The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law
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III. Introduction to the European Convention on Human Rights

1. Introduction

As this research has as its subject the impact of the European Convention on Human Rights on private international law, it is prudent to provide the reader with an introduction to the ECHR. However, this should be read in light of the subject of this research. This discussion will focus on the most important aspects of the ECHR with regard to issues of private international law. For a more detailed overview one should turn to one of the many excellent handbooks on the ECHR.106

The ECHR has been one of the most important accomplishments of the Council of Europe, an international organization established after the Second World War to foster co-operation in Europe. It is an international treaty, which was adopted in Rome on 4 November 1950 and entered into force on 3 September 1953 after ratification by ten States.107 The ECHR was the culmination of increased attention towards the international protection of human rights following the Second World War and represented ‘the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights].’108 It was the first international legally binding treaty translating some of the rights derived from the 1948 Universal Declaration of Human Rights (Universal Declaration) into a regional vocation thereof.

One should note, though, that the ECHR is certainly not a carbon copy of the Universal Declaration, as not all of the rights contained in the latter can be found in the former. In fact, one could say that it is mainly those rights that are covered by the later-created category of ‘civil and

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108 The Preamble of the Convention.
political rights’ of the Universal Declaration that are contained in the ECHR, which was mostly a matter of tactics and priorities. However, some of the rights initially not included have subsequently been added in additional Protocols to the ECHR and in other conventions, particularly the European Social Charter of 1961. In 2012, the ECHR had forty-seven Contracting Parties, comprising all the countries on the European continent with the exception of Belarus.

This overview of the characteristics of the ECHR which are particularly relevant to the discussion of the impact of this instrument on issues of private international law will start with a discussion of the enforcement machinery of the ECHR. Here, attention will also be paid to the admissibility criteria of the ECHR (in 2). Thereafter, one will find an examination of the status of the ECHR in the national and international legal orders. This section will include a discussion of conflicts between international treaties, as this issue could arise with regard to the impact of the ECHR on private international law (3). Next, the structure and content of the ECHR will be discussed (4). This will be followed by a discussion of the nature of the Contracting Parties’ obligations following from the rights guaranteed by the ECHR, where it will be observed that these entail not only negative obligations, but also positive obligations. Thereafter, the nature of the rights guaranteed will be further examined, and particularly the manner in which these rights may be limited under specific circumstances (5). In conclusion, recent developments concerning the system of protection offered by the ECHR and the future of the Court will be discussed (6).

2. The Enforcement Machinery

One of the aspects that makes the ECHR stand out among other international human rights treaties is its enforcement machinery. It should be noted that the primary responsibility for guaranteeing the rights and freedoms contained in the ECHR principally rests upon the Contracting Parties, as the Strasbourg enforcement machinery is subsidiary to the national

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109 Harris, O’Boyle and Warbrick supra n. 106, at p. 3.
110 The 47 Contracting Parties are in alphabetical order: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, “The former Yugoslav Republic of Macedonia”, Malta, Moldova, Monaco, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom.
systems safeguarding human rights.\footnote{See generally with regard to the principle of subsidiarity and the ECHR, e.g., H. Petzold, ‘The Convention and the Principle of Subsidiarity’, in R. St. J. MacDonald, eds., et al., The European System for the Protection of Human Rights, (Dordrecht, Martinus Nijhoff 1993), p. 41-62.} It is for the Contracting Parties themselves as to how to ensure these rights, as the Court held in the *Handyside* case, where it with an eye hereto introduced the so-called ‘margin of appreciation’.\footnote{Handyside v. the United Kingdom, judgment of 12 December 1976, par. 49-50, ECHR Series A-24. See also infra III.5.2.} The subsidiary nature of the ECHR is also reflected in the fact that before bringing a case before the Court in Strasbourg, an applicant must first have exhausted all of his or her legal remedies in the Contracting Party against which the complaint is directed.\footnote{See further infra the text following n. 117.}

What makes the enforcement machinery particularly unique and effective is that it provides for individual applications. Previously this required separate declarations by the Contracting Parties recognizing this right.\footnote{Declarations under Article 25 ECHR were required for the jurisdiction of the Commission, while the jurisdiction of the Court had to be recognized under Article 48 ECHR.} It took quite some time for all the Contracting Parties to recognize the jurisdiction of the Court. However, with the entry into force of Protocol 11 in 1998, the Court now automatically has jurisdiction over individual as well as intra-State applications.\footnote{Protocol 11 was adopted in 1994 and entered into force in 1998.} Protocol 11 also marked the end of the Commission. A new permanent Court was introduced, which replaced the European Commission of Human Rights (Commission) and the old European Court of Human Rights.\footnote{See Article 32 ECHR.} Originally, the Strasbourg machinery consisted of three entities: the Commission, established in 1954; the European Court of Human Rights (the old Court), established in 1959; and the Committee of Ministers of the Council of Europe.\footnote{The Committee of Ministers did retain its supervisory role with regard to the execution of the Court’s judgments. See with regard to the supervisory task of the Committee of Ministers e.g. Van Dijk supra n. 106, at p. 291-321.} The new Court emphasized in its first cases after the entry into force of Protocol 11 that it considered the existing case law of both the Commission and the old Court as its own.\footnote{See, e.g., Matthews v. the United Kingdom [GC], no. 24833/94, par. 39, 40 and 59, ECHR 1999-I, in which the Grand Chamber of the new Court referred to the old Court’s and Commission’s case law as its own.}

An important issue related to the Strasbourg enforcement machinery is who can bring an individual application, and under what conditions? It follows from Article 34 ECHR that an application can be received ‘from any person, non-governmental organization or group of
individuals’, provided that such an applicant is a victim of the alleged violation. In this Article the Contracting Parties have also undertaken to refrain from any hindrance in the effective exercise of this right to bring an application. Yet it should be noted that in order for such an application to be admissible, a few criteria have to be met. The various conditions of admissibility can be found not only in Article 34 ECHR, but also in Article 35 ECHR.119 The Court has held frequently with regard to these criteria that they should be interpreted with some degree of flexibility and without excessive formalism.120

Article 35 (1) ECHR contains two of the most important criteria in this respect, as it provides that all domestic remedies must first have been exhausted and that the application must be brought within six months after the final decision has been taken. These are the procedural grounds for inadmissibility.121 Other important admissibility criteria of Articles 34 and 35 ECHR concern the competence of the Court and may be summarized as follows: who is competent to bring a case and against whom (compatibility ratione personae); what is the subject matter of the application (compatibility ratione materiae); where did the alleged violation take place (compatibility ratione loci); and when did it allegedly take place (compatibility ratione temporis)? 122

Even if an application is completely compatible with the ECHR and fulfills all the (formal) admissibility criteria mentioned above, an application may still be found inadmissible on the merits. The most frequent reason for this is that an application is held to be ‘manifestly ill-founded’.123 The use of the term ‘manifestly’ is, in this context, somewhat misleading, as it has been abundantly established in the Strasbourg case law that this term is always used when it is decided that an application does not warrant a formal examination of the merits (and a likely

119 See generally with regard to the admissibility criteria of the Court, e.g., Harris, O’Boyle and Warbrick supra n. 106, at p. 757-810; Van Dijk supra n. 106, at p. 98-203. The Research Division of the Court has published the Practical Guide on Admissibility Criteria, which is available at www.echr.coe.int (last updated version March 2011).
120 See, e.g., Cardot v. France, 19 March 1991, Series A no. 200; İlhan v. Turkey [GC], no. 22277/93, ECHR 2000-VII.
121 The rationale behind the exhaustion rule is that the national authorities of the Contracting Parties should have had the opportunity to deal with the alleged violation of the ECHR. The assumption that there are remedies available within the national legal orders is also reflected in Article 13 ECHR, which guarantees an effective remedy before a national authority.
122 See, e.g., White and Ovey supra n. 106, at p. 33-34.
123 Article 35 (3) ECHR.
resulting judgment on the merits) after a preliminary examination of the case has demonstrated no apparent violation of any of the rights guaranteed in the ECHR.\(^{124}\) The term does not refer to a threshold and nor does it necessarily suggest a cursory review of the application.\(^{125}\) In fact, as will be demonstrated in subsequent chapters, applications which are held to be ‘manifestly ill-founded’ may be rather extensively reasoned and may, for example, provide valuable insights into issues of private international law.

It is important to understand that most of the applications brought to Strasbourg actually end up being found inadmissible. In 2011, for example, 52,188 applications were handled by the Court. Of these, 50,677 applications resulted in a decision by the Court in which they were either found to be inadmissible or were struck out.\(^{126}\) The Court only delivered a judgment in 1,157 cases concerning 1,511 applications.

3. The Status of the ECHR in the Domestic and International Legal Orders

An important aspect of the relationship between the Court in Strasbourg and the Contracting Parties is how the ECHR is generally applied by the national courts of the respective Contracting Parties and the position of the ECHR in the respective national legal orders. This varies from Contracting Party to Contracting Party, but may be an important factor for the impact of the ECHR on any given area of law, including private international law.

From the point of view of the Court, Contracting Parties are not obligated to incorporate the ECHR into their respective laws and may satisfy their commitments as to Article 1 ECHR in any way they choose.\(^{127}\) Nevertheless, all Contracting Parties have now incorporated the ECHR into their domestic laws in one way or another, taking into account that in some Contracting Parties


\(^{125}\) See, e.g., Mentzen alias Mencena v. Latvia (dec.), no. 71074/01, 7 December 2004, for an example of a lengthy exposition in a case which was ultimately found to be inadmissible on the merits. See generally, on the notion of manifestly ill-founded, e.g., the Court’s Practical Guide on Admissibility Criteria supra n. 119, at p. 68-74.

\(^{126}\) See for the numbers the Analysis of the Statistics 2011, which can be found at: [www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS_EN_2011.PDF], visited August 2012.

\(^{127}\) See Swedish Engine Drivers’ Union, 6 February 1976, Series A no. 20. See also Ireland v. the United Kingdom, 18 January 1978, par. 239, Series A no. 25, in which the Court appears to display a preference for the incorporation of the ECHR into domestic law, though.
incorporation was not necessary. This does not mean that the position of the ECHR is identical in every Contracting Party; quite the contrary – the position of the ECHR may differ considerably. The situation varies, for example, in the three jurisdictions – England (United Kingdom), the Netherlands, and Switzerland – whose case law will most often be referred to in this study.

England, or rather the United Kingdom (UK), was late in integrating the ECHR into its national legal order. The UK follows the dualist tradition with regard to the relationship between international law and national law, meaning that additional legislative action was needed in order to make the ECHR enforceable before English courts. Not until the entry into force of the 1998 UK Human Rights Act (HRA) in 2000 did the ECHR and the Court’s case law become part of domestic law in the UK. With the HRA, the ECHR’s rank in the UK’s domestic law has become somewhat unclear: while the HRA does not render any constitutional priority of ECHR rights over earlier or subsequent legislation, only Parliament’s clear and express intention can lead to non-ECHR compliant legislation, and even then courts may issue a declaration of incompatibility. Such a declaration does not directly affect the validity of legislation, but does put pressure on the government to amend a law.

The Netherlands has a monist tradition regarding the relationship between international and domestic law, and the Dutch Constitution, furthermore, guarantees a paramount position to international treaty law. Consequently Dutch courts can directly apply the ECHR, as this treaty is intended to create directly enforceable rights for individuals and the rights contained in the ECHR are capable of being enforced directly. It also follows from the Dutch Constitution

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129 See on the monist and dualist approach to international law, e.g., I. Brownlie, Principles of Public International Law (Oxford, Oxford University Press 2008), p. 31-33.
131 Harris, O’Boyle and Warbrick 2008 supra n. 106, at p. 24.
132 See Articles 93 and 94 of the Grondwet (Dutch Constitution).
and the case law of the Dutch Hoge Raad (Supreme Court) that in the case of a conflict between the application of domestic law and the ECHR, the ECHR will prevail and the national court is obliged to set aside that law.\textsuperscript{134} It should also be noted that Dutch courts, in principle, should have regard to all relevant judgments of the Court in Strasbourg for the interpretation of the relevant provisions of the ECHR; they should not limit themselves to judgments against the Netherlands.\textsuperscript{135}

Switzerland, like the Netherlands, also adheres to a monist approach with regard to the relationship between international and national law, rendering all self-executing provisions of international law binding for Switzerland.\textsuperscript{136} In 1977 the Swiss Tribunal fédéral (Federal Supreme Court) found that the substantial guarantees in the ECHR – with the exception of Article 13 ECHR – were directly applicable in Switzerland from the moment of the entry into force of the ECHR.\textsuperscript{137} Despite this monistic approach, the hierarchical relationship between domestic and international law is, however, not entirely clear, except in the case of norms of \textit{jus cogens},\textsuperscript{138} although in its more recent case law the Tribunal fédéral stresses the prevalence of international law.\textsuperscript{139}

3.1 The ECHR and other Private International Law Treaties\textsuperscript{140}

In the previous chapter it has been established that rules of private international law of the Contracting Parties, regardless of whether they pertain to issues of jurisdiction, applicable law, or the recognition and enforcement of foreign judgments, may emanate from international sources.\textsuperscript{141} Contracting Parties may thus have entered into multilateral conventions on issues of private international law, such as one of the various treaties of the Hague Conference of Private

\textsuperscript{134} Hins and Nieuwenhuis \textit{supra} n. 133, at p. 61ff.
\textsuperscript{135} De Wet \textit{supra} n. 133, at p. 237.
\textsuperscript{137} ATF 103 V 190, 192. See particularly 2 a).
\textsuperscript{138} See Article 193 and 194 of the Swiss Constitution with regard to \textit{jus cogens}.
\textsuperscript{139} See Aemisegger \textit{supra} n. 136, at p. 309-310; Thurnherr \textit{supra} n. 136, at p. 329-331 and the case law cited in both contributions.
\textsuperscript{141} See \textit{supra} ch. II.4.
International Law,\textsuperscript{142} but also bilateral treaties,\textsuperscript{143} while Contracting Parties doubling as EU Member States are also bound by many EU private international law instruments.\textsuperscript{144} The international origin of these rules may lead to a particular issue if (the result of) the application of such private international law rules would result in a violation of one of the rights guaranteed in the ECHR. In that case a Contracting Party would essentially be faced with two conflicting norms originating from international treaties.\textsuperscript{145}

Before further examining the guidelines concerning the concurrence of two international treaties, it should, first of all, be noted that a conflict between private international law rules from an international source and the obligations following from the ECHR is quite rare. This is largely due to the fact that there can only be a true conflict of norms if a Contracting Party is actually unable to ‘simultaneously comply with its obligations under both treaties.’\textsuperscript{146} This will only exceptionally be the case with regard to international treaties concerning issues of private international law, as most such treaties will include a public policy exception.\textsuperscript{147} If it is, for example, possible to set aside a foreign applicable law or judgment violating one of the rights guaranteed in the ECHR by invoking the public policy exception, there is no true conflict. Similarly, with regard to rules originating from EU private international law instruments, the argument could be put forward that, even if a public policy exception may be missing, the rights guaranteed in the ECHR are still deemed part of the fundamental principles of EU law, which may ultimately bring relief in such a situation.\textsuperscript{148}

In the event, though, that the obligations flowing from an international treaty on private international law and the ECHR could not possibly be complied with simultaneously, one could turn to the classic conflict rules regarding obligations arising out of international treaties: the

\begin{footnotesize}
\textsuperscript{142} See <www.hcch.net>.
\textsuperscript{143} See, e.g., infra n. 154.
\textsuperscript{144} See supra ch. II.4.1.
\textsuperscript{145} One should, incidentally, note that the increase of international treaties concerning private international law not only may result in a possible conflict with the ECHR, but could also lead to conflicts between two treaties concerned with similar issues of private international law. This is, particularly in the area of international family law, a growing concern for national courts. See on this issue, e.g., Th.M. de Boer, ‘Samenloop van verdragen en verordeningen op het terrein van het internationaal familierecht’ [Concurrence of treaties and regulations in the area of international family law], 32 Familie en jeugdrecht (2010), p. 308-315.
\textsuperscript{147} But see supra ch. II.5.
\textsuperscript{148} See further infra ch. VIII.2.4.
\end{footnotesize}
rules of *lex specialis derogat legi generali* and *lex posterior derogat legi priori*.\textsuperscript{149} These rules, unfortunately, are not a great help for conflicts between international treaties on private international law and the ECHR from the viewpoint of the protection of human rights. The *lex specialis* in an issue of private international law would undoubtedly be the rule of private international law which could lead to a violation of the ECHR, although one could also argue that in such a case there are actually two different *lex speciali*. This would not lead to a solution. The other rule, *lex posterior*, would only offer a solution if the international treaty on private international law was older than the ECHR, as in that case the ECHR would apply. Another possible solution would be to regard human rights norms as the hierarchically superior norm. One could, for example, infer that human rights norms are norms of *jus cogens*,\textsuperscript{150} which arguably could be regarded as the hierarchically superior norm.\textsuperscript{151} However, the majority of the rights guaranteed in the ECHR are not considered to be norms of *jus cogens*.\textsuperscript{152} Whether it is possible to regard human rights norms as hierarchically superior is a discussion fraught with difficulties.\textsuperscript{153}

Again, the issue of conflicting norms between international treaties concerning issues of private international law and the ECHR is a rare phenomenon. However, in French case law it has arisen in the past in connection with the recognition of Moroccan repudiations. On the basis of a bilateral treaty between France and Morocco of 10 October 1981,\textsuperscript{154} French courts had to recognize these repudiations with regard to Moroccan nationals living in France, even though at the time it was only possible for a man to repudiate his wife, and not vice versa. This is a violation of Article 5 of Protocol No. 7 ECHR, which guarantees equality between spouses.\textsuperscript{155}

\textsuperscript{149} See for an overview of all the rules for resolving conflicts between treaties which have been used by national courts, e.g., S.A. Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Leiden, Martinus Nijhoff Publishers 2003), p. 99ff.


\textsuperscript{151} Even though this may not necessarily be a given. See, e.g., J. Vidmar and E. de Wet, eds., *Hierarchy in International Law: the Place of Human Rights* (Oxford, Oxford University Press 2012), p. 3-4.

\textsuperscript{152} There is much discussion on which could be regarded as norms of *jus cogens*. See for a list of the most commonly accepted norms of *jus cogens* the ILC Articles on State Responsibility, Commentary to Article 40, par. 4-5.

\textsuperscript{153} See, e.g. Vidmar and De Wet supra n. 151.

\textsuperscript{154} Convention entre la République Française et le Royaume du Maroc relative au status des personnes et de la famille et à la cooperation judiciaire, 10 August 1981. See for the text *JDI* 1983, p. 922-928.

\textsuperscript{155} See also *D.D. v. France* (dec.), no. 3/02, 8 November 2005, which is discussed *infra* ch. VII.6.
was not possible to rely on a public policy exception, turning this into an example of two conflicting treaty obligations.

This example, incidentally, offers an additional complicating factor in that Morocco is not a Contracting Party to the ECHR. Therefore, the afore-mentioned rule of *lex posterior derogat legi priori* is rendered somewhat meaningless, as one of the two international treaties does not apply between both parties.\(^{156}\) A possible solution to this situation could have been to regard equality between spouses as a norm of *jus cogens*.\(^{157}\) However, it has been pointed out that this right is not a universal norm.\(^{158}\) In the end, the French *Cour de Cassation* came up with a different solution and avoided the conflict between the treaties altogether. Instead of referring to the bilateral treaty of 1981, the French court referred to an older treaty between the two countries that did include a public policy exception.\(^{159}\) It could consequently rely on a public policy exception to stave off the recognition and there was no longer a conflict. However, this was not an elegant solution from the point of view of the *lex posterior* rule.

In conclusion, one should reiterate that the issue of conflicting obligations between private international law treaties and the ECHR is uncommon. It appears to be an issue that courts would prefer to avoid dealing with, which, given the uncertainties regarding this issue, is quite understandable.

### 4. The Structure and Content of the ECHR

It is not necessary to discuss all the rights and freedoms contained in the ECHR and its additional Protocols, as only a limited number of rights may impact upon issues of private international law. It will be demonstrated in the subsequent chapters that Article 6 (1) ECHR, which guarantees the right to a fair trial, and Article 8 ECHR, which, *inter alia*, guarantees the right to

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\(^{156}\) See, e.g., Sadat-Akhavi *supra* n. 149, at p. 64.


private and family life, are the most relevant rights with regard to issues of private international law. Yet the impact of the ECHR on issues of private international law is not limited to these two Articles. In principle, all rights guaranteed in the ECHR that are capable of having an impact on issues of private law could have an impact on private international law. Family life, for example, is not only protected in Article 8 ECHR, but aspects of it are also protected in Article 12 ECHR and Article 5 of Protocol No. 7 ECHR. Moreover, the prohibition on discrimination, which can be found in Article 14 ECHR as well as Protocol No. 12 ECHR, could have an impact on issues of private international law. Article 10 ECHR, guaranteeing the right to freedom of expression, has also occasionally played a role in issues of private international law. Finally, the right to property, which is guaranteed in Article 1 of Protocol No. 1 ECHR, has a considerable role, particularly with regard to the obligation to recognize and enforce certain foreign judgments. It could therefore be observed that most of the formal and material subjects with which private international law is concerned are, at least to some extent, covered by the rights guaranteed in the ECHR.

In order to give the reader some idea of the set-up and the content of the other rights guaranteed in the ECHR, a brief overview of the Articles contained in the ECHR will be presented here. Article 1 ECHR contains the basic obligation which the Contracting Parties have undertaken to ensure. The guarantee stated in Article 1 ECHR is that the Contracting Parties ‘shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ This Article is certainly relevant for issues of private international law, as will be demonstrated in the next chapter.

After Article 1, the ECHR contains a list in Section I of the rights and freedoms that it guarantees in its Articles 2 to 12 ECHR. Other rights and freedoms have subsequently been added in the

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160 The impact of the principle of discrimination is not part of this research, though. See supra ch. I.
161 See infra ch. IV.
162 The rights guaranteed in Art. 2-12 ECHR are: Art. 2: the right to life; Art. 3: freedom from torture and inhuman or degrading treatment or punishment; Art. 4: freedom from slavery and forced or compulsory labour; Art. 5: right to liberty and security; Art. 6: right to a fair trial; Art. 7: freedom from retrospective effect of penal legislation (ne bis in idem); Art. 8: right to respect for private and family life, home and correspondence; Art. 9: freedom of thought, conscience and religion; Art. 10: freedom of expression; Art. 11: freedom of assembly and association; Art. 12: right to marry and found a family.
additional Protocols No. 1, No. 4, No. 6, No. 7, No. 12, and No. 13.\textsuperscript{163} Section I contains seventeen Articles (Articles 2 to 18). In addition to the substantive rights and freedoms, the following provisions may be found here: Article 13 ECHR, guaranteeing that everyone whose rights and freedoms set forth in the Convention are violated will have an effective remedy before a national authority; and the above-mentioned Article 14 ECHR, which obliges States to secure the rights contained in the Convention without any discrimination on any ground.

Articles 15 to 18 ECHR offer various guidelines for the restriction of certain rights guaranteed in the ECHR and the prohibition of abuse of the rights guaranteed in this instrument. Article 15 ECHR, for example, allows every State the possibility to derogate from certain rights during a time of war.\textsuperscript{164} Article 16 ECHR allows States to restrict the political activities of foreigners, notwithstanding Articles 10, 11, and 14 ECHR. Article 17 ECHR states that the rights guaranteed in the Convention cannot be abused to engage in behavior leading to the destruction of the Convention, while Article 18 ECHR implies a prohibition of misuse (\textit{détournement de pouvoir}) concerning the right of the Contracting States to impose restrictions of the rights and freedoms guaranteed in the ECHR.\textsuperscript{165} Section II of the ECHR contains Articles 19 to 51 ECHR, which pertain mostly to organizational issues of the Court. The most important Articles in this section with regard to the research have already been mentioned, as they pertain to the admissibility criteria set out in Articles 34 and 35 ECHR.\textsuperscript{166} Section III contains Articles 52 to 59 ECHR, a set of miscellaneous Articles concerning, for example, reservations and ratification.

\section*{5. The Nature of the Contracting Parties’ Obligations and of the Rights in the ECHR}

Article 1 ECHR obliges the Contracting Parties to ‘secure’ the rights and freedoms contained in the Convention. This obligation, taken together with the text of the several following Articles, has been interpreted as imposing both negative and positive obligations. Classic civil and

\begin{footnotesize}
\begin{itemize}
\item The rights later added in an additional Protocol, which are relevant for private international law, are Article 1 of Prot. No. 1 ECHR (the right to property) and Article 5 of Prot. No. VII ECHR (equality between spouses). Protocol No. 12 ECHR may also play an important part with regard to the impact of the ECHR on private international law in the future, as this Protocol broadens the scope of application of Article 14 ECHR. However, it should be noted that a large number of Contracting Parties have not signed the Protocol – including Switzerland and the United Kingdom.
\item See \textit{infra} III.5.1.
\item See for more on the system of restrictions of the rights guaranteed in the Convention \textit{infra} III.5.1.
\item See \textit{supra} III.2.
\end{itemize}
\end{footnotesize}
political rights guarantees traditionally entailed negative obligations for the State, such as the requirement to abstain from torture, which can, for example, be found in Article 3 ECHR. In addition to the various negative obligations, there are also some positive obligations expressly stated in the ECHR, or they necessarily follow from the ECHR. An example is the obligation to protect the right to life by law, which can be found in Article 2 (1) ECHR.\textsuperscript{167} 

There is, however, also a category of positive obligations which have been read into the ECHR by the Court.\textsuperscript{168} This practice started in the famous Marckx case.\textsuperscript{169} In this case the Court held that with regard to ‘family life’ in Article 8 ECHR, ‘it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective “respect” for family life.’\textsuperscript{170} Since this case the Court has, on numerous occasions, and especially often with regard to Article 8 ECHR, found that positive obligations had been infringed, usually justifying such a stance by stating that the finding of positive obligations is necessary in order to make ECHR rights effective.\textsuperscript{171} It has now generally been accepted that all the rights guaranteed in the ECHR entail both negative and positive obligations for the State.\textsuperscript{172} 

There is, finally, another category of positive obligations that may be distinguished. The Court has also found that Contracting Parties have the positive obligation to protect rights guaranteed in the ECHR by protecting such rights of persons against the acts of others. The first signs of such a practice were visible in the case of X and Y v. the Netherlands.\textsuperscript{173} The Court held that the obligation derived from Article 8 ECHR to respect an individual’s privacy imposed positive

\textsuperscript{167} See, e.g., Harris supra n. 106, at p. 18-19. 
\textsuperscript{169} Marckx v. Belgium, 13 June 1979, ECHR Series A-31. 
\textsuperscript{170} Marckx v. Belgium, 13 June 1979, par. 31, ECHR Series A-31. 
\textsuperscript{171} Harris, O’Boyle and Warbrick supra n. 106, at p. 7. 
\textsuperscript{172} Mowbray 2004, supra n. 168, at p. 224. 
obligations that ‘may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals themselves.’

Later, in entirely different settings, this line of reasoning was used again. In Platform ‘Ärzte für das Leben’ v. Austria, the Court held that the State must take reasonable and appropriate measures to ensure that a demonstration can take place and that Article 11 ECHR thus contains a positive obligation to protect demonstrators from interference by others. Another example of such a positive obligation can be found in Von Hannover v. Germany, in which the Court held that Article 8 ECHR contains the positive obligation to protect one’s privacy.

For the question concerning the third-party applicability of human rights – the protection under the ECHR of individuals against other private persons – the term Drittwirkung is used in the German literature. This term is consequently often also used to describe the last-mentioned category of positive obligations under the ECHR. However, this is somewhat misleading, as this notion in the German literature is concerned with the possibility of a private person relying on a national bill of rights to bring a claim against another individual. Human rights have to be respected by the State and consequently by all of its institutions. However, can other parties also be bound by the ECHR? It is clear that even if the ECHR is valid between private parties, only States can be held accountable before the Court in Strasbourg. Thus one could say that with regard to the ECHR, there is only place for indirect third party applicability, or mittelbare Drittwirkung, which is reminiscent of the positive obligation construction of Contracting Parties being responsible for the protection of ECHR rights of people against third parties, discussed above.

Thus one could state that the ECHR has a certain ‘horizontal effect’ in the sense that one can bring up the ECHR against other individuals, but one can do this only indirectly, as such a

174 X and Y v. the Netherlands, 26 March 1985, par. 23, ECHR Series A no. 91.
175 Platform Ärzte für das Leben v. Austria, 21 June 1988, ECHR Series A no. 139.
176 Von Hannover v. Germany, no. 59320/00, ECHR 2004-VI.
A complaint must be phrased as a complaint against one of the Contracting Parties. One can only succeed in this endeavor by phrasing such a complaint as a situation in which the Contracting Party failed to live up to its positive obligations under a certain right guaranteed in the ECHR.

This horizontal effect of the ECHR could naturally be important with regard to issues of private international law, as private parties are the subjects of private international law. An example of such use of the ECHR in an issue of private international law can, for example, be found in certain cases concerning international child abduction. These cases commence with a complaint by one parent against the abducting parent, but if such a case ends up before the Court in Strasbourg the complaint is no longer directed against the abducting parent (which would be fruitless), but instead against the Contracting Party which has allegedly failed its positive obligation following from Article 8 ECHR in re-uniting the child and the parent left behind.179

5.1 The Nature of the Rights Guaranteed in the ECHR

It is possible to categorize the rights guaranteed in Section I of the ECHR in several distinctive ways. For example, the rights guaranteed in the ECHR can be categorized as either absolute rights, qualified rights, or limited rights.180 One should note that this latter category of limited rights is not often distinguished. However this distinction is useful for our discussion because it corresponds with whether it is possible for the Contracting Parties to restrict these rights in their operation and, if so, under which conditions. An important issue of this research will be the extent to which Contracting Parties may restrict the rights guaranteed in the ECHR in issues of private international law. The theoretical framework provided by the categorization of rights as absolute, qualified, and limited is thus valuable for this research. Moreover, this categorization will offer the opportunity to further discuss the restrictions or limitations that are possible under the respective rights guaranteed in the ECHR. I should emphasize that regardless of this categorization, there is no formal hierarchy between the rights and freedoms that are guaranteed in the ECHR.181 This means that in the case of a conflict between individual freedom rights, the

179 See, e.g., *P.P. v. Poland*, no. 8677/03, par. 81, 8 January 2008; *Ignaccolo-Zenide v. Romania*, no. 31679/96, par. 94, ECHR 2000-I.


181 See, e.g., White and Ovey *supra* n. 106, at p. 8-10.
Court (or, in an earlier stage, national courts) will have to strike a balance between the competing rights of individuals.

5.1.1 Absolute Rights
Absolute rights under the ECHR are the rights which are non-derogable under Article 15 ECHR. Article 15 ECHR, in the first paragraph, allows the Contracting States to derogate from a number of provisions during times of war or other public emergencies threatening the nation, but the second paragraph sets out a number of rights which cannot be derogated from under any circumstances. These are, respectively, the right to life in Article 2 ECHR (even though some exceptions are listed in this Article); the prohibition of torture, inhuman or degrading treatment in Article 3; freedom from slavery and forced or compulsory labor in Article 4; and freedom from the retrospective effect of penal legislation in Article 7 ECHR. It should be noted, however, that the absolute rights are not particularly relevant with regard to the impact of the ECHR on private international law, as issues of private international law are usually not concerned with the above-mentioned rights.

5.1.2 Qualified Rights
Qualified rights are rights which are subject to interference by the Contracting Party in order to secure certain interests, which are expressly stated in the Article itself. These interests are either the operation of the rights of others, or the needs of society. These rights thus require a balancing act by the Contracting Party, whereby a possible limitation of the rights should be weighed against the rights of others or the well-being of society. The Court’s assessment of a Contracting Party’s weighing of interests follows a set pattern, which will be discussed in the next paragraph. Qualified rights include, inter alia, the right to respect for private and family life, home, and correspondence in Article 8 ECHR; freedom of thought, conscience, and religion in Article 9 ECHR; freedom of expression in Article 10 ECHR; and freedom of assembly and associations in Article 11 ECHR, and also Article 1 of Protocol No. 1 ECHR. As noted above, Article 8 ECHR and Article 1 of Protocol No. 1 ECHR are particularly relevant rights with regard to the impact of the ECHR on private international law.

The Court has developed a set pattern with regard to its assessment of restrictions to qualified rights. The qualified rights of Articles 8 to 11 of the ECHR have, for example, a similar
limitation clause. If an interference of one of the rights contained in these Articles is found, one has to determine whether such interference can be justified on the basis of the three standards that are laid down in the second paragraph of the respective Articles. When the Court identifies an interference of one of these Articles, it has to determine whether such interference was ‘in accordance with law’ or ‘prescribed by law’, whether it pursued a legitimate aim – whether the restriction matches one of the aims which are exhaustively provided in the second paragraph of Articles 8 to 11 ECHR and which vary slightly – and whether the interference was ‘necessary in a democratic society’. These requirements are cumulative. The Court has expanded on these points in its case law.

It follows from the case law that the Court usually works through these points in order, but it will occasionally skip a point, if it can easily establish that one of the other points will lead to an unlawful interference. It also follows from the case law that the second condition, the legitimate aim, is not a difficult hurdle to overcome for the Contracting Parties, as the Court will usually accept the aims put forward by the Contracting Parties. However, the first restriction concerning the prescription by law is examined quite strictly by the Court, and the third condition concerning necessity in a democratic society in particular will be scrutinized meticulously.

The required legal basis for an interference means that the restriction must have some basis in the national law of the Contracting Party, and this law must also be foreseeable and accessible. The Court will, in principle, accept the interpretation of the national law given by the national courts, unless there are very compelling reasons not to do so. The law does not need to be a (national) statute: common law rules are accepted, as well as rules following from an

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183 Cf. Van Dijk supra n. 106, p. 335.
184 See, e.g., Sunday Times v the United Kingdom, 26 April 1979, par. 46-53, ECHR Series A no. 30.
185 See for such a rare exception Roche v. the United Kingdom, par. 120.
186 Sunday Times v the United Kingdom, 26 April 1979, ECHR Series A no. 30.
international treaty,\(^\text{187}\) a (formerly) EC Regulation,\(^\text{188}\) and under certain circumstances, even an order by the authorities.\(^\text{189}\)

What the requirement of ‘necessary in a democratic society’ entails has been established by the Court in its case law.\(^\text{190}\) For an interference to be necessary in a democratic society, there must be ‘a pressing social need’.\(^\text{191}\) It is, in principle, for the Contracting Party to assess whether there is such a pressing social need and the Contracting Party does enjoy a margin of appreciation.\(^\text{192}\) However, in reviewing the Contracting Party’s assessment in this regard, the Court will evaluate whether the restriction was proportionate to the legitimate aim pursued and whether perhaps another less invasive measure could have been taken by the authorities.\(^\text{193}\) The Court thus introduces here a fair balance test, having regard to the principles of proportionality (whether the measure was proportionate to the legitimate aim pursued) and subsidiarity (whether a less invasive measure could have been taken by the authorities).\(^\text{194}\)

5.1.3 Limited Rights

Limited rights are rights which may only be limited under particular circumstances. Unlike qualified rights, these circumstances are not prescribed in the Article itself, but it is generally accepted that the Contracting Parties have less discretion in restricting these rights.\(^\text{195}\) These limitations have also been referred to as ‘inherent limitations’.\(^\text{196}\) An example of a limited right is Article 6 (1) ECHR, which guarantees the right to a fair trial. Under particular circumstances this

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187 Slivenko v. Latvia [GC], no. 48321/99, ECHR 2003-X.
188 Bosporus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, ECHR 2005-VI.
189 Oliveira v. the Netherlands, no. 33129/96, ECHR 2002-IV.
190 One could with regard to this requirement in relation to the subject of this research wonder whether rules of private international law are at all necessary in a democratic society. However, the Court has clearly not approached this requirement in such a manner, as follows from its case law concerning issues of private international law.
191 See, e.g., Sunday Times v the United Kingdom, 26 April 1979, ECHR Series A no. 30.
192 See with regard to the notion of the margin of appreciation infra III.5.2.
193 See, e.g. Groppera Radio AG and Others v. Switzerland, 28 March 1990, par. 72, ECHR Series A no. 173. See for the classic formulation of whether a restriction is necessary in a democratic society Silver and Others v. the United Kingdom, 25 March 1983, par. 97, Series A no. 61.
195 Cf. Lambert supra n. 180, at p. 47.
196 Van Dijk supra n. 106, at p. 343ff.
right may be limited. These implied limitations are particularly relevant with regard to issues of private international law, as the following examples will further demonstrate.

In *Soering v. the United Kingdom* the Court found that Article 6 (1) ECHR has an extra-territorial effect in cases concerning extradition, and that it would be possible under that Article to raise the argument that Article 6 ECHR would have been violated ‘where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.’ This approach was confirmed in *Drozd and Janousek v. France and Spain*. This standard has since also been discussed among specialists of private international law with regard to both the application of a foreign law and the recognition and enforcement of foreign judgments.

In these cases concerning Article 6 ECHR and international co-operation, the Court has thus introduced the standard of ‘a flagrant denial of justice’, which could be viewed as an inherent limitation to the right to a fair trial under particular circumstances in the sense that the threshold for finding a violation of Article 6 (1) ECHR under such circumstances is high. In such cases, which are concerned with the applicability of the ECHR to situations taking place in another country, particularly in third countries, the Court thus does find that Article 6 (1) ECHR may be violated, but only in the event of a ‘flagrant denial of justice’. The Court, taking account of the cross-border dimension of these cases, thus introduces an attenuated standard of control of the ECHR in such cases. It is clear that such a standard of control in cross-border cases is highly relevant for cases concerning private international law.

Another example of a right which is susceptible to being inherently limited is the right of access to a court, which is a right derived from Article 6 ECHR. When the Court first derived this right from the right to a fair trial in *Golder v. the United Kingdom*, it had actually already held...
that this right was inherently limited.\textsuperscript{205} It will be demonstrated that this right of access to a court plays an important role with regard to the impact of the ECHR on the issue of jurisdiction in private international law.\textsuperscript{206}

5.2 The Margin of Appreciation

The margin of appreciation doctrine plays an important part in the interpretation of the rights guaranteed in the ECHR.\textsuperscript{207} The doctrine of the margin of appreciation is an expression of the Court’s ‘delicate task of balancing the sovereignty of Contracting Parties with their obligations under the Convention.’\textsuperscript{208} It has been argued that the doctrine is founded upon subsidiarity.\textsuperscript{209} The Court merely reviews the measures taken at a national level and in that regard it has held that national authorities are often better equipped to evaluate local issues. However, the Court, naturally, has the final word in these matters and decides whether Contracting Parties are left a margin of appreciation and consequently what its scope will be. In \textit{Handyside} the Court found that Contracting Parties have a margin of appreciation with regard to the standard of ‘necessary in a democratic society’, as, for example, found in the second paragraph of Articles 8 to 11 ECHR, and generally with regard to qualified rights.\textsuperscript{210}

However, the Strasbourg Institutions have extended the use of this doctrine by finding that national authorities have a margin of appreciation when they have to strike a balance between the right of an individual and the interests of society as a whole.\textsuperscript{211} The Court has also used the doctrine for evaluating emergency measures \textit{ex} Article 15 ECHR.\textsuperscript{212}

\textsuperscript{205} See \textit{Golder v. the United Kingdom}, 21 February 1975, par. 21, 37-41, Series A no. 18; cf. \textit{Osman v. the United Kingdom}, 28 October 1998, par. 147, Reports of Judgments and Decisions 1998-VIII; see also, e.g., Van Dijk \textit{supra} n. 1, at p. 343ff.

\textsuperscript{206} See infra ch. V.

\textsuperscript{207} The doctrine is one of one of the most frequently discussed aspects of the ECHR. See, e.g., Arai-Takahashi \textit{supra} n. 194; S.C. Greer, \textit{The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Right} (Strasbourg, Council of Europe) 2000; J. Kratochvil, ‘The Inflation of the Margin of Appreciation by the European Court of Human Right’, 29 \textit{Netherlands Quarterly of Human Rights} (2011), p. 324-357 as well as the handbooks cited \textit{supra} n. 106.


\textsuperscript{210} See \textit{supra} III.5.1.2.1

\textsuperscript{211} Arai-Takahashi \textit{supra} n. 194, at p. 8.

The margin of appreciation differs from right to right and from case to case; it is impossible to establish a State’s margin of appreciation in abstracto.\textsuperscript{213} The Court often finds that the Contracting Parties have ‘a certain margin of appreciation’ without further detailing the extent of the margin.\textsuperscript{214} Generally speaking, the Court adheres to strict(er) scrutiny of the margin of appreciation (a narrow margin) where there is a common European standard, while it uses a wide margin in the absence of such a European standard.\textsuperscript{215} It is, for example, possible to speak of a common European standard with regard to Article 6 ECHR, the right to a fair trial.\textsuperscript{216} Here, a Contracting Party’s margin of appreciation would be more limited than compared, for example, to an issue concerning ‘good morals’, in relation to which the Court has frequently held that the Contracting Parties would have a more considerable margin.

However, it should be stressed again that the interpretation of the margin of appreciation is notoriously difficult: it has a ‘casuistic, uneven, and largely unpredictable nature.’\textsuperscript{217} What the margin has to offer, though, is a certain latitude or room for maneuver for Contracting Parties as to how they fulfill their obligations following from the ECHR.\textsuperscript{218} It is this room that may be crucial for the application of the rights guaranteed in the ECHR to private international law disputes. As will be discussed in this research, it has been argued that as private international law is inherently concerned with a foreign element, there may be a need for the attenuation of the standards provided by the ECHR.\textsuperscript{219} The margin of appreciation is a prime candidate for providing such flexibility.\textsuperscript{220} It should also be noted that the Court is of the opinion that the

\textsuperscript{213} See, e.g., the dissenting opinion of Judge Malinverni, joined by Judge Kaladjieva, in Lautsi v. Italy [GC], no. 30814/06, 18 March 2011. Judge Malinverni held that ‘[w]hilst the doctrine of the margin of appreciation may be useful, or indeed convenient, it is a tool that needs to be handled with care because the scope of that margin will depend on a great many factors: the right in issue, the seriousness of the infringement, the existence of a European consensus, etc.’

\textsuperscript{214} This practice started in Sunday Times v. the United Kingdom, 26 April 1979, par. 62, Series A No. 30.

\textsuperscript{215} See further on the scope of the margin of appreciation, e.g., Lawson and Schermers supra n. 106, at p. 38-39.

\textsuperscript{216} See, e.g., Arai-Takahashi supra n. 194, at p. 15; White and Ovey supra n. 106, at p. 329.

\textsuperscript{217} Greer supra n. 207, at p. 5. It is, incidentally, interesting to observe the similarities between the manner in which the margin of appreciation and the public policy exception in private international law are described. See supra ch. II.5.

\textsuperscript{218} See, e.g., Arai-Takahashi supra n. 67, at p. 8; Greer supra n. 79, at p. 5. It is also interesting to discuss and compare this notion with the functioning of the public policy exception in private international law. See supra ch. II.5.

\textsuperscript{219} See particularly ch. V-VIII.

\textsuperscript{220} See further particularly the discussion on the attenuation of the standards of the ECHR in ch. VI.3.2.
margin of appreciation solely concerns the relationship between the domestic authorities and the Court. It should not be used in the same manner by national courts.\(^{221}\)

6. The Future of the System of Protection offered by the ECHR

A look at the future of the system of protection offered by the ECHR should not be excluded from this chapter, as future developments may have an impact on the direction of the Court’s case law,\(^{222}\) which in turn will also impact upon the findings of this research. There are two developments that can be distinguished which may alter the way the Court will work in the future. One is related to a problem that has plagued the Court for quite some time, but which the Court and the Contracting Parties have not yet been able to get under control, and that is the Court’s case-load. On 1 January 2012 approximately 151,600 applications were pending.\(^{223}\) Considering that in 2011 the Court handled 52,188 applications,\(^{224}\) and that a steady influx of new applications is to be expected,\(^{225}\) it should be clear that this is an enormous problem for the Court. This problem, of course, did not materialize overnight. In fact, in the past a number of actions have been taken to reverse this trend. The reform of the supervisory system brought about by Protocol 11 was largely motivated by the increasing workload of the then existing institutions.\(^{226}\) This reform proved to be inefficient in dealing with the ever-increasing workload, and subsequently Protocol 14 was introduced to further streamline the process, mainly by allowing the Court to devote less time to clearly inadmissible cases.\(^{227}\) However, as

\(^{221}\) A. and Others v. the United Kingdom [GC], no. 3455/05, par. 184, ECHR 2009.


\(^{223}\) See ‘The ECHR in facts & figures 2011.’ The various reports on statistical information regarding the ECHR may be found at: <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+data/OldStats.htm>, visited April 2013.

\(^{224}\) Supra n. 223.

\(^{225}\) The number of applications allocated to a judicial formation in the past five years shows a steady influx of new applications: 2007: 41,650 applications; 2008: 49,850 applications; 2009: 57,100 applications; 2010: 61,300 applications; 2011: 64,500 applications. See further supra n. 223.

\(^{226}\) Van Dijk supra n. 106, at p. 36.

\(^{227}\) Protocol 14 finally entered into force on 1 June 2010, three months after the ratification by the last State to do so, which was Russia. Protocol No. 14 was originally adopted by the Council of Europe Committee of Ministers in May 2004. It took Russia a long time to ratify the Protocol. In fact, it took so long – while the Court’s case load continued to grow – that the Committee of Ministers adopted Protocol 14 bis in the meantime, in order to provisionally apply certain measures provided by Protocol 14. Protocol 14 bis ceased to be in force from the moment Protocol 14 entered into force. See with regard to Protocol No. 14, e.g., J.W. Reiss, ‘Protocol No. 14 ECHR and Russian non-ratification: the Current State of Affairs’, 2 Harvard Human Rights Journal (2009), p. 293-318; see also the
acknowledged in the Brighton Declaration, even these changes did not prove to be enough and a further revision of the system will be pursued.\textsuperscript{228}

Another development that should be mentioned is the discussion on whether the Court should focus more on the most serious cases and whether it should be more deferential in other cases. The latter part of the discussion was rekindled in the run-up to the Brighton Conference because public officials in the United Kingdom (UK) openly questioned whether the UK should defy the Court’s judgment in \textit{Hirst No. 2 v. the United Kingdom},\textsuperscript{229} in which the Court rejected the blanket ban on a prisoner’s right to vote.\textsuperscript{230} The Brighton Declaration could be read as an attempt to rein in the power of the Court in Strasbourg, as the role of both the principle of subsidiarity and the margin of appreciation is emphasized by the Contracting Parties in this document.\textsuperscript{231}

However it should also be noted that the Contracting Parties open the Brighton Declaration with a reaffirmation of their ‘deep and abiding commitment’ to the ECHR.\textsuperscript{232}

The related discussion on whether the Court should not focus more on the most serious violations is not new. Back in 1986 the President of the Court noted that the ECHR was being applied to relatively minor and technical matters, which were far removed from the issues which the drafters had in mind back in the day.\textsuperscript{233} One could say in this regard that there are two categories of violations: the ECHR after all not only protects against the abuse of power by the State, but also against limitations on the rights and freedoms guaranteed in the ECHR where such limitations go beyond what is necessary.\textsuperscript{234} From the beginning – when only Western European countries were Contracting Parties – the Court focused more on the latter violations over the course of time. This changed with the expansion of the Council of Europe into Eastern Europe.
after the fall of the Berlin Wall. Suddenly the first category of abuse of power by the State returned to the forefront. The Court has had to deal with both categories of violations simultaneously ever since. It should be clear that if the Court was to focus on the more serious violations of the ECHR to a greater extent in the future, this would lead to fewer cases concerning issues of private international law.