105] T. Ereciński, *Kilka uwag o tzw. jurysdykcji koniecznej* [in:] *Rozprawy Prawnicze. Księga pamiątkowa Profesora Pazdana*, eds. W. Popiołek, L. Ogiegło, M. Szpunar, Kraków 2005, p. 69.

[106] D.P. Fernández Arroyo, *A New Autonomous...*, p. 418. C.f. D.P. Fernández Arroyo, *Compétence...*, p. 162, where a similar claim is made in the context of necessity jurisdiction for violation of human rights ("*forum necessitatis* pour la violation des droits fondamentaux, for spécial qui [...] n'exige pas une règle écrite").

[107] See the judgment of the CJEU of 17 April 2018, C-414/16, Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V., EU:C:2018:257, paragraph 78.

[108] See sec. 3.2.

[109] See sec. 3.2.

concerning diplomatic immunities. However, international law does not necessarily enjoy priority over primary EU law. Thus, whenever the necessity jurisdiction is anchored in Art. 47 of the Charter, its confrontation with imperatives of international law does not have to be automatically ruled in favour of the said imperatives[110].

Last, it should in any case be less objectionable to ensure necessity jurisdiction "by extension", than to create it through the interpretation for a standalone case that concerns a single subject matter[111]. In our hypothetical scenario, ensuring necessity jurisdiction "by extension" safeguards the *effet utile* of the provision that confers jurisdiction to a Member State court at least in connection with some subject matters. It also promotes some coherence and consistency of the system that the EU Family Regulations form. Besides, the equally doubtful alternative is to extend the material scope of one of the Regulations through their interpretation[112], so as to include the subject matter for which no Member State court has jurisdiction under the other Regulation.

Fourth, under the EU Regulations, necessity jurisdiction is available for the claimants not only where proceedings in a third State are impossible or unreasonable, but also where no court of a Member State has jurisdiction in accordance with the Regulation[113]. The question is whether the doctrine of *forum necessitatis* can operate intra-EU[114], in order to

[110] See, to that effect in the context of State immunity, the judgment of the CJEU of the 7 May 2020, C-641/18, LG v. Rina SpA and Ente Registro Italiano Navale, EU:C:2020:349, point 55.

[111] A proposal to introduce a necessity jurisdiction through the interpretation of the Brussels II bis Regulation has been recently made by the Advocate General Campos Sánchez-Bordona in his Opinion in the IB case, C-289/20, EU:C:2021:561. In this case the CJEU is invited to interpret the Brussels II bis Regulation in the context of a request for a preliminary ruling originating from the proceedings for a divorce. The preliminary question addresses the issue of multiple place of residence of one of the spouses. According to the Opinion, a spouse may have only one place of habitual residence and multiple places of "non-habitual" residence. In principle, the places of "non-habitual" residence are of no relevance under the Brussels II bis Regulation (points 83 et 90). Nevertheless, where no court has jurisdiction pursuant to the Regulation, including the national rules of jurisdiction that may be of relevance under its Art. 7 (residual jurisdiction), the courts of one of the Member States where the spouse (non-habitually) resides may exercise jurisdiction in order to remedy situations of the denial of justice (points 100 and 101). See K. Pacuła, *AG Campos Sánchez-Bordona on multiple places of (habitual) residence under the Brussels II bis Regulation in the case IB, C-289/20*, https://conflictoflaws.net/2021/ag-campos-sanchez-bordona-on-multiple-places-of-habitual-residence-under-the-brussels-ii-bis-regulation-in-the-case-ib-c-289-20 (access 2.11.2021).

[112] For discussion on such "extension" of the material scope of the Succession Regulation see K. Pacuła, *The Principle of a Single Estate and Its Role in Delimiting the Applicable Laws*, "Problemy Prawa Prywatnego Międzynarodowego" 2020/26, p. 119–121.

[113] See sec. 2.3.

[114] The twin Regulations on Matrimonial Property Regimes and Registered Partnerships are not binding for the Member States that do not participate in the enhanced cooperation. It is argued that "the forum of necessity can come into operation only when [all] participating Member States [lack] jurisdiction (...) Accordingly, the fact that a non-participating Member State can exercise jurisdiction under its national law will not preclude the recourse to the forum of necessity in a participating Member State". See G. Biagioni, *Article 11...*, p. 120, point 11.10. However, the question can be also viewed as a more fundamental one for the EU legal order: whether a Member State to the EU,

prevent the denial of justice originating from a situation attributable to a Member State court that has jurisdiction pursuant to EU private international law, but for some reason it is not possible or reasonable for the claimant to bring proceedings before that court.

It seems that this question should be in principle answered negatively, save for some extreme scenarios.

Asserting necessity jurisdiction where another Member State court has jurisdiction pursuant to EU private international law has the potential to distort the allocation of jurisdiction provided for under that law[115]. Thus, it may be argued that a Member State court should not ensure necessity jurisdiction where a court in another Member State cannot be seized due to some factual obstacles. The assessment could be different where no court of that another Member State could *de facto* exercise jurisdiction. That Member State should not be left alone with such a scenario.

Under EU private international law, subject to a few exceptions, the Member States courts are not authorized to review the jurisdiction of a court in another Member State[116]. In principle, they are also not authorized to evaluate the correctness of application of EU law by courts in other Member States[117]. As a consequence, in a situation where a court of a Member State incorrectly refuses to exercise its jurisdiction resulting from the rules of EU law, a court in another Member State should not, at least in principle, assert necessity jurisdiction[118]. The forum of necessity is not an alternative forum, but an emergency one.

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which does not participate in a specific area of the cooperation in civil and commercial matters, does still benefit from the mutual trust? In the affirmative, there is no reason to have recourse to the doctrine of forum necessitates where a court of a non-participating Member State has jurisdiction under non-harmonized rules of jurisdiction. For discussion under the Succession Regulation in a different context see J. Basedow, *'Member States' and 'Third States' in the Succession Regulation*, "Problemy Prawa Prywatnego Międzynarodowego" 2020/26, p. 21 et seq.

[115] See sec. 3.2.

[116] See, by analogy, the judgment of the CJEU of 26 June 1991, C-351/89, Overseas Union Insurance Ltd and Deutsche Ruck Uk Reinsurance Ltd and Pine Top Insurance Company Ltd v. New Hampshire Insurance Company, EU:C:1991:279, para. 24.

[117] At least as long as that error does not constitute a breach of an essential rule of law in the EU legal order and therefore in the legal order of the Member State in which recognition is sought. See the judgment of the CJEU of 16 July 2015, C-681/13, Diageo Brands BV v. Simiramida-04 EOOD, EU:C:2015:471, paragraph 52.

[118] See, to that effect, G. Biagioni, *Article 11...*, p. 121, point 11.12. See also P. Lagarde, *Le for de nécessité...*, p. 257, who bases similar finding on the extraordinary character of the forum of necessity. Cf. A. Bonomi, *Article 11* [in:] *Le droit européen des succession, Commentaire du règlement (UE) nº 650/2012, du 4 juillet 2012*, eds. A. Bonomi, P. Wautelet, Bruxelles 2016, p. 245; A. Bonomi, *Article 11* [in:] *Le droit européen des relations patrimoniales de couple – commentaire des règlements nºs 2016/1103 et 2016/1104*, eds. A. Bonomi, P. Wautelet, Bruxelles 2021, point 7, who admits that Art. 11 of the Succession Regulation and Arts. 11 of the twin Regulation cannot apply intra-EU and, without endorsing it, elaborates on their application by analogy.

The question can be also viewed from a less technical perspective. In the EU, the cooperation in civil and commercial matters is built upon the mutual trust and the principle of mutual recognition.

The trust that the Member States accord to each other's legal system and judicial institutions, does not allow for the distortion, for no-extraordinary reasons, of the allocation of jurisdiction provided for under EU private international law[119].

As explained by K. Lenaerts, the Member States trust each other to protect fundamental rights adequately and it is because they trust each other that judicial cooperation in civil matters is feasible, through the mutual recognition of judicial decision[120]. Member States are prevented from checking whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU, despite that fact that it can have a negative impact on the exercise of fundamental rights in certain situations[121].

It is only in "exceptional circumstances" that the mutual trust can be set aside[122]. Hypothetically, in line with the hints that can be traced in the case-law built upon the judgment in the case Aranyosi and Căldăraru[123], ultimately it cannot be excluded that a court of a Member State could be called upon to ensure emergency jurisdiction in the event of a "systemic deficiencies" scenario in a Member State, even where its courts have jurisdiction pursuant to EU private international law[124].

[119] See, by analogy, the judgment of the CJEU of 9 December 2003, C-116/02, Erich Gasser GmbH v. MISAT Srl, EU:C:2003:657, where the CJEU tackled inter alia the preliminary question whether Art. 21 of the Brussels Convention ("*lis pendens*") must be interpreted as meaning that it may be derogated from where, in general, the duration of proceedings before the courts of the Contracting State, in which the court first seised is established, is excessively long. Pronouncing itself against such derogation, the CJEU held that the Convention "is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments" (para. 72).

[120] K. Lenaerts, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust*, "Common Market Law Review" 2017/54, p. 812.

[121] K. Lenaerts, *La vie...*, p. 812, "For example, the competent court under the Brussels IIa Regulation may order a parent who has removed a child from his or her Member State of habitual residence to return the child to that Member State, thus placing a constraint on that parent's right to a family life".

[122] Opinion 2/13 of the CJEU, EU:C:2014:2454, paragraph 191.

[123] The judgment of the CJEU of 5 April 2016, C-404/15, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, EU:C:2016:198.

[124] Interestingly, A. Mills elaborated on hypothetical scenario where a subsidiary forum of necessity jurisdiction could be recognised in order to remedy situation of the denial of justice in the State which "does not adhere to the rule of law". See A. Mills, *Rethinking jurisdiction...*, p. 224.

Abstrakt

Forum necessitatis w sprawach z zakresu prawa rodzinnego w ramach prawa Unii i prawa międzynarodowego

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Forum necessitatis opiera się na założeniu, że sąd może stanąć wobec konieczności rozpoznania sprawy, mimo braku jurysdykcji na mocy przepisów mających zasadniczo zastosowanie. Uzasadnieniem istnienia jurysdykcji jest to, że powód nie może doprowadzić do przeprowadzenia postępowania przed innym forum lub nie można tego w danej sytuacji od niego wymagać. Niniejszy artykuł stanowi próbę umiejscowienia jurysdykcji koniecznej w szerszym kontekście, w którym funkcjonuje ona w państwach członkowskich, tj. w kontekście prawa UE i prawa międzynarodowego. Zestawia trzy pojęcia prawne (forum necessitatis, forum non conveniens i uniwersalna jurysdykcja cywilna) w celu określenia granic jurysdykcji koniecznej w postaci, która przyjęta została w prawie UE. Rozpatruje także jurysdykcję konieczną w świetle prawa międzynarodowego i, uwzględniając wpływ praw człowieka i/lub praw podstawowych, zmierza do wyjaśnienia, czy prawo międzynarodowe nakłada na państwa członkowskie jakiekolwiek ograniczenia lub obowiązki w zakresie zapewnienia takiej jurysdykcji. Biorąc pod uwagę wnioski płynące z tych rozważań, w artykule dokonuje się przeglądu przypadków, w których jurysdykcja konieczna może znajdować zastosowanie na tle różnych instrumentów unijnego prawa prywatnego międzynarodowego, ze szczególnym uwzględnieniem tych, które dotyczą spraw z zakresu prawa rodzinnego.

Słowa kluczowe: *Forum necessitatis, jurysdykcja konieczna, prawo prywatne międzynarodowe EU, dostęp do wymiaru sprawiedliwości, jurysdykcja uniwersalna, forum non conveniens, prawa podstawowe*

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