The impact of the ECHR on private international law: An analysis of Strasbourg and selected national case law
Kiestra, L.R.

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VII. The Recognition and Enforcement of Foreign Judgments: The Obligation to Recognize and Enforce Foreign Judgments

1. Introduction

The recognition and enforcement of foreign judgments is an important aspect of private international law. \(^{860}\) Judgments rendered in one country have their effect, in principle, only in that country. In order for a judgment to have an effect in a foreign country, it first needs to be recognized in that foreign country. This effect of the recognition of a judgment is twofold: the judgment acquires *res judicata* effect, while the principle of *ne bis in idem* subsequently also applies: the matter is settled and can, in principle, not be re-litigated. \(^{861}\) Whether it is subsequently necessary to enforce the judgment depends on the content of the judgment. The enforcement of a judgment is needed if a certain measure ensuring compliance with the judgment is required for the judgment to have an effect. For a declaratory judgment, such as a foreign family law judgment declaring a status, recognition suffices. However, judgments awarding a sum of money need to be enforced if the judgment debtor is unwilling to satisfy the judgment.

The rules relating to the recognition and enforcement of foreign judgments, in principle, differ from country to country. However there are also multilateral (and bilateral) treaties on the recognition and enforcement of judgments, \(^{862}\) and for EU Member States, EU rules on recognition and enforcement are of great importance; \(^{863}\) the Brussels/Lugano regime is

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\(^{860}\) See also *infra* ch. II.


particularly relevant for the EU and EFTA Member States in civil and commercial matters.\textsuperscript{864} However, even though the exact composition of the regimes of States differs, the general rule with regard to recognition and enforcement of foreign judgments is in many States the same.\textsuperscript{865} Foreign judgments should, in principle, be recognized and enforced, provided certain requirements are met. One should note that many international (and bilateral) treaties have a similar starting point, which is fairly obvious, as the goal of such treaties is to enhance international co-operation. The exact conditions a foreign judgment must satisfy in order to be recognized and enforced will depend on the legal regime concerned.

The most common requirements for the recognition and enforcement of foreign judgments are that the foreign judgment should be final,\textsuperscript{866} it should not violate either procedural or substantive public policy,\textsuperscript{867} and not be contrary to another judgment between the parties.\textsuperscript{868} Another important requirement in both international treaties and national legislation is the jurisdiction requirement, which in short entails that a foreign judgment will only be recognized if the court of the country of origin had adjudicatory jurisdiction on a reasonable basis.\textsuperscript{869} Particularly in the event of a default judgment, the service of process will also be assessed by courts.\textsuperscript{870} Other grounds of refusal, which are less frequently used, include fraud, or \textit{fraude à la loi},\textsuperscript{871} and the choice-of-law requirement, which entails that a foreign judgment will only be recognized if the law that was applied to the merits of the case was the same law as the forum would have applied.

\footnotesize{\textsuperscript{864} This ‘regime’ consists of the so-called Brussels I Regulation, Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, \textit{OJ} 2001 L12/1 (a number of amendments and corrections have since been added to this text) and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, \textit{OJ} 2007 L339/3, which is practically identical to the Brussels I Regulation. The Lugano Convention has been adopted by Iceland, Norway, and Switzerland.}


\footnotesize{\textsuperscript{866} See, e.g., the discussion of the requirements used in England, the Netherlands, and Switzerland \textit{infra} VII.2.2.}

\footnotesize{\textsuperscript{867} Id.}

\footnotesize{\textsuperscript{868} See, e.g., Article 34 (3) and (5) of the Brussels I Regulation (\textit{supra} n. 864).}

\footnotesize{\textsuperscript{869} See, e.g., Article 23 (2-a) of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. See also \textit{infra} VII.2.2. See generally on the requirements for recognition and enforcement and particularly the jurisdictional requirement, e.g., A.T. Von Mehren, ‘Recognition and Enforcement of Foreign Judgments – General Theory and the Role of Jurisdictional Requirements’, 167 \textit{Recueil des Cours} (1980), p. 9-112.}

\footnotesize{\textsuperscript{870} See, e.g., Article 34 (2) of the Brussels I Regulation (\textit{supra} n. 864).}

\footnotesize{\textsuperscript{871} But see \textit{infra} n. 882. See also, e.g., \textit{infra} n. 933.}
to the case.\textsuperscript{872} A more liberal approach can be found within the European Union.\textsuperscript{873} This has an effect that under, for example, the Brussels I Regulation,\textsuperscript{874} a refusal may only be based on a limited number of grounds, which are explicitly defined in this instrument.\textsuperscript{875}

What do the rights guaranteed in the ECHR mean for the recognition and enforcement of foreign civil judgments? It will be demonstrated in this chapter that the Court has, of the three main issues of private international law, delivered by far the most decisions on the issue of the recognition and enforcement of foreign judgments. It follows from the discussion of this case law that not only may an obligation for the Contracting Parties be derived from certain rights guaranteed in the ECHR to recognize and enforce a foreign judgment, but that there may also be an obligation requiring Contracting Parties to deny the recognition and enforcement of foreign judgments under certain circumstances.

Because of the volume of the Court’s case law on the issue of the recognition and enforcement of foreign judgments, the examination of this issue will be divided into two chapters. In this chapter the obligation to recognize and enforce foreign judgments following from the rights guaranteed in the ECHR will be discussed. In the next, Chapter VIII, the invocation of the rights guaranteed in the ECHR against recognition and enforcement of foreign judgments will be elaborated upon.

The obligation to recognize and enforce can be based on a number of different rights guaranteed in the ECHR. This discussion of the obligation therefore has three different strands. First, the general obligation following from Article 6 (1) ECHR, which guarantees the (procedural) right to a fair trial, will be examined (in 2). Thereafter, the obligation to recognize and enforce judgments \textit{ex} Article 1 of Protocol No. 1 ECHR, which guarantees the right to property, will be addressed (3). Finally, it will be demonstrated that Article 8 ECHR, which guarantees, \textit{inter alia}, the right to respect for private and family life, may also contain an obligation to recognize and enforce judgments (4). All this will be followed by a conclusion (5). Below, these rights will be examined separately. The separation of these Articles with regard to the recognition and

\textsuperscript{872} But see infra n. 969.
\textsuperscript{873} See further infra VII.5.4.
\textsuperscript{874} See supra n. 864.
\textsuperscript{875} See, particularly, Articles 34 and 35 of the Brussels I Regulation (\textit{supra} n. 864). An even more liberal approach is proposed by the Commission. See further infra VII.5.4.
enforcement of foreign judgments is somewhat forced, though, as it will be shown below that the general obligation following from Article 6 (1) ECHR is often combined with a specific obligation from either Article 1 of Protocol No. 1 ECHR or Article 8 ECHR, or even both, depending on the subject matter of the issue. However, for analytical purposes it is nevertheless useful to make the distinction.

2. Article 6 (1) ECHR and the Obligation to Recognize and Enforce

From the wording of Article 6 (1) ECHR it is prima facie not clear whether the recognition and enforcement of (foreign) judgments would be covered at all. Nevertheless, one could say that the Court’s starting point with regard to the recognition and enforcement of foreign judgments is that it would, in principle, be a violation of Article 6 (1) ECHR not to recognize and enforce a foreign judgment. The Court’s reasoning follows from a case concerning the execution of a domestic judgment, Hornsby v. Greece. The Court decided that the execution of a judgment is also protected under Article 6 (1) ECHR. The Greek government’s main defense in this case was that the complaint could not fall within the scope of Article 6 ECHR, arguing that this right only guaranteed the fairness of the ‘trial’ in the literal sense. The Court, however, made clear that the government’s interpretation would lead to an unacceptable confinement of Article 6 ECHR in the following – and later often repeated – consideration:

‘However, that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 para. 1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the “trial” for the purposes of Article 6.’

The Court has since reiterated its stance taken in Hornsby with regard to the need to comply with final judicial decisions in many subsequent cases concerning the failure of authorities to execute final, binding domestic decisions. Although Hornsby and subsequent case law concerned

878 See, e.g., Burdov v. Russia, no. 59498/00, ECHR 2002-III and Jasiūnienė v. Lithuania, no. 41510/98, 6 March 2003.
domestic cases, there was, in principle, no reason to assume that this reasoning could not also extend to the recognition and enforcement of foreign judgments. This had also been argued in the literature well before the Court would find this to be the case.\textsuperscript{879}

Initially, however, the Court appeared to approach this issue quite hesitantly in its admissibility decision in \textit{Sylvester v. Austria},\textsuperscript{880} although it would eventually acknowledge that Article 6 ECHR applied to the recognition of an American judgment concerning divorce and a custody decision in Austria. It should be noted, however, that in this case the applicant complained about the length of the enforcement proceedings and not about the refusal to enforce the American judgment. The complaint was, incidentally, declared admissible by the Court.\textsuperscript{881}

It would take a subsequent case concerning an American divorce judgment, \textit{McDonald v. France},\textsuperscript{882} for the Court to finally embrace the applicability of its case law first established in \textit{Hornsby} to the recognition and enforcement of foreign judgments. \textit{McDonald v. France} concerned the divorce of McDonald, an American diplomat, and D, his French wife. He initiated divorce proceedings in France, but his request was denied in the first instance. He did not appeal, but brought a new set of divorce proceedings in his by then new place of residence, Florida. He was granted a divorce and subsequently married another French wife in the Ivory Coast. Later he requested \textit{exequatur} of the Florida divorce in France. The \textit{exequatur} was denied by the French courts and Mr. McDonald subsequently complained in Strasbourg on the basis of Articles 6 (1) and Article 14 ECHR.

The Court for the first time considered the refusal to recognize a foreign judgment in light of Article 6 (1) ECHR, as it had done with regard to the enforcement of a domestic judgment in


\textsuperscript{880} \textit{Sylvester v. Austria} (dec.), no. 54640/00, 9 October 2003.

\textsuperscript{881} In its subsequent judgment the Court found a violation of Article 6 (1) in this respect. See \textit{Sylvester v. Austria} (no. 2), no. 54640/00, 3 February 2005. See with regard to the admissibility of claims generally \textit{supra} ch. III.2.

\textsuperscript{882} \textit{McDonald v. France} (dec.), no. 18648/04, 29 April 2008.
Hornsby, but ultimately declared the application inadmissible, because the French court had denied *exequatur* on the basis of ‘*fraude commise par le requérant*’ and the Court held – in line with its earlier case law – that nobody can complain about a situation to which they themselves had contributed. The applicant had committed this fraud by deliberately bypassing the French courts, while appeal was still open, by applying to an American court.

In *McDonald v. France* the Court thus fully embraced the principle that the refusal to recognize a foreign judgment may violate Article 6 (1) ECHR, but it did not find a violation in this regard due to the applicant’s own doing. It should be noted, though, that the Court acknowledged this in relation to the right to a fair trial. Even though the Court ultimately found no violation of Article 6 (1) ECHR, this case received quite some attention, particularly in France. It was argued that the novelty of this case was that it was from now on possible to attach the right to the recognition and enforcement of a foreign judgment to the right of a fair trial *ex* Article 6 (1) ECHR. In a similar vein it was held that it followed from *McDonald* that Article 6 (1) ECHR pertains to all stages of the proceedings, including the enforcement of the judgment, and that the origin of the judgment – whether a domestic or a foreign decision is concerned – is irrelevant in this regard. The right to recognition and enforcement was thus clearly treated as being part of the procedural right to a fair trial. In two subsequent cases, however, *Jovanoski v. the Former Yugoslav Republic of Macedonia* and *Vrbica v. Croatia*, the Court would also find a violation on account of Article 6 (1) ECHR and the refusal to enforce a foreign judgment, but

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884 The Court held the following in *McDonald v. France*: ‘La Cour reconnaît que le refus d’accorder l’*exequatur* des jugements du tribunal américain a représenté une ingérence dans le droit au procès équitable du requérant. La Cour reconnaît que le refus d’accorder l’*exequatur* des jugements du tribunal américain a représenté une ingérence dans le droit au procès équitable du requérant.’


887 Marchadier 2008 supra n. 885, at p. 196.

888 See also Kinsch 2010 supra n. 885, at p. 267ff.

889 *Jovanovski v. The Former Yugoslav Republic of Macedonia*, no. 31731/03, 7 January 2010.

890 *Vrbica v. Croatia*, no. 32540/05, 1 April 2010.
instead of relying on the (general) right to a fair trial, it based the violation on the right of access to a court \textit{ex} Article 6 (1) ECHR.

In 1991 Mr. Jovanoski, a Macedonian national, instituted enforcement proceedings against a Croatian company before a court in Macedonia. At first, part of the debt was paid. When the applicant thereafter attempted to enforce the remainder of the judgment during the years 1992-1993, communications were interrupted due to the conflict in Croatia and the case could not be resolved. The applicant claimed in Strasbourg that his rights under Article 6 ECHR had been violated, as he had been denied the right of access to a court on account of the non-enforcement of his claim.

The Court held that even in light of the circumstances, the State (Macedonia) had failed to take adequate and effective measures to enforce the applicant’s claim and thus found a violation of Article 6 (1) ECHR. However, when it came to the assessment of the applicant’s damages under Article 41 ECHR,\textsuperscript{891} the Court held that it found persuasive the argument that the applicant could have sought to enforce the remainder of his claim before the Croatian courts. As the applicant had failed to do so, he was only awarded EUR 500 in respect of non-pecuniary damages, instead of the EUR 1,076,283 he had claimed in respect of pecuniary damages (which corresponded with the amount initially awarded in the Macedonian judgment plus interest).

In the case of \textit{Vrbica v. Croatia} Mr. Vrbica, the applicant, had been awarded a monetary judgment in Montenegro against two Croatians for injuries sustained in a traffic incident. This judgment was subsequently recognized in Croatia. Shortly thereafter, the applicant filed for a rectification of this decision, as the decision mistakenly referred to a wrong case number. The Croatian court rectified the mistake later that month. The applicant had, meanwhile, already started enforcement proceedings in December 2001 (after the initial recognition of the Montenegrin judgment) before the very same court, but these proceedings proved to be unsuccessful, as the defendants successfully appealed by pointing out the incorrect case number. The Croatian court invited the applicant to resubmit the case, but the applicant failed to do so, as

\textsuperscript{891}Article 41 ECHR reads as follows. ‘If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.’
he figured that the court already had the correct case number. The court declared the pending, unaltered application for enforcement inadmissible. Later, the applicant once more attempted to get the judgment enforced, but this time the defendants successfully argued that by now the enforcement had become time-barred.

Mr. Vrbica subsequently filed a complaint in Strasbourg invoking not only Article 6 (1) ECHR, but also Article 1 of Protocol No. 1 ECHR and Article 13 ECHR (the right to an effective remedy) taken in conjunction with Article 1 of Protocol No. 1 and Article 14 ECHR. With regard to Article 6 ECHR, the Court examined whether that decision had unduly limited the applicant’s right to a court. As discussed in Chapter V, it is standard case law of the Court that this right is not absolute and may be subject to limitations. In assessing whether a limitation of the right of access to a court may be allowed, the Court follows a scheme similar to the one used with regard to restrictions in Article 8 (2) ECHR. Such limitations cannot reduce the access so much that the right of access is essentially thwarted; moreover, such limitations must pursue a legitimate aim and be proportional to the aim pursued.

The Court held in Vrbica that statutory periods serve several important purposes and that legal certainty in general is aided by such a limitation period. The Court has also on numerous occasions stated that the existence of such a period is not per se incompatible with the ECHR. However, in this case the Court found that the restriction was not proportionate to the aim pursued. It did so by referring to its findings with regard to Article 1 of Protocol No. 1 ECHR.

It is thus interesting to observe that in the cases of Jovanoski and Vrbica, the Court examined the issue of the enforcement of a foreign judgment from the perspective of the right of access to a court. As discussed in Chapter V, this is a right that has been derived from the right to a fair trial by the Court in Golder v. the United Kingdom. The finding of a violation of Article 6 (1) based on the right of access to a court in Vrbica led two of the judges in this case, Judges

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892 See supra ch. V.4.1.
893 Id.
894 Vrbica v. Croatia, no. 32540/05, par. 63, 1 April 2010.
895 See, e.g., Stubbings and Others v. the United Kingdom, 22 October 1996, par. 50, Reports of Judgments and Decisions 1996-IV.
896 See for the Court’s findings in this regard infra VII.3.
897 Golder v. the United Kingdom, 21 February 1975, Series A no. 18. See further supra ch. V.4.
Malinverni and Spielmann, to issuing concurring opinions, in which they both argued that it was not so much the applicant’s right of access to a court that was unduly restricted, but rather the ‘excessive formalism’ and arbitrary interpretation of the relevant rules which led to a violation of the right to a fair trial ex Article 6 (1) ECHR. However, in a subsequent case concerning the enforcement of a foreign decision, Romańczyk v. France, the Court once again approached the issue from the right of access to a court.

Romańczyk concerned the enforcement in France of a maintenance order awarded to the applicant in Poland. Under the terms of the divorce in Poland between the applicant and her ex-husband and father of their two children (both Polish nationals), the latter was ordered to pay maintenance. The father lived in France. The applicant did not receive any payments and she subsequently made an application under the Convention of New York of 20 June 1956 on the Recovery Abroad of Maintenance (the New York Convention). After a slow start to these proceedings, French police tracked down the debtor in 2004, and the French authorities informed the Polish authorities that he had signed a written undertaking to pay maintenance. In 2005 the Polish authorities informed the French authorities that the ex-husband had still not honored this commitment. The French authorities did not follow up. Up until the procedure in Strasbourg the applicant had been unable to recover maintenance.

Invoking Article 6 (1) ECHR, she filed a complaint against France, as the French authorities had been unable to procure the enforcement. She also complained about the excessive length of the proceedings. In this case the Court reiterated that the right to a court would be illusory if a State allowed a final, binding judgment to remain inoperative to the detriment of one party. While the French authorities argued that the obligation to act rested solely with the applicant, the Court found that France had a positive obligation to enforce the judgment, as the applicant had a right to the assistance of the authorities in the enforcement of the judgment under the New York Convention.

898 See par. 9-15 of the concurring opinion of Judge Malinverni and par. 2ff of the concurring opinion of Judge Spielmann in Vrbica (supra n. 890).
899 Romańczyk v. France, no. 7618/05, 18 November 2010.
900 Romańczyk v. France, no. 7618/05, par. 53, 18 November 2010.
At issue was thus, according to the Court, whether the assistance of the French authorities had been adequate and sufficient. The Court found that this had not been the case. It particularly emphasized the fact that the French authorities had not followed up after being informed that the husband did not honor his written undertaking. The French government had argued that this was a trite administrative error, and that it would be contrary to the spirit of the ECHR that such an oversight by an individual would lead to a violation of the ECHR. However, although the Court accepted that a mere filing error could not lead to a violation of the ECHR, it found that this error could not be attributed to the applicant at all and that it had effectively thwarted the enforcement. The Court thus concluded that Article 6 (1) ECHR had been violated.

The Court here therefore used a slightly different reasoning compared to the afore-mentioned cases of Jovanoski and Vrbica. Instead of only assessing the refusal, or perhaps rather the unwillingness, to recognize and enforce as an interference with the right of access to a court, the Court in Romańczyk held that France had a positive obligation to assist in the enforcement. This positive obligation for the State essentially followed from the New York Convention, an international treaty. The different approach may thus be explained by the fact that the obligation to enforce in this case followed from an international commitment to do so. On the other hand, the Court’s reasoning in Jovanoski and Vrbica similarly suggests that Contracting Parties should have a properly functioning system in place to assist in the enforcement of (foreign) judgments, even though it did not expressly discuss this in light of a positive obligation.

It is noteworthy that the Court’s case law concerning the obligation to recognize a foreign (family law) judgment following from Article 6 (1) ECHR has recently been confirmed in Négrépontis-Giannis v. Greece. This case concerned the unjustified refusal by the Greek authorities to recognize a foreign adoption order. The Court noted that in order for a foreign decision to be recognized and enforced under Greek law, a number of conditions have to be met. One of these conditions is that the judgment must not violate Greek ordre public (public policy).

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902 The Court also noted in this regard that it essentially followed its previous case law concerning the enforcement of judgments under the New York Convention. The Court cited Huc v. Romania and Germany (dec.), no. 7269/05, 1 December 2009; Dimu v. Romania and France, no 6152/02, 4 November 2008; K. v. Italy, no 38805/97, ECHR 2004-VIII; Zabawska v. Germany (dec.), no. 49935/99, 3 March 2006 and W.K. v. Italy (dec.), no. 38805/97, 25 June 2002.

However, the Court found that the interpretation by the Greek courts of the notion of *ordre public* should not be made in an arbitrary and disproportionate manner.

It is interesting to observe that the Court in this case explicitly refers to the private international law notion of *ordre public*, or public policy, which the Greek court invoked in order to deny the recognition and enforcement.\(^{904}\) Taking into account the texts on which the Greek Supreme Court based its decision to refuse to give effect to the American decision and its conclusions under Article 8 ECHR, the Court held that the principle of proportionality had not been respected with regard to Article 6 (1) ECHR and thus found a violation of this Article.\(^{905}\)

It is important to note with regard to foreign family law judgments that there could be specific limitations to the invocation of Article 6 (1) ECHR in cases where the rights of others, particularly children, are involved. For example, in *Pini and Others v. Romania*,\(^{906}\) the Court examined the failure of the Romanian authorities to execute final, binding decisions concerning the adoption of two Romanian children by two Italian couples. In this case a Romanian educational centre, where the children stayed during the adoption proceedings, basically did everything to prevent the enforcement of the final adoption judgments. However, after all those years the minors involved expressed an unwillingness to move to Italy.

The Court examined the failure to enforce these judgments in light of both Articles 6 (1) and Article 8 ECHR. Contrary to the complaint under Article 8 ECHR, the Court did find a violation of Article 6 (1) ECHR on account of the failure of the authorities to enforce the final judgments. Citing the need for a swift solution in such cases,\(^{907}\) as the mere passage of time can have irreparable consequences, the Court ultimately held that despite the delicate nature of the issue, the non-enforcement of the binding decisions contravened ‘the principles of the rule of law and of legal certainty, notwithstanding the existence of special reasons potentially justifying it, the Government having cited the obligation on the respondent State with a view to its future

\(^{904}\) See with regard to the public policy exception *infra* ch. II.5 and ch. VI.3.3.3.

\(^{905}\) *Négrépontis-Giannisis v. Greece*, no. 56759/08, par. 90-91, 3 May 2011. See for a more detailed discussion of this case *infra* VII.4ff.

\(^{906}\) *Pini and Others v. Romania*, nos. 78028/01 and 78030/01, ECHR 2004-V (extracts).

\(^{907}\) The Court cited in this regard, *inter alia, Maire v. Portugal*, no. 48206/99, ECHR 2003-VII.
accession to the European Union legal order. However, considering the fact that the minors did not want to move to Italy, the judgment amounted to nothing more than a Pyrrhic victory to the applicants.

Finally, it is interesting to note with regard to the impact of Article 6 (1) ECHR on the issue of the recognition and enforcement of foreign judgments that the Court has held that Article 6 (1) ECHR is also applicable to exequatur proceedings concerning foreign judgments. In Saccoccia v. Austria, a case involving the enforcement of an American forfeiture order in Austria, the Court confirmed its admissibility decision in this case in the sense that it held that the right to a fair trial following from Article 6 (1) ECHR is also applicable to the execution phase of a foreign judgment. Exequatur proceedings thus also have to meet all the fair trial requirements following from Article 6 (1) ECHR. In Saccoccia no hearing had been held before taking over the execution of the American judgment. However, as the proceedings concerned merely technical issues of inter-State co-operation and no taking of further evidence was required, the Court found that there had not been a violation of Article 6 (1) ECHR.

In Ern Makina Sanayi ve Ticaret A.Ş v. Turkey, however, the Court had earlier found a violation of Article 6 (1) ECHR in a case concerning exequatur proceedings regarding the enforcement of a Russian arbitral award in Turkey, in which the defendant had not been notified. The fact that Article 6 (1) ECHR is applicable to enforcement proceedings concerning foreign judgments means that the guarantee of a reasonable length of procedures is also applicable to such proceedings. Whether or not such a violation can be found will naturally depend on the specific circumstances of the case. One could point to Zabawska v. Germany, a case concerning

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909 See infra VII.4ff for a more detailed discussion of this case and the complaint under Article 8 ECHR.
910 Cf. Spielmann supra n. 885, at p. 770ff. See in this regard also Kinsch 2007 supra note 879, who before the Court’s judgments in Saccoccia (infra n. 911) and Ern Makina Sanayi ve Ticaret A.Ş (infra n. 915) already noted – citing the Court’s admissibility decision in Ern Makina Sanayi ve Ticaret A.Ş v. Turkey (dec.), no. 70830/01, 4 October 2005 – that Article 6 (1) ECHR (and Article 13 ECHR) could be applicable to such proceedings.
911 Saccoccia v. Austria, no. 69917/01, 18 December 2008.
912 Saccoccia v. Austria (dec.), no. 69917/01, 5 July 2007.
913 Saccoccia v. Austria, no. 69917/01, par. 61-65, 18 December 2008.
914 Saccoccia v. Austria, no. 69917/01, par. 70-80, see particularly par. 78-80, 18 December 2008.
the enforcement of a Polish maintenance order in Germany, where no violation of Article 6 ECHR was found, despite the considerable lapse of time.\textsuperscript{917}

2.1 The Obligation to Recognize and Enforce following from Art. 6 (1) ECHR

It follows from the case law discussed above that the Court has derived an obligation to recognize and enforce foreign judgments from Article 6 (1) ECHR. This right had already been deduced by the Court with regard to domestic judgments in\textit{Hornsby}, but this right has been extended to foreign judgments. As Article 6 (1) ECHR is concerned with virtually all civil judgments, the Court’s finding of an obligation following from this Article introduces a general obligation to recognize and enforce foreign (civil) judgments, including foreign family law judgments.\textsuperscript{918}

The Court has nevertheless not been consistent in how it has constructed this obligation. Originally, it based this obligation on the fact that recognition and enforcement must be part of the trial and it thus could be derived from the right to a fair trial.\textsuperscript{919} In its more recent case law, though, it has based the obligation on the right of access to a court.\textsuperscript{920} Moreover, the Court has also treated the obligation to enforce judgments as a positive obligation of the State.\textsuperscript{921}

The precise construction of this obligation to recognize and enforce under Article 6 (1) ECHR could be of interest in light of possible limitations to this obligation. It follows from the Court’s case law that the obligation to recognize and enforce is not absolute. One could argue that the room for the Contracting Parties to maneuver with regard to the obligation following from Article 6 (1) ECHR may differ depending on whether it is derived from the right to a fair trial, or from the right of access to a court, or whether this obligation concerns a positive obligation. However, even though the Court is not very precise in its assessment of the obligation to recognize and enforce, it is possible to observe important overlaps between the Court’s different methods regarding limitations to this obligation. As has been noted above, it follows from the

\textsuperscript{917} \textit{Zabawska v. Germany} (dec.), no. 49935/99, 2 March 2006. See also \textit{supra} n. 902.
\textsuperscript{918} See with regard to the issue of whether Article 6 (1) ECHR generally applies to issues of private international law \textit{supra} ch. V.4.1.1.
\textsuperscript{919} See \textit{Hornsby} and \textit{McDonald supra} VII.2.
\textsuperscript{920} See \textit{Jovanoski} and \textit{Vrbica supra} VII.2-3.
\textsuperscript{921} See \textit{Romańczyk supra} VII.2.
Court’s case law that it deems it important that Contracting Parties have a system in place ensuring that (foreign) judgments will, in principle, be recognized and enforced.

A failure to recognize and enforce appears to be treated by the Court in most cases as a restriction to Article 6 (1) ECHR. It further follows from the Court’s case law that it reviews the proportionality of such a restriction in particular. This review, of course, fits in with the Court’s general approach to restrictions to qualified rights, while it has previously been held that the Court also uses this approach with regard to the right of access to a court ex Article 6 (1) ECHR.922

Whether a restriction to the obligation to recognize and enforce under Article 6 (1) ECHR can thus be allowed will mostly depend on whether the restriction is proportionate to the legitimate aim pursued. In my opinion, the interests of others can, in principle, also be weighed by the Court in its assessment of the proportionality.923 It follows that the restrictions which the Contracting Parties impose on the recognition and enforcement of foreign judgments in the framework of their private international law regimes must also comply with this condition of proportionality. Thus these grounds of refusal in private international law must be proportionate to the legitimate aim pursued. Notably, this even applies to the substantive public policy exception, as the Court found in Négrepontis. This exception cannot be applied in a disproportionate and arbitrary manner. Yet there is no reason to assume that this, in principle, does not also apply to other private international law defenses against recognition and enforcement of foreign judgments.924

The one exception here is the condition of fraud. This is because the ECHR cannot be invoked against situations to which the applicant has contributed him or herself. Moreover, as will be further discussed in Chapter VIII, human rights obligations may also stand in the way of the recognition and enforcement of foreign judgments.925 It would stand to reason that there cannot be an obligation to recognize and enforce foreign judgments whose recognition would

922 See generally on the system of restrictions supra ch. III.5.1ff. See with regard to the right to access to a court supra ch. V.4.1.
923 Even though the Court did not do so in Pini (see supra n. 906).
924 See for an overview supra VII.1.
925 See infra VIII.2-VIII.3.
subsequently lead to a violation of one of the rights guaranteed in the ECHR. In this regard, one should also note that some of the requirements for the recognition and enforcement of foreign judgments, such as the proper service of documents and irreconcilable judgments, will presumably pass this test easily, as they contribute to a large part to the protection of rights guaranteed in Article 6 (1) ECHR.926

2.2 Jurisprudence of National Courts of the Contracting Parties

Despite the Court’s finding that an obligation to recognize and enforce foreign judgments follows from Article 6 (1) ECHR, there is little relevant case law of the national courts in England, the Netherlands, or Switzerland to be found927 in which this obligation is invoked in order to have a foreign judgment recognized and enforced.

There is one case worth mentioning, *Golubovich v Golubovich*, even though the obligation to recognize and enforce was not explicitly invoked. In this case one half of a couple, W, commenced divorce proceedings in England, while the other half, H, began divorce proceedings in Russia shortly thereafter. H prevented the grant of a divorce decree in England by producing a Russian divorce decree that turned out to be forged. Meanwhile, the English court issued a *Hemain* injunction929 preventing H from further action in the Russian courts. Contrary to the injunction, though, H obtained a divorce before the Russian courts. The Court of Appeal found that this divorce could be recognized in England and declined to refuse recognition on the basis of the public policy exception. The English court found that to deny recognition from another jurisdiction within the Council of Europe could only occur under truly exceptional circumstances. This was not deemed to be the case here.

This case clearly demonstrates the extent of the starting point, discussed above, that foreign judgments should, in principle, be recognized and enforced. Even under these circumstances, the

926 The proper service of documents certainly contributes to a fair trial under Article 6 (1) ECHR, while the ground of refusal of irreconcilable judgments could be said to be vested in the general notion of the rule of law.
927 See with regard to the choice of these legal orders *supra* ch. I.3.
928 [2010] EWCA Civ 810.
929 The so-called *Hemain* injunction is an interim injunction in international proceedings, which is sought for a limited time in order to preserve the *status quo*, while an application for a stay is made. The injunction thus precludes both parties from litigating on the substantive issues in either court involved. In *Hemain v. Hemain* [1988] 2 FLR 388, such an injunction was granted in respect of French proceedings (prior to the Brussels II Regulation).
English court found that this situation was not exceptional enough to make an exception to this principle. It is noteworthy that the English court emphasized the fact that the judgment originated from another Contracting Party, as if to suggest that this resulted in a stronger assumption that the judgment should be enforced. However, one could say that it is quite remarkable that the English court was willing to recognize this judgment, considering the fraudulent behavior of one of the parties. As has been discussed above, the Court in McDonald saw fit to deny an appeal for the recognition of a foreign judgment because of such fraudulent behavior. Apparently the English public policy exception could not be invoked in order to prevent this. The English court in this case thus goes further in recognizing this judgment than the Court would require.

What could be the reason for the lack of case law concerning the obligation derived from Article 6 (1) ECHR to recognize and enforce foreign judgments? First, most of the Court’s case law on this issue is relatively recent. More importantly, however, is the fact that in England, the Netherlands, and Switzerland the starting point with regard to the recognition and enforcement of foreign judgments is that they will be recognized and enforced unless the foreign judgment does not meet the requirements to do so. For judgments in civil and commercial matters originating from other EU Member States or States party to the Lugano Convention, for example, the Brussels/Lugano regime applies in the afore-mentioned countries. The free movement of judgments is one of the purposes of the Brussels/Lugano regime and the grounds for refusal are limited. The Brussels II bis Regulation, for example, has a similar starting point. Additionally, there are many bilateral treaties which follow a similar approach.

Although under the common law rules in England a few more obstacles may be raised against recognition and enforcement of foreign judgments compared to the Brussels/Lugano regime, the principle remains that foreign judgments will be recognized and enforced when the court of origin had proper jurisdiction, the foreign judgments are final, they were not obtained by way of fraud, and finally are not contrary to the principles of English public policy. A comparable

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930 As discussed above, the Court’s case law in this regard suggests that the origin of the judgment is irrelevant. See supra VII.2.1.
931 See supra VII.2.
932 See, e.g., no. 6 of the preamble of the Brussels I Regulation (supra n. 864).
933 See generally with regard to the recognition and enforcement of foreign judgments in England, e.g., A. Briggs and P. Rees, Civil Jurisdiction and Judgments (London, Informa 2009), p. 665ff; Cheshire, North and Fawcett,
legal framework has been designed over time by the Dutch courts. Originally in the Netherlands, however, foreign judgments could not be recognized and enforced in the absence of a treaty stating otherwise. This starting point is clearly in violation of the obligation to recognize and enforce following from Article 6 (1) ECHR. However, rules on the recognition and enforcement of foreign judgments have since been developed by the Dutch courts and, in principle, foreign judgments will be recognized, provided that at least three requirements are met: the foreign judge had jurisdiction to hear the case (based on internationally accepted standards of jurisdiction); there was a fair trial; and, finally, the foreign judgment does not violate Dutch public policy. In Switzerland, the rules relating to recognition and enforcement are laid down in Article 25 of the Swiss Private International Law Act, in which much the same three requirements are included.

This practice essentially means that the obligation to recognize and enforce foreign judgments following from Article 6 (1) will in most cases be fulfilled and, if not, only because the foreign judgment did not satisfy one of a number of possible requirements following from the private international law regime of a Contracting Party. However, this is where the impact of the ECHR will be felt.

It is more than conceivable that some of these requirements for the recognition and enforcement will come under pressure in the future, as has been demonstrated by the Court with regard to

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935 See also Kinsch 2007 supra n. 879, at p. 105-106.
936 Strikwerda 2012 supra n. 934, at p. 279-280. Cf. N. Rosner, Cross-Border Recognition and Enforcement of Foreign Money Judgments in Civil and Commercial Matters (Doctoral Series, dissertation Groningen 2004), p. 31ff. Some authors have argued that a fourth condition – finality of the judgment – should be added. See Rosner, p. 51ff and the Dutch authors cited there. Occasionally, the requirement that the foreign judgment should have a proper, understandable reasoning has been mentioned. See, e.g., Rb. Rotterdam 29 September 1989, NIPR 1992, 277. However, one could also argue that such a requirement would fall under the requirement of a fair trial, whereby it should be mentioned that a lack of reasons in a judgment will not always violate Article 6 (1) ECHR. See, e.g., HR 18 March 2011, RvdW 2011, 392, which will be discussed infra ch. VIII.2.2.2.
(substantive) public policy in Négrépontis, for example. Any reason put forward by a Contracting Party to deny recognition and enforcement, including traditional private international law defenses, must comply with the requirements regarding restrictions to Article 6 (1) ECHR. At the very least, such a restriction must not have been arbitrary or disproportionate. While one could say that the substantive public policy exception in Négrépontis had been quite arbitrarily raised, as the Greek courts in this case referred back to ancient texts which were long thought to be irrelevant in this regard, it is nevertheless possible to infer more general consequences from this case. It is, for example, imaginable under the Court’s reasoning that too much emphasis on national interests to the detriment of an applicant’s interest in having a foreign judgment recognized and enforced may not be proportionate.

2.3 Preliminary Conclusions
The Court has found that Article 6 (1) ECHR applies to enforcement proceedings and that the failure of the authorities to recognize and enforce foreign judgments may result in a violation of Article 6 (1) ECHR. One could therefore say that Article 6 (1) contains an obligation for Contracting Parties to facilitate the recognition and enforcement of foreign judgments. This obligation applies, in principle, to all civil judgments and one may thus infer that Article 6 (1) ECHR contains a general obligation in this regard. However this obligation is not absolute. While the Court has used varying criteria to assess whether a restriction to the obligation to recognize and enforce a foreign judgment is permissible, the Court will at least assess whether the restriction was not arbitrary and was proportionate (to the legitimate aim pursued). It has been demonstrated that the proportionality requirement is usually the most important condition in this regard.

The obligation under Article 6 (1) ECHR to recognize and enforce foreign judgments does not yet have a prominent role in the national case law of the Contracting Parties. This is most likely due to the fact that these countries adhere to a favor recognitionis: foreign judgments are, in principle, recognized and enforced under national or EU private international law, unless there

are compelling reasons not to do so. Such reasons consist mainly of traditional private international law defenses – the afore-mentioned grounds of refusal – against recognition and enforcement, such as, for example, a jurisdiction requirement\textsuperscript{939} or public policy. However, it follows from the Court’s case law that any interference to the obligation to recognize and enforce based on these traditional private international law defenses must also meet the Court’s demands with regard to restrictions under Article 6 (1) ECHR. It has been demonstrated that the ground of refusal of fraud is an exception to this rule, while it should also not be forgotten that the grounds of refusal may also contribute to the protection of human rights, as it will be discussed in the next chapter that there may also be an obligation to refuse the recognition and enforcement of foreign judgments.

3. Article 1 of Protocol No. 1 ECHR and the Obligation to Recognize and Enforce

The obligation to enforce a judgment following from Article 1 of Protocol No. 1 ECHR, which guarantees the right to property,\textsuperscript{940} was – just like the obligation derived from Article 6 (1) ECHR – first developed in a purely domestic case. In a case concerning the failure of the authorities to execute a final judgment, \textit{Burdov v. Russia},\textsuperscript{941} the applicant not only relied on Article 6 (1) ECHR, but also complained of a violation of Article 1 of Protocol No. 1 ECHR. This domestic case concerned the Russian authorities’ refusal to completely fulfill their obligations with regard to the compensation the applicant was awarded on account of his health issues following his part in emergency operations at the site of the Chernobyl nuclear plant disaster.

The Court examined the allegedly substantial and unjustified delays in the execution of the final judgments under both Article 6 (1) and Article 1 of Protocol No. 1 ECHR. The Court held with regard to Article 6 (1) ECHR, citing \textit{Hornsby},\textsuperscript{942} that the authorities’ failure to comply with the final decisions for years entailed a violation of the said Article. Furthermore, with regard to

\textsuperscript{939} But see further \textit{Hussin v. Belgium} with regard to the jurisdiction requirement (with regard to Article 8 ECHR) \textit{infra} n. 956.
\textsuperscript{941} \textit{Burdov v. Russia}, no. 59498/00, ECHR 2002-III.
\textsuperscript{942} \textit{Burdov v. Russia}, no. 59498/00, par. 34, ECHR 2002-III.
Article 1 of Protocol No. 1 ECHR, the Court first reiterated that a ‘claim’ could also constitute ‘possessions’, as it had previously held in Stran Greek Refineries and Stratis Andreadis v. Greece. It consequently found that by failing to comply with the judgments, the authorities had interfered with the applicant’s rights following from Article 1 of Protocol No. 1 ECHR, while no justification for this interference had been presented.

With regard to the obligation ex Article 1 of Protocol No. 1 ECHR in relation to foreign judgments, the Court in Vrbica, in examining the complaint under this Article, relied on its judgment in Burdov in finding that the applicant’s rights had been interfered with. The Court subsequently held that it found it untenable that instituting proceedings for the recognition of a foreign judgment did not interrupt the running of a statutory limitation period, as was held by the Croatian courts. Such a stance, according to the Court, makes it possible that a judgment creditor would lose the right to enforce a foreign judgment due to circumstances beyond the creditor’s control, which cannot be brought in line with the principle of the rule of law. The Court thus found that the interference was incompatible with the principle of lawfulness and it held that there had (also) been a violation of Article 1 of Protocol No. 1 ECHR.

In this case the Court thus treated the non-enforcement of a foreign (monetary) judgment as a restriction to the right to property. As has been stated earlier, the right to property is not absolute. Under Article 1 of Protocol No. 1 ECHR, however, such a restriction is only allowed if it is prescribed by law, is in the public interest, and is necessary in a democratic society. One should note that in this case the Court thus found, exceptionally, that the first condition – lawfulness – had not been met.

The (partial) non-enforcement of an arbitral award can also be a violation of Article 1 of Protocol No. 1 ECHR. Kin Kin-Stib and Majkić v. Serbia concerned the enforcement of the remainder of an arbitral award. The Serbian government argued, inter alia, that it had done everything

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943 Burdov v. Russia, no. 59498/00, par. 40, ECHR 2002-III.
944 Stran Greek Refineries and Stratis Andreadis v. Greece, judgment of 9 December 1994, Series A no. 301-B.
945 Vrbica v. Croatia, no. 32540/05, par. 55, 1 April 2010.
946 See also supra VII.2.
947 See generally supra ch. III.5.1.2.
possible to enforce the award, but after the Serbian court had imposed the maximum amount of fines possible, there had effectively been no further attempts to enforce the remainder of the arbitration award as there appeared to be no more means available to enforce it under Serbian law. This failure to take the necessary measures to fully enforce the arbitration award, without providing any reasons for this failure, amounted to a violation of Article 1 of Protocol No. 1 ECHR, according to the Court.949

Even though Article 1 of Protocol No. 1 ECHR is concerned with property, it is possible for this Article to play a role in the recognition and enforcement of foreign family law judgments. In Négrépontis the Court held that the non-recognition of a family law judgment regarding one’s status may also lead to a violation of Article 1 of Protocol No. 1 ECHR where one’s position as an heir is concerned. Due to the non-recognition of a foreign adoption order by the Greek court on appeal, the applicant in Négrépontis lost his position as the sole heir to his adoptive father. The Court held that this amounted to a violation of Article 1 of Protocol No. 1 ECHR.950

3.1 The Obligation following from Article 1 of Protocol No. 1 ECHR

The impact of Article 1 of Protocol No.1 ECHR has to date hardly been discussed in the literature or the case law of the Contracting Parties.951 The impact of the right to property on the enforcement of foreign judgments is a recent development. It should be emphasized that the right to property may, in principle, only come into play where the foreign judgment concerned falls within the scope of this right. However, as follows from the case law discussed above, this is not only the case where the enforcement of foreign money judgments is concerned, but may also be the case where a foreign judgment concerns a status acquired abroad, which may lead to possessions, such as the status of an heir. This, of course, enhances the importance of the right to property.

949 Kin Kin-Stib and Majkić v. Serbia, par.84-85, no. 12312/05, 20 April 2010. With regard to the alleged violation of Article 6 (1) in this case, the Court considered it to be unnecessary to examine separately the same issue under Article 6 (1) ECHR. The applicants had under Article 6 (1) also complained about the failure to respect the res judicata effects of the arbitration awards. However, this complaint was incompatible ratione temporis, as Serbia had at the time of (the end of) the annulment proceedings not yet ratified the ECHR.
950 Négrépontis-Giannisis v. Greece, no. 56759/08, par. 93-105, 3 May 2011. See also supra VII.2 and more extensively infra VII.4.
951 But see Spielmann supra n. 885, at p. 774ff, particularly at p. 783.
One may deduce from the Court’s case law in *Vrbica* and *Kin-Stib and Majkic* that Article 1 of Protocol No. 1 ECHR, in principle, obligates a State to enforce a foreign monetary judgment, or at the very least obliges a State to have an effective framework for the enforcement of foreign judgments and arbitral awards in place. In both these cases the framework provided for the recognition and enforcement of foreign judgments fell short of the mark. As discussed above, a similar obligation can be deduced from Article 6 (1) ECHR. Of course there may be justifications for the non-enforcement of a foreign judgment. Article 1 of Protocol No. 1 ECHR, like Article 6 (1) ECHR, leaves open that possibility.

There is clearly some overlap between Article 6 (1) and Article 1 of Protocol No. 1 ECHR. This also follows from the Court’s finding in *Kin-Stib and Majkic*, in which it held, after finding a violation of Article 1 of Protocol No. 1 ECHR, that it was not necessary to separately examine the complaint under Article 6 (1) ECHR, as it concerned the same issue. However, the distinction between these two rights should also be clear: Article 6 (1) ECHR concerns a procedural right, while Article 1 of Protocol No. 1 ECHR is a substantive right. Moreover, the scope of Article 6 (1) ECHR is larger. Not all judgments covered by Article 6 (1) ECHR will also be covered by Article 1 of Protocol No. 1 ECHR. Finally, while the obligation following from these rights, as well as the manner in which the Court assesses interferences under these rights, is quite similar, there is a subtle difference with regard to the system of restrictions under the respective rights. As discussed above, although the Court’s examination under Article 6 (1) ECHR varies slightly, a restriction must, essentially, not be arbitrary and disproportionate. Under Article 1 of Protocol No. 1 ECHR the Court will, in principle, follow a somewhat stricter test, which follows from the Article itself, as Article 1 of Protocol No. 1 ECHR is a qualified right. This means that an interference with Article 1 of Protocol No. 1 ECHR should – compared to Article 6 (1) ECHR – additionally have a basis in national law.

There may, however, be one more interesting distinction between these two rights with regard to the obligation to recognize which may be deduced from the Court’s case law, and this concerns

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952 See *supra* VII.2.1.
953 Art. 1 of Protocol No. 1 ECHR is not absolute. See *supra* ch. III.5.1.2.
reparation *ex* Article 41 ECHR. In *Jovanoski*, in which the enforcement of a monetary judgment was only examined in light of Article 6 (1) ECHR, the successful applicant was awarded only a small amount in damages. In a case in which such a judgment was (also) examined in light of Article 1 of Protocol No. 1 ECHR, *Kin-Stib and Majkic*, however, the successful litigants were paid the entire sum of the judgment in question.

3.2 Preliminary Conclusions

The failure on account of the authorities to enforce (part of) a foreign judgment or arbitral award concerning some sort of possession may (also) result in a violation of Article 1 of Protocol No. 1 ECHR, the right to property. However the obligation to enforce foreign judgments is not absolute. The Court’s review in this regard is similar to its review under Article 6 (1) ECHR, albeit slightly stricter. There is not much relevant case law of the national courts of the Contracting Parties on the impact of Article 1 of Protocol No. 1 ECHR in this regard, as is also the case concerning the obligation to enforce following from Article 6 (1) ECHR. Here, too, one could point out that these developments are relatively recent. As was concluded for Article 6 (1) ECHR, it is certainly conceivable that the requirements traditionally used in the Contracting Parties regarding recognition and enforcement will come under pressure.

4. Article 8 ECHR and the Obligation to Recognize Foreign Judgments

In addition to Articles 6 (1) ECHR and Article 1 of Protocol No. 1 ECHR, there is one more right guaranteed in the ECHR that may entail an obligation for a Contracting Party to recognize a foreign judgment, and that is Article 8 ECHR, which, *inter alia*, guarantees the right to private and family life. After having initially rejected the argument that the failure to recognize a foreign family law judgment may violate Article 8 ECHR, the Court has in its most recent cases on this topic accepted that the non-recognition of such judgments may entail a violation of Article 8 ECHR.

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954 See *supra* n. 891.
955 However, this difference may also have depended on the particular circumstances of the cases. In *Vrbica* the case was re-opened, but this should, in principle, of course lead to enforcement after all.
In *Hussin v. Belgium*\(^{956}\) the Court for the first time examined whether the non-recognition of a foreign family law judgment could possibly violate one of the substantive rights guaranteed in the ECHR, specifically Article 8 ECHR.\(^{957}\) Mrs. Hussin, a Belgian national, was resident in Germany with her two children. The local youth Protection Agency in Germany, which had custody over the two children at the time, succeeded (on behalf of the children) in obtaining a judgment in the local court in Germany against G, a Belgian national and resident. The judgment held that G was the natural father of the children and ordered him to pay maintenance for the children. The German court based its jurisdiction on the Brussels Convention.\(^{958}\)

Mrs. Hussin later attempted to have this judgment recognized in Belgium, where G resided, but ultimately failed in obtaining an *exequatur* of the German judgment in Belgium. The Belgian courts (all the way up to the Supreme Court) took another interpretation of the Brussels Convention and ultimately held that this instrument was inapplicable and that the German court could not assert jurisdiction under this Convention. Instead, the Belgian/German Convention of 1958 was held to be applicable, and it followed from this instrument that the German court was not competent to hear a case against a person domiciled in Belgium. It was ultimately held that none of the decisions obtained in Germany would receive *exequatur* in Belgium, as the jurisdiction requirement had not been met. Mrs. Hussin and her children subsequently complained in Strasbourg, invoking Article 8 ECHR and Article 1 of Protocol No. 1 ECHR (with regard to the maintenance order).

The Court first noted that its task did not include an examination of whether the Belgian courts’ refusal to enforce the foreign judgment on account of the German court not having jurisdiction

\(^{956}\) *Hussin v. Belgium* (dec.), no. 70807/01, 6 May 2004.
\(^{957}\) It is worth mentioning that long before the Court would be called upon to examine whether the non-recognition of a foreign judgment could violate Article 8 ECHR, the Commission had already decided a case, *X. v. Sweden* (dec.), no. 172/56, *Documents and Decisions* 1955-1956-1957, p. 211-219, in which this was one of the issues. In this case the Commission had to decide whether the non-recognition in Sweden of a Polish judgment awarding the applicant a divorce and giving him custody of the child, followed by a Swedish decision granting the applicant’s wife a divorce and giving her custody over the couple’s child, violated Article 8 ECHR. The Commission ultimately decided that the application was inadmissible. However, it should be noted that the Commission in so deciding neither really discussed the private international law issue in this case, nor the complaint under Article 8 ECHR for that matter.

\(^{958}\) The 1968 Brussels Convention on the Jurisdiction and Enforcement in Civil and Commercial Matters, *OJ* 1972 L 299/32, is the predecessor of the Brussels I Regulation, which has been discussed *supra* n. 864. Matters of status are excluded from the scope of the Brussels Convention, but this matter was also concerned with an issue of maintenance, which does fall within its scope.
was justified; its task was not to decide on the righteousness of the interpretation of the Brussels Convention. Rather, its task was to decide whether the refusal to enforce the German judgment was an interference of the applicants’ rights guaranteed in Article 8 ECHR and Article 1 of Protocol No. 1 ECHR. The Court found that the refusal to enforce the German judgment did indeed interfere with the applicants’ rights guaranteed in both Article 8 and Article 1 of Protocol No. 1 ECHR.

Nevertheless, the Court held that the application was manifestly ill-founded. It invoked in this regard the principle that no one can complain about a situation to which they themselves have contributed. Reviewing the facts of the case, the Court found that the reason that the applicants were unable to have the German judgment enforced in Belgium – the reason for the Belgian refusal to enforce – was the fact that the applicants had initially brought their case before a court that did not have the competence to hear such a case. The Court concluded that the Belgian authorities could not be blamed for their refusal to enforce the German judgment, as this judgment had been rendered in disregard of the (proper) applicable rules on jurisdiction.

Before the Court’s decision in Hussin, the possible impact of Article 8 ECHR in this regard had hardly been discussed in the literature, certainly if compared to issues concerning Article 6 (1) ECHR. The fact that the Court found that the non-recognition of a foreign family law judgment was indeed an interference of both Article 8 and Article 1 of Protocol No. 1 ECHR is thus an important finding and may have paved the way for the Court’s subsequent findings, in particular in Wagner and Négrepontis, which are further discussed directly below. However, the reasoning consequently used by the Court in not finding a violation of these rights in Hussin is quite odd.

By finding that Belgium had restricted the applicant’s rights, the Court thus acknowledged that the obligations of a Contracting Party with regard to Article 8 ECHR are not confined to

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959 See with regard to this notion supra ch. III.2.
960 See also supra n. 883.
961 But see A. Bucher, ‘La famille en droit international privé’, 283 Recueil des Cours (2000), particularly p. 96-115. See also Matscher supra n. 879, at p. 221 – noting the early decision of the Commission in X. v. Sweden (supra n. 957).
situations created by the Contracting Party itself or to situations which are already recognized in its legal order.\textsuperscript{963} This may not be terribly surprising,\textsuperscript{964} except perhaps for the fact that the Commission, in an old case, once had more or less expressed the opposite view.\textsuperscript{965} However, despite the Court’s acknowledgment of the importance of Article 8 ECHR (and also Article 1 of Protocol No. 1 ECHR) in \textit{Hussin}, the application was found manifestly inadmissible.

However, it is first hard to see what Mrs. Hussin could have done differently in this case. Moreover, it is difficult to blame the applicants for the interpretation of the rules of international jurisdiction by the Belgian courts, which has been called ‘dubious’.\textsuperscript{966} Perhaps most importantly, by upholding the Belgian courts’ decision to refuse the enforcement of the German judgment, the Court contributes to a limping legal relationship. In Germany the father of the children has been established, while this is not the case in Belgium. One could wonder whether this does not in itself violate Article 8 ECHR.\textsuperscript{967} One could also wonder how the Court’s findings in \textit{Hussin} relate to its subsequent findings in \textit{Wagner}, where the Court emphasized the importance of the legitimate expectations of the parties.\textsuperscript{968}

In \textit{Wagner and J.W.M.L. v. Luxembourg}\textsuperscript{969} the Court had to decide whether the failure of the Luxembourg authorities to recognize the family ties between mother and child created by a Peruvian judgment (i.e. a judgment originating from a third country) pronouncing a full adoption, by not enforcing that Peruvian adoption judgment, would result in a violation of Article 8 ECHR. In addition to their complaint under Article 8 ECHR, the applicants had also alleged that by refusing to enforce the adoption judgment they had been unjustifiably discriminated against, resulting in a violation of Article 14 ECHR in conjunction with Article 8 ECHR. Finally, the applicants had also submitted that they had been deprived of a fair hearing

\textsuperscript{964} In Chapter IV it has been discussed that the act of (not) recognizing a foreign judgment constitutes a situation within the jurisdiction of the Contracting Parties \textit{ex} Article 1 ECHR. It consequently follows that this act may give rise to responsibility following a violation of one of the rights guaranteed in the ECHR.
\textsuperscript{965} \textit{X and Y v. the United Kingdom} (dec.), no. 7229/75, 15 December 1977.
\textsuperscript{966} Kinsch 2010 \textit{supra} n. 885, at p. 263.
\textsuperscript{967} One could particularly wonder in this regard whether this takes the ‘social reality of the situation’ sufficiently into account. See, e.g., \textit{infra} n. 974.
\textsuperscript{968} See further \textit{infra} the Court’s findings in \textit{Wagner}.
under Article 6 ECHR, as the authorities had not fully considered their complaints in relation to Article 8 ECHR.\textsuperscript{970}

The applicants were Jeanne Wagner and her adoptive daughter. At the time they both lived in Luxembourg. In 1996, under a Peruvian judgment, the mother had adopted the then 3 year old girl, who had previously been declared abandoned. In 1997 the mother brought a civil action in Luxembourg seeking to have the Peruvian adoption judgment enforced in Luxembourg, in order, among other things, to have the child acquire Luxembourg nationality. However the district court dismissed the application, as it held that a court dealing with the enforcement of such a decision had to verify whether the adoption had been announced in accordance with Luxembourg law. The court thus used a choice-of-law test. Full adoption was not available to single women at the time under Luxembourg law. The mother appealed, relying in particular on the judgment being in violation of Article 8 ECHR. The appeal was dismissed, however, because, according to the higher court, the district court had rightfully dismissed the application on the basis that adoptions were subject to the law of the nationality of the adopter. These conclusions were upheld by the Cour de Cassation, which held that Luxembourg law was applicable to the adoption.

With regard to the complaint under Article 8 ECHR, the Court first noted that there was \textit{de facto} ‘family life’ between the mother and the adopted child. It thereafter considered that the refusal to declare the Peruvian decision enforceable amounted to an interference with the applicants’ right to respect for their family life. This was in itself not a remarkable finding, as the Court had come to a similar conclusion concerning the recognition of a foreign (family law) judgment in \textit{Hussin}.\textsuperscript{971} However, this time the Court not only found an interference with Article 8 ECHR, but also a violation of this right.

In assessing whether the interference with Article 8 ECHR would amount to a violation, the Court essentially followed its usual approach regarding restrictions under this right – namely that it should be in accordance with the law, have a legitimate aim, and be necessary in a democratic

\textsuperscript{970} It should be noted that the Court in this case (also) found a violation of Article 6 (1) ECHR, essentially because the Luxembourg courts had not given any reasons for the dismissal of the applicant’s complaints based on Article 8 ECHR. However, as the complaint under Article 6 (1) ECHR had otherwise little to do with private international law, it will not be further considered here.

\textsuperscript{971} See \textit{supra} n. 956.
society – which in short entails that the restriction must be proportionate to the legitimate aim pursued.\textsuperscript{972} The Court first observed that the government’s cautious approach in examining adoption decisions was not unreasonable. This served a legitimate aim, according to the Court. As for whether the government’s measure had been ‘necessary in a democratic society’ under Article 8 (2) ECHR, the Court noted that its task did not amount to defining the most appropriate response, but rather to review under the ECHR the decisions taken by the courts pursuant to their power of appreciation.

The Court used an all-encompassing approach, in the sense that it took quite a number of different factors into consideration. It noted that a broad consensus existed on the issue of adoption by unmarried persons. In most of the 47 Contracting Parties this is allowed without restrictions.\textsuperscript{973} The Court further noted that up until recently, it had been the practice in Luxembourg to recognize automatically Peruvian judgments granting full adoption. Thus the applicants could reasonably have expected that the Peruvian judgment would be enforced. The Court took the view that the refusal to declare the judgment enforceable did not take account of the ‘social reality of the situation’.\textsuperscript{974} By not enforcing the decision, the family ties created in Peru could not officially be acknowledged in Luxembourg, which led to all kinds of problems in the applicants’ day-to-day lives. Finally, the Court reiterated that in such cases the child’s best interests had to take precedence, and thus found that there had been a violation of Article 8 ECHR.\textsuperscript{975}

Once a violation of Article 8 ECHR is found, the Court usually no longer deems it necessary to review a complaint under Article 14 ECHR in conjunction with Article 8 ECHR. However, in this instance, the Court did review that complaint separately. Not surprisingly, the Court also found a violation in this regard, as it held that the child had been penalized in her daily life because of her status as the adoptive child of an unmarried mother. This status resulted, for example, in her not having Luxembourg nationality, which necessitated applying regularly for residence permits and requesting visas for visiting certain countries. The Court did not see any

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\textsuperscript{972} See with regard to the system of restrictions under Article 8 ECHR further supra ch.III.5.1.2.


\textsuperscript{974} Wagner and J.W.M.L. v. Luxembourg, no. 76240/01, par. 132, ECHR 2007-VII (extracts).

\textsuperscript{975} Wagner and J.W.M.L. v. Luxembourg, no. 76240/01, par. 133, ECHR 2007-VII (extracts).
justification for such discrimination, especially because earlier full adoption orders had automatically been granted in Luxembourg with respect to other Peruvian children.

How should one weigh the Court’s findings in Wagner?\textsuperscript{976} It should be clear that the impact of this judgment with regard to the recognition of not only foreign adoption judgments, but also foreign family law judgments determining one’s status more generally, could potentially be enormous if one were to interpret this judgment as entailing a blanket obligation for the Contracting Parties to recognize and enforce such judgments. Interpreted in this manner, the Wagner judgment could be seen as introducing a new method of recognition for foreign family law judgments based on Article 8 ECHR replacing the traditional private international law methods.\textsuperscript{977} The traditional private international law method entails that foreign family law judgments will, in principle, be recognized, provided that certain requirements are met.\textsuperscript{978} Taken to the extreme, Wagner could entail that Contracting Parties are no longer allowed to deny recognition to such judgments in light of, in particular, the legitimate expectations of the parties and the social reality of the situation, and that the requirements, the grounds of refusal, following from the private international law regimes would no longer be valid. It has in this regard been argued that the Wagner judgment can be considered to be part of a general movement within European family law, a new methodology based on fundamental rights, in which the recognition of foreign situations trumps traditional private international law rules.\textsuperscript{979}

However, one could, in my opinion, wonder whether such a far-reaching interpretation of this judgment can be justified.\textsuperscript{980} Although one may easily argue that the Court’s findings in Wagner

\textsuperscript{976} The Wagner judgment has been often discussed, primarily in the French literature. See for annotations, e.g., Dalloz 2007, p. 2700ff (note Marchadier) and Rev.crit dr:int.priv. 2007, p. 807ff (note Kinsch).
\textsuperscript{978} These requirements differ from country to country. See supra VII.1 for a brief presentation of the various requirements regarding foreign judgments.
\textsuperscript{980} Cf. Franzina supra n. 963.
need not necessarily be limited to foreign adoption judgments, it is at least arguable that the particular circumstances of the case have in large part contributed to the Court’s judgment.  

The Court in *Wagner*, in its reasoning concerning Article 8 ECHR, named several factors which contributed to its finding that the decision of the Luxembourg courts to deny recognition was not proportionate. It noted that full adoption has been recognized in an overwhelming majority of the European States. This is essentially an argument against giving the respondent Contracting Party a wide margin of appreciation. The Court also clearly emphasized the legitimate expectations of the applicants. The mother had the legitimate expectation that the Peruvian judgment – and thus the status acquired abroad – would be recognized in Luxembourg, as that had, in fact, been the practice until the mother attempted to do so. The impact of *Wagner* on the recognition and enforcement of foreign judgments determining a status may therefore largely depend on the extent to which the Court is willing to stretch its interpretation of the legitimate expectations of parties. This, in my opinion, does not necessarily mean that such a legitimate belief only exists in a case where recognition of a status acquired abroad is the current practice in a State, but there must at least be some reason to assume that recognition would be possible in order to invoke Article 8 ECHR. An individual must thus act ‘in good faith’.  

Another important element of the Court’s findings in *Wagner* concerns the fact that a status validly created in a foreign country may at a certain point become a ‘social reality’, as the Court puts it, which may consequently stand in the way of a denial of the recognition of such a foreign judgment. If one were to focus more on this aspect of the Court’s findings in *Wagner*, this may lead to many more occasions where a validly acquired status abroad will be able to

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981 Cf. Kinsch 2010 *supra* n. 885, at p. 266; Kinsch 2007b *supra* n. 976, at p. 815-818.
982 See Kinsch 2010 *supra* n. 885, at p. 266, who notes that the legitimate expectation in this case may have been unique in the sense that, according to this author, the civil registry in Luxembourg did not apply the law as it stood correctly.
984 The *Wagner* judgment has in this regard also been hailed as ‘an affirmation of the importance of the recognition of pre-existing family links, taking into consideration the best interest of the child, which should always predominate’ by Judge Berro-Lefevre in a contribution to the Joint Council of Europe and European Commission Conference Challenges in adoption procedures in Europe: Ensuring the best interests of the child. This conference was held in Strasbourg from 30 November 2009 until 1 December 2009. The report of the Conference may be found at the website of the Council of Europe: [http://www.coe.int/t/dghl/standardsetting/family/Adoption%20conference/Brochure%20conf%C3%A9rence%20Adoption_LR.pdf](http://www.coe.int/t/dghl/standardsetting/family/Adoption%20conference/Brochure%20conf%C3%A9rence%20Adoption_LR.pdf), visited November 2012.
circumvent traditional private international law rules regarding recognition / grounds for refusal, as it is easily imaginable that a status acquired abroad will attain such a status. The Court in this regard referred to the problems in the applicant’s day-to-day life caused by ignoring this ‘social reality’, but these are arguably the concerns of limping legal relationships generally. Finally, the Court also referenced the best interests of the child, which remain an important consideration for the Court in such cases.

Since its judgment in Wagner, the Court has had the opportunity to expand on its findings with regard to the obligation to recognize foreign family law judgments. In its admissibility decision in Mary Green and Ajad Farhat v. Malta\textsuperscript{985} the Court found the applicants’ invocation of Article 8 ECHR against the refusal by the Maltese authorities to register their marriage concluded in Libya to be manifestly ill-founded. The applicants were both Maltese nationals. In 1978 the first applicant, Mary Green, married Mr. X, a Maltese citizen, in accordance with the rites of the Catholic Church and Maltese law. In 1980 she went to Libya and converted to Islam. This had a consequence that her first marriage was deemed null and void. Later that year she married the second applicant in Libya in accordance with the rites of Islam. The applicants continued to live lawfully married in Libya for twenty years. In 2000 the couple returned to Malta to take care of the first applicant’s ailing father. Several attempts were made to register the second marriage, but the Public Registry and thereafter the Maltese courts refused, as, in short, the first applicant had failed to prove that the first marriage had been annulled (the applicant’s first husband had been unaware of any proceedings) and that her second marriage had not been polygamous, while she had also failed to establish that she was domiciled in Libya since she had retained her Maltese citizenship.

Before the Court in Strasbourg the applicants invoked Article 8 ECHR, and Article 8 ECHR taken in conjunction with Article 14 ECHR against the refusal to register the Libyan marriage, whereby the complaint with regard to Article 8 ECHR is of particular interest. The Court made short work of the invocation of Article 8 ECHR in this case. It found that even assuming that there had been an interference with Article 8 ECHR, there could be no breach of this Article.

\textsuperscript{985} Mary Green and Ajad Farhat v. Malta (dec.), no. 38797/07, 6 July 2010.
After setting out its general approach to interferences with Article 8 ECHR, the Court found that the authorities’ assessment that the applicant had not satisfied the legal requirements was not considered manifestly unreasonable. These legal requirements regarding the registration of marriages fell within the State’s margin of appreciation. In the circumstances, the Court could not find that the respondent Contracting Party had failed to strike a fair balance, given ‘the interests of the community in ensuring monogamous marriages’ and those of the third party directly involved, the first husband. The interference could thus be held to be necessary in a democratic society.

Even though the Court dismissed the invocation of Article 8 ECHR against the refusal to register a foreign family law judgment, it is not difficult to rhyme this decision with the Court’s judgment in Wagner. The Court also referred to its usual scheme with regard to restrictions under Article 8. While it does not really go into details, it is clear that in this case – just like it did extensively in Wagner – the Court goes back to whether a refusal is necessary in a democratic society. This requirement leaves room for a balancing of interests. In Green and Farhat the Court’s assessment of this requirement is simply different, which given the circumstances, is not hard to explain. Not only was Wagner concerned with a topic in which there was a European consensus, which has, of course, an impact on the margin of appreciation, but more importantly in Green and Farhat the interests of others played an important role, as the first applicant’s first husband was still alive and domiciled in Malta, and had been unaware of any proceedings concerning the annulment of his marriage.

Négrépontis-Giannissis adds another piece to the discussion on the obligation ex Article 8 ECHR to recognize (and enforce) foreign family law judgments. This case concerned the refusal of the Greek courts to recognize an American adoption order. The applicant, Nikolas Négrépontis-Giannissis, was a Greek national born in 1964, who resided in Greece. In the 1980s, when the applicant was studying, he lived with his uncle, an orthodox monk, in the United States. In 1984 the applicant and his uncle started proceedings in the United States for the uncle to adopt him. The uncle indicated that he wanted an adoption because the applicant would thus become his

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986 See supra ch. III.5.1.2.1.
legal heir. Later that year the adoption was pronounced by a court in Michigan. The following year the applicant returned to Greece. The applicant and his uncle visited each other on a regular basis. In 1996 the uncle returned to Greece, where he passed away two years later.

In the first instance the American adoption order was recognized in Greece and the adoption was declared to be final and legally enforceable in Greece in 1999. After this judgment the applicant initiated having his name changed, and was allowed to add his adoptive father’s surname, Négrépontis, to his original last name of Giannissis. The recognition of the adoption order resulted, however, in the applicant being the only legal heir, which was to the prejudice of the brother and sisters of the applicant’s uncle. The brother and sisters subsequently initiated proceedings challenging the recognition of the American adoption. This challenge was first denied, but it was overturned on appeal, as the appeal court found that monks were prohibited from carrying out legal acts relating to secular activities, such as adoption, because this was held to be incompatible with the monastic life and Greek *ordre public*. This decision was affirmed by the Greek Court of Cassation, which based the decision on canon law texts originating from the seventh and eighth century.

Before the Court in Strasbourg the applicant subsequently invoked Article 8 ECHR, Article 8 in conjunction with Article 14 ECHR, Article 6 (1) ECHR, and Article 1 of Protocol No. 1 ECHR against the Greek court’s refusal to recognize the American adoption order. The applicant alleged that the refusal by the Greek authorities to recognize his adoption in Greece and the obligation to change back his last name violated Article 8 ECHR. The Court first considered that it did not see any reason why the relationship between the applicant and his adoptive father would not fall under ‘family life’. The Court held that this case concerned two adults who were well aware of the consequences of the adoption procedure. Referring to its finding in *Wagner*, the Court thus found that the Greek authorities’ decision amounted to an interference of Article 8 ECHR.

In assessing whether this interference was justified, the Court first turned to the issue of whether the interference was ‘in accordance with the law’, as Article 8 (2) ECHR prescribes.988 The

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988 See further on the system of restrictions regarding Article 8 ECHR *supra* ch. III.5.1.2.1.
Court acknowledged that the highest Greek court had based its rejection of the adoption order on certain provisions of the Greek Civil Code, which in short entail that a foreign judgment can only be enforceable in Greece if it does not conflict with Greek public policy. However, in finding that an adoption by a monk violated Greek public policy, the Greek court had referred to certain ancient articles of an ecclesiastical nature which dated back to the seventh and eighth century. Moreover, the Court found that in 1982 legislation was passed in Greece that permitted monks to marry, and there was no legislation that expressly did not permit monks to adopt. The Court also took into consideration the fact that the adoption order was already in place for twenty-four years and that it had been the express wish of the adoptive father to have a legitimate son who could inherit his property. Taking all this into account, the Court ultimately held that the interference – the refusal to recognize the foreign order – did not amount to a pressing social need, which is a requirement in relation to necessity in a democratic society.\textsuperscript{989} Even if there had been a legitimate aim, the refusal to recognize the adoption order was disproportionate, as the refusal completely denied the adoptive son’s status. The Court thus found a violation of Article 8 ECHR.

Similar to its judgment in Wagner, the Court in Négrépontis did not only find a violation in respect of Article 8 ECHR. As to the applicant’s complaint that the Greek decision was discriminatory, because a biological child of his uncle could have maintained his inheritance rights invoking Article 8 ECHR taken in conjunction with Article 14 ECHR, the Court – referring to its earlier case law in this regard\textsuperscript{990} – found a violation, because the Greek authorities could not provide reasons that justified the difference in treatment.\textsuperscript{991}

It will, finally, be recalled that the Court in Négrépontis also found violations of both Article 6 (1) ECHR and Article 1 of Protocol No. 1 ECHR. With regard to Article 6 (1) ECHR the Court found that while it was, in principle, possible for the Greek courts to refuse to recognize a foreign adoption order where a foreign decision would violate public policy, the interpretation thereof cannot be made in an arbitrary and disproportionate manner.\textsuperscript{992} As the refusal to

\textsuperscript{989} See \textit{supra} ch. III.5.1.2.1. \\
\textsuperscript{990} See, particularly, \textit{Pla and Puncernau v. Andorra}, no. 69498/01, par. 61, ECHR 2004-VIII. \\
\textsuperscript{991} See \textit{Négrépontis-Giannisis v. Greece}, no. 56759/08, par. 77-84, particularly par. 82-84, 3 May 2011. \\
\textsuperscript{992} \textit{Négrépontis-Giannisis v. Greece}, no. 56759/08, par. 85-92, 3 May 2011. See also \textit{supra} VII.2.
recognize the foreign adoption order had consequences for the applicant’s ability to inherit from his adoptive father, the Court – referring also to its findings with regard to Article 8 ECHR – found that there had also been a violation of Article 1 of Protocol No. 1 ECHR.993

Négrépontis-Giannisis is mostly a confirmation of what the Court had previously held in Wagner, even though the Court does give some more insights into what the obligation to recognize foreign family law judgments under Article 8 ECHR exactly entails.994 Just like it had in Wagner, the Court in Négrépontis-Giannisis underscored the fact that the foreign judgment had been validly created abroad and that the relationship between the applicant and his adoptive father had become a social reality.995 It could also be noted that the Court attached weight to the fact that the adoption had been valid for twenty-four years. In determining whether the interference of Article 8 ECHR could be justified under Article 8 (2) ECHR the Court again, as it did in Wagner, grouped together a number of arguments before concluding that under the circumstances the reasoning used by the highest Greek court not to recognize the adoption did not amount to a pressing social need and that the non-recognition was disproportionate. Again, the particular circumstances of the case make it possible to interpret this judgment restrictively. After all, in its judgment the Court attached significant weight to the fact that the order had initially been declared legal, while it also criticized the peculiar use of the public policy exception.

It is interesting to further reflect on the fact the Court essentially rejected in casu the use of the public policy exception by the Greek courts, as the American adoption decree was ultimately rejected on the basis of the invocation of Greek public policy.996 Even though this may come across as a very important restriction of the leeway that Contracting Parties may claim with regard to the recognition of foreign family law judgments under their private international law regimes, one should not overstate this particular finding. The public policy exception was

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993 Négrépontis-Giannisis v. Greece, no. 56759/08, par. 93-105, 3 May 2011. See also supra VII.3.
995 Négrépontis-Giannisis v. Greece, no. 56759/08, par. 56 and 74, 3 May 2011 (citing Wagner and J.W.M.L. v. Luxembourg, no. 76240/01, par. 132-233, ECHR 2007-VII (extracts)).
996 See also supra n. 904.
invoked in this case by the Greek court because it was held that adoption by monks would violate public policy. However, as was also discussed above, this view was based on seventh and eighth century canon texts, while in 1982 a law had been passed allowing monks to marry. Moreover, there was no law prohibiting monks from adopting. It is not altogether surprising that given these circumstances, the Court did not condone the invocation of the public policy exception.

Nevertheless, it would go too far to regard the Court’s decision in this respect as a general indictment of the use of (substantive) public policy as a barrier to the recognition of foreign family law judgments. There may be limits to its use, as Négrépontis clearly demonstrates, but one should not lose sight of the fact that the construction of the public policy exception by the Greek courts was quite peculiar. What should also be clear is that the invocation of the public policy exception by the courts of the Contracting Parties with regard to the recognition and enforcement of foreign judgments must meet the requirements that the Court prescribes in relation to restrictions to the rights guaranteed in the ECHR. An invocation of the public policy exception must thus be proportional.

_Harroudj v. France_997 may, for now, be regarded as the Court’s final piece of the discussion on the obligation ex Article 8 ECHR to recognize (and enforce) foreign family law judgments. However this case should be distinguished from Wagner and Négrépontis-Giannisis because it does not concern the outright denial to recognize a foreign judgment, as the effects of the foreign judgments in this case were partly recognized.

The applicant was a French national who lived in France. In 2004 an Algerian court granted her the right, in accordance with Islamic law, to take into her legal care a child born in Algeria. This is known as _kafala_. The child had been abandoned at birth and her parents were unknown. The Algerian authorities granted legal authorization to change the child’s last name to Harroudj. The child was brought to France in 2004.

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997 _Harroudj v. France_, no. 43631/09, 4 October 2012.
In France, the applicant attempted to adopt the child, but this was denied by the French courts because the *kafala* gave the applicant parental authority over the child, which enabled her to take all the decisions in the child’s interests, while also giving the child all the protection to which it was entitled under international treaties. Moreover, French private international law rules regarding adoption point to the law of the country of origin of the child, Algerian law. Algerian law does not allow adoption. Under Islamic law it is not possible to create family bonds comparable to those created by biological filiation. The form of guardianship of *kafala* available in Algeria entails a voluntary undertaking to provide for a child and to take care of his or her welfare and education. In France *kafala* is regarded as a form of guardianship, or delegation of parental authority, which does not create family bonds, gives no right to inherit, and no (automatic) right for the child to acquire the nationality of the guardian.

It should be noted that contrary to the situation set out above, French law does authorize adoption governed by Islamic law if the minor was born and habitually resides in France. Finally, it is possible for a child who has been under the care of a French national, but who cannot be adopted due to his or her status under Islamic law, to apply for French citizenship if they have lived in France for at least five years. On appeal before the French *Cour de Cassation* the mother argued that adoption was in the best interests of the child and that the denial of the adoption resulted in a difference in treatment based on the child’s country of origin. The *Cour de Cassation* rejected these arguments by, *inter alia*, referring to the New York Convention on the Rights of the Child, in which *kafala* is explicitly acknowledged as protecting the child’s best interests in the same way as adoption.

Before the Court in Strasbourg the applicant, relying on Article 8 ECHR, argued that the refusal to acknowledge family bonds between her and the child amounted to a disproportionate interference of her right to family life. She also complained under Article 14 ECHR. Concurring with the French authorities, the Court first noted that the refusal to let the applicant adopt the child did not really amount to an interference with the applicant’s family life. The Court remarked that it was more appropriate to discuss the complaint through the lens of a positive
obligation. The Court further immediately distinguished Harroudj from Wagner, as in Harroudj the situation was merely limited to not equating a kafala with an adoption and referring to the personal law of the child for determining whether an adoption is possible, while in Wagner the Luxembourg courts had ignored a status created validly abroad in an unreasonable manner, thereby violating Article 8 ECHR.

With regard to a possible positive obligation under Article 8 ECHR the Court first observed that France enjoyed a wide margin of appreciation on this issue, as there is no consensus between the Contracting Parties on how to deal with kafala. While none of the Contracting Parties, according to the Court, treat kafala as being equal to adoption, the approaches vary as to whether the law of the country of origin of the child constitutes an obstacle to adoption. The Court further noted that, while the decision of France was in the first place based on the French law, it was also based on compliance with the New York Convention on the Rights of the Child, in which kafala is acknowledged as being on par with adoption.

The Court also observed that kafala was fully accepted in French law and produced effects similar to guardianship. Moreover, it was possible for the applicant to include the child in her will and to choose a legal guardian. The child had the possibility to acquire French nationality after a short time, after which it would even be possible for the child to be adopted, according to the Court. The Court concluded that the French authorities had struck a fair balance between the public interests and those of the applicant, thereby respecting cultural pluralism. In light of this finding with regard to Article 8 ECHR the Court deemed that no separate issue arose under Article 14 ECHR.

While the Court in both Wagner and Négrépontis-Giannis appears to instill a more recognition-friendly framework with regard to the recognition and enforcement of foreign family law judgments, resulting in greater scrutiny of grounds for refusal of recognition, it is interesting to

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998 See Harroudj v. France, no. 43631/09, par. 47, 4 October 2012. The Court, incidentally, noted earlier in its judgment that the principles regarding issues concerning a positive obligation under Article 8 (1) ECHR and a negative obligation under the same Article and the extent to which possible interferences are allowed under Article 8 (2) ECHR are similar. See Harroudj v. France, no. 43631/09, par. 43, 4 October 2012. The fact that the Court uses a similar approach to these two issues also follows from its findings in Wagner and J.M.W.L. v. Luxembourg, no. 76240/01, 28 June 2007 (see supra n. 969).

999 See Harroudj v. France, no. 43631/09, par. 22, 4 October 2012.
note that the Court in *Harroudj* did not find a violation of Article 8 ECHR. However, as noted above, this latter case did not concern the outright refusal to recognize a foreign judgment. Effect was given to the Algerian judgment in France, just not to the extent the applicant had in mind. The fact that some effect was given to the judgment appears to make a difference, in the Court’s view. Moreover, the resulting disadvantages of not being adopted could be remedied by the mother by other means. The fact that *kafala* is recognized in international treaties as being in the best interests of the child appears to have persuaded the Court that in this case no violation of Article 8 ECHR had occurred.

The Court’s judgment is thus understandable, even though the Court’s finding does lead to a difference of treatment in the name of cultural pluralism. Finally, the invocation of cultural pluralism by the Court in this case is interesting. In the previously discussed cases in this research this never really appeared to be a consideration of the Court, at least not explicitly so.\(^{1000}\) It will be interesting to see whether this consideration will be limited to this case, or whether the Court will move in a new direction.

There are some other, final issues that could be discussed with regard to the obligation to recognize foreign family law judgments following from Article 8 ECHR. One of these is whether the origin of the foreign family law judgments is relevant. One could note that in *Hussin* the foreign judgment originated from Germany, another Contracting Party, while *Wagner* and *Négrépontis-Giannisis* were, respectively, concerned with a Peruvian and an American judgment (two non-Contracting Parties). However, in my opinion, the origin of the judgment is irrelevant. At issue is, after all, whether the receiving Contracting Party violates the right to family life by not recognizing the foreign family law judgment. It is only relevant whether the status following from this family law judgment has been validly acquired abroad and whether the applicant had a legitimate expectation that the status would be recognized. The origin of that judgment, however, is in itself not relevant.

What is, finally, particularly relevant with regard to the obligation to recognize foreign family law judgments following from Article 8 ECHR is the additional component that the recognition
of such judgments may affect the rights of others – whose rights may also be protected under the same Article.\textsuperscript{1001} \textit{Green and Farhat} is a pertinent example.\textsuperscript{1002} In such cases there may be interests that override the interest of the recognition and enforcement of a foreign judgment. This was also demonstrated in the Court’s judgment in \textit{Pini and Others v. Romania} in relation to a competing obligation under Article 6 (1) ECHR.\textsuperscript{1003}

It will be recalled that \textit{Pini} concerned the complaint of two Italian couples about a violation of both Articles 8 and 6 ECHR due to the failure to execute decisions of a Romanian court regarding the adoption of two Romanian minors. Because of this failure, the applicants had been deprived of virtually all contact with the two children. The Court found a violation of Article 6 (1) ECHR.\textsuperscript{1004} With regard to the compliance with Article 8 ECHR the Court first reiterated that it had consistently held that the State’s obligation to take positive measures includes the parents’ right to measures facilitating the reunion with their children and the obligation of the State to take such action, although this obligation is not absolute, especially in the case in which parent(s) and child are strangers to each other.\textsuperscript{1005} Thus the decisive issue is whether the authorities took all the necessary steps to enable the applicants to establish family relations with the children they had adopted.

The Court held that the applicants could not enjoy absolute protection of Article 8 ECHR in this case, insofar as the children had a competing interest and that the children’s interests should prevail. While the Court stated that it deplored the manner in which the adoption proceedings were conducted, in particular the lack of genuine contact between the parties to the adoption, it could not justify under these circumstances imposing on the Romanian authorities an absolute obligation to ensure that the children would go to Italy against their will. The Court thus did not find a violation of Article 8 ECHR in this respect.

\textsuperscript{1001} The rights of others may also play a role with regard to the obligation to recognize and enforce under, respectively, Article 6 (1) ECHR and Article 1 of Protocol No. 1 ECHR, but this issue will be more prevalent with regard to Article 8 ECHR.
\textsuperscript{1002} See supra n. 985.
\textsuperscript{1003} \textit{Pini and Others v. Romania}, nos. 78028/01 and 78030/01, ECHR 2004-V (extracts).
\textsuperscript{1004} See supra VII.2.1.
\textsuperscript{1005} See \textit{Pini and Others v. Romania}, nos. 78028/01 and 78030/01, par. 149-151 with references to the Court’s established case law in this respect.
*Pini* is something of a curious case, because the Court reached opposite conclusions with regard to the obligation to recognize under Articles 6 (1) and 8 of the ECHR. It found a violation of Article 6 (1) ECHR, but no violation of Article 8 ECHR. The latter result is perfectly understandable because of the two competing interests – that of the applicants, the prospective parents, and the children, who preferred to stay in Romania. As has been discussed above, in the balancing of interests, the interests of others play an important part. This balancing act is included in the requirement of necessity in a democratic society in Article 8 (2) ECHR.

What remains difficult to understand, though, is how the Court could reach two opposite conclusions regarding Article 8 and Article 6 ECHR. If enforcing the final decisions would violate the rights of the children, how could the Court then still find a violation in respect of Article 6 (1) ECHR? The only thing that I could think of is that the Court wanted to make a statement with regard to the enforcement mechanism of the Romanian authorities, but even though such a signal may be important, it still leaves Romania with two competing obligations with which it could not have possibly complied simultaneously. It appears to follow from the Court’s case law that where the rights of third parties are directly concerned, the obligation to recognize and enforce would, in principle, have to take a back seat.

**4.1 The Obligation to Recognize and Enforce following from Article 8 ECHR**

What does the obligation to recognize foreign family law judgments exactly mean, particularly with regard to the traditional private international law rules on recognition and enforcement? It follows from the Court’s case law that Article 8 ECHR, in principle, entails an obligation to recognize foreign family law judgments in which a status is acquired, but that this obligation is not absolute. Therefore there is still room for private international law defenses against the recognition of foreign family law judgments. However, these must comply with the requirements following from Article 8 ECHR, which means that they must pursue a legitimate aim, have a basis in law, and be necessary in a democratic society. As we have seen before, the Court performs a balancing of interests, particularly in regard to this latter condition. In short, a decision to interfere with the obligation to recognize must be proportionate.

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1006 Cf. the Dissenting Opinion of Judge Thomassen joined by Judge Jungwiert in *Pini* (supra n. 906), who concludes that this is impossible. Incidentally, Judge Thomassen was of the opinion that in this case no family life existed between the applicants and the Romanian children.
How does the Court weigh all of this? It has been noted that the Court takes into account a number of factors. However, the extent of the obligation to enforce will largely depend on how the Court will further interpret in future cases the legitimate expectations of parties in relation to the social reality of a situation which is created by a foreign family law judgment. In particular, an emphasis on this notion of the legitimate expectation of parties may limit the extent of the obligation to recognize under Article 8 ECHR and prevent this obligation becoming a semi-automatic override of traditional private international law defenses. One could argue that in both Wagner (where the practice to recognize and enforce was in place, until the applicants attempted to have the adoption recognized) and Négrépontis (where the adoption was seemingly valid for twenty-four years) the parties had every reason to expect recognition of the status acquired abroad. It will be interesting to see what happens in the absence of such a strong presumption, where nevertheless the social reality created by the foreign judgment is hard to ignore.

In the balancing of interests with regard to the obligation to enforce, the protection of the rights of others appears to trump the obligation to recognize and enforce. Moreover, the best interests of the child is a transcending factor in the Court’s case law, which may either help in finding a failure to recognize and enforce (Wagner), or override an obligation to enforce (Pini).

Finally, it follows from the Court’s latest case on the obligation under Article 8 ECHR to recognize foreign family law judgments that a distinction should be made between the situation in which the recognition of a foreign family law judgment is refused and the situation in which some effect is given to such a judgment. One could argue that in the latter situation the scrutiny of the Court with regard to Article 8 ECHR will be less strict.

4.2 Jurisprudence of the National Courts of the Contracting Parties
There is not – yet – a lot of case law directly concerned with Article 8 ECHR and the obligation to recognize foreign family law judgments in the national case law of the Contracting Parties. The Court’s case law in this regard is still quite recent, and developing. One may nevertheless already discern an increasing role for Article 8 ECHR in relation to the recognition and enforcement of foreign family law judgments. It will furthermore be demonstrated that the Court’s case law concerning the obligation to recognize foreign family law judgments, in spite of
traditional private international law rules opposing recognition, is not an isolated event, as long before the Court’s findings in this regard the German Bundesverfassungsgericht had already decided such a case in a similar manner. Below, some relevant decisions of national courts will be examined.

The English case of Singh v Entry Clearance Officer (New Delhi), for example, concerned the issue of whether ‘family life’, as understood in Article 8 (1) ECHR, could be established between the appellant, a six year old Indian boy, and his adoptive parents, who were settled in the United Kingdom (UK). The Indian child had been adopted in India by an English couple of Indian descent in a Sikh religious ceremony. According to Indian law the adoption was valid and formally transferred parental rights from the natural parents to the adoptive parents. However, the adoption was not recognized by the UK. As a result of, inter alia, the non-recognition the child had been denied entry clearance to join his parents in the UK. However, it was held in this case that the relationship between the child and his adoptive parents was protected by Article 8 ECHR, while it was, incidentally, acknowledged that this situation had only come about because of the difference of views of what an adoption entails.

In another English case, Re N (Recognition of Foreign Adoption Order), the impact of Article 8 ECHR on the obligation to recognize foreign adoption orders was also visible, as it was held in this case that the Adoption and Children Act 2002 should be read differently in order to respect the rights guaranteed in this Article. In this case a British man adopted the child of his Armenian partner in Armenia. The Armenian birth certificate was changed in order to name the British man as the child’s father, but the name of the mother was also still on the certificate, which confirmed that the mother retained parental responsibility after the adoption. Upon relocation to England, the man sought a declaration before the courts recognizing the foreign adoption order. However, a literal interpretation of section 67 (3) of the Adoption and Children

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1007 See infra n. 1022.
1009 It is, incidentally, interesting to compare this case to the afore-mentioned case of the Commission, X and Y v. the United Kingdom, no. 7229/75, 15 December 1977. The facts in both cases are remarkably similar, yet the outcome is not. It demonstrates the development of the interpretation of Article 8 ECHR.
1010 See particularly [57] per Munby J.
1012 The Adoption and Children Act 2002.
Act 2002 would appear to result in the mother losing parental responsibility. This was held to be in violation of Article 8 ECHR and the best interests of the child and, given that an English court would be able to make an adoption order without such an effect, it was held that the relevant section of the Adoption and Children Act 2002 should be read differently.

Dutch jurisprudence offers a few scattered examples of Article 8 ECHR being invoked in order to have a foreign family law judgment recognized. With regard to the recognition of foreign documents establishing the civil status of a person, Article 8 ECHR has been unsuccessfully invoked, even though Dutch courts have recognized the relevance of Article 8 in these cases. Before the Gerechtshof Amsterdam, for example, a man from Afghanistan requested the municipality to register the death certificate of his wife. This death certificate, however, was deemed by the relevant Dutch authorities to be of questionable validity and the request was denied. The court in the first instance also rejected the man’s request, as the validity of the document could not be established. On appeal Article 8 ECHR was, inter alia, discussed. The appeal court held that the refusal to register the certificate would indeed stand in the way of the man marrying in the Netherlands, which would interfere with his private life. However according to the appeal court this interference was justified under Article 8 (2) ECHR. The registration of the certificate was therefore denied.

An example of a successful invocation of Article 8 ECHR can be found in a case before the district court in Haarlem concerning the recognition of a Chinese adoption order. The court recognized the adoption order on the basis of the criterion of the best interests of the child, which it basically derived from Article 8 ECHR.

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1013 Hof Amsterdam 6 March 2003, NIPR 2005, 305. See also Rechtbank ‘s-Gravenhage, 22 April 2004, NIPR 2005, 224, in which a Dutch court in a somewhat similar case found, regarding the registration of a wedding certificate of a marriage between a Dutch man and his Afghan wife, that the decision not to register such a document did not interfere with his rights under Article 8 ECHR.
In a fairly recent case the Swiss Tribunal fédéral has refused the recognition of a Brazilian adoption order on the basis of Article 78 (1) of the Swiss Private International Law Act.\textsuperscript{1016} The Tribunal fédéral concluded that as the adoption had been announced in Brazil in accordance with Brazilian law, the country of domicile at the time of the child, while the parents were at the time domiciled in Spain and had Swiss nationality, the requirements following from Article 78 of the Swiss Act had not been met.\textsuperscript{1017} The Swiss court held that Switzerland generally followed the principle of favor recognitionis and that, in principle, foreign adoptions are recognized. However, it held that the limitations following from the afore-mentioned Article were justified because the authorities of the State of domicile of the child are generally better qualified to examine whether the adoption corresponds with the best interests of the child and whether the prospective parents are able to take care of the child. As was indicated above, the child whose adoption had not been recognized has brought her case before the Court in Strasbourg, alleging violations of Article 8 ECHR and Article 8 in conjunction with Article 14 ECHR. The case is now pending.\textsuperscript{1018}

The cases discussed above could be cited as an acknowledgement by national courts of the Contracting Parties of an emerging obligation following from the Court’s case law regarding Article 8 ECHR for Contracting Parties to (more easily) recognize foreign family judgments in which a status is validly acquired abroad. A clear exception to this trend can be found in the decision of the Swiss Tribunal fédéral, which found that the non-recognition of a foreign adoption did not violate Article 8 ECHR.\textsuperscript{1019} This decision has, however, been criticized, as it has been contended that this judgment is similar to the Wagner case, in which, of course, a violation of, \textit{inter alia}, Article 8 ECHR was found.\textsuperscript{1020} The same author has even, in more general terms, argued that the Swiss rules of private international law regarding the recognition

\textsuperscript{1016} ATF 134 III 467, 470-475.
\textsuperscript{1017} Article 78 (1) of the Swiss Private International Law Act reads as follows: Adoptions made abroad shall be recognized in Switzerland provided that they were pronounced in the State of domicile or the State of nationality of the adopted person or adopting spouses (translation provided by the author).
\textsuperscript{1018} Michel v. Switzerland, no. 3235/09. The case was introduced on 22 December 2008. See the Statement of Facts of 20 September 2010.
\textsuperscript{1019} ATF 134 III 467, 470-475.
\textsuperscript{1020} A. Bucher, 20 RSDIE (2010), p. 203.
of foreign adoption orders ex Article 78 of the Swiss Private International Law Act may, under certain circumstances, lead to a violation of Article 8 ECHR. ¹⁰²¹

There are, in my opinion, some differences between the Court’s judgment in Wagner and the afore-mentioned decision of the Swiss Tribunal fédéral. It will therefore be interesting to see whether the obstacles to the recognition of the foreign adoption, as laid down in Article 78 of the Swiss Private International Law Act, and as applied by Tribunal fédéral, will pass the test of the Court. What makes this case different from Wagner is that the obstacle following from the Swiss Private International Law Act essentially concerns a jurisdiction test. One may recall that in Hussin the Court found that the applicant could not rely on Article 8 ECHR, because she could not complain about a situation to which she herself had contributed. It will be interesting to see whether the Court will focus once again on this aspect, which may become a hurdle in this case.

The Court could also go further down the path it chose in Wagner and also Négrépontis-Giannissis. However, while an emphasis on the ‘social reality’ of the situation could be regarded as an argument in favor of finding a violation of Article 8 ECHR in this case, one should also acknowledge that it cannot be said that the applicant really had a legitimate expectation that the adoption would be recognized, as the rules and practice with regard to the recognition of foreign adoption orders in Switzerland were clear. Moreover, as also acknowledged by the Court in Wagner, for example, there are, in principle, sound reasons for having stringent rules regarding the recognition of international adoptions. One could argue that the Swiss rules concerning the recognition of adoptions are particularly rigid, resulting in an undesirable outcome for the applicant in this specific case. However this is not a given, and a cautious approach by the Court in this case is certainly imaginable.

There have been other decisions that could be cited to support the thesis that a (family law) status has to be recognized where the parties (merely) had the legitimate expectation that their status would be recognized. Back in 1984, the German Bundesverfassungsgericht, for example, in the so-called Wallace case, found that a marriage concluded between an English military man and a

¹⁰²¹ But see K. Siehr on Art. 78, at no. 9, p. 778-779, in D. Girsberger, et al., eds., Zürcher Kommentar zum IPRG: Kommentar zum Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987 (Zürich, Schulthess 2004). This opinion was cited and followed by the Tribunal fédéral.
German woman in Germany, but on an English military site in accordance with English law, would have to be recognized, despite the fact this marriage had formally never been validly concluded in Germany.\footnote{Bundesverfassungsgericht 30 November 1982, IPrax 1984, p. 88ff.}

After their marriage the couple settled in Germany. After the death of her husband in 1975, the wife attempted to make a pension claim for surviving spouses. At that time it was held that they had never been validly married. Until that time, though, the German authorities had never questioned the validity of the marriage. The Bundesverfassungsgericht finally held that the marriage should nevertheless be considered valid, citing, inter alia, the good faith of the parties, the fact that the German authorities had never before questioned the validity of the marriage, and the fact that the marriage had been validly concluded with regard to English law. In doing so, the Bundesverfassungsgericht effectively ignored the German choice of law rules. It has been argued that the German Court thus emphasized the ‘social reality’ of the situation, a notion which has, as has been discussed above, since been introduced by the Court in order to justify the obligation following from Article 8 ECHR to recognize foreign family law judgments in which a status is validly acquired abroad.\footnote{R. Baratta, ‘La reconnaissance internationale des situations juridiques personnelles et familiales’, 348 Recueil des Cours (2010), p. 392. Cf. Wagner and Négrépontis-Giannisis v. Greece (cited above). See in the context of the protection of minority rights, Muñoz Diaz v. Spain, no. 49151/07, 8 December 2009, in which the Court found a violation of Article 1 of Protocol No. 1 ECHR taken in conjunction with Article 14 ECHR in a case with some remarkable similarities. This case also concerned a pension claim for surviving spouses. In this case the Spanish authorities refused to pay, because of an invalid marriage. The marriage had been concluded in Spain in accordance with Roma rites, but was never registered there. Nevertheless, the Court found a violation in this case.}

One could thus argue that the Court does not stand alone with its case law concerning Article 8 ECHR containing an obligation to recognize and enforce foreign family law judgments in which a status has been acquired. It will be very interesting to see to what extent Contracting Parties will be obliged to recognize foreign family law judgments in the future. One could imagine that the recognition of some foreign family law judgments could be quite controversial in some (or all) of the Contracting Parties – for example, surrogacy judgments\footnote{See in this regard, e.g., A.V.M. Struycken, ‘The Netherlands Surrogacy, a new way to become mother?’, in K. Boele-Woelki, et al., eds., Convergence and Divergence in Private International Law - Liber Amicorum Kurt Siehr} and judgments pertaining to same sex relationships.\footnote{1025}
How would the Court look at such judgments? If the ‘social reality’ which such judgments would undoubtedly create were to be emphasized by the Court, then there is a good case to be made that such judgments should be recognized, particularly where the rights of third parties do not play a role (and, admittedly, this could very well play a role, particularly with regard to surrogacy judgments). On the other hand it is also conceivable that the Court would find that parties could not have had a legitimate expectation, while it would also probably extend a wide margin of appreciation to the Contracting Parties with regard to such controversial judgments. After all, Contracting Parties have traditionally had a wide margin of appreciation in such cases. The social reality created by such international family law judgments may nevertheless eventually compel the Court to impose a more favorable view on the recognition of such judgments by the Contracting Parties. Although the extent of the Court’s case law with regard to the obligation to recognize foreign family law judgments is not yet entirely clear, it appears that there should at least be an increased willingness to look favorably at recognition in such issues.

4.3 Preliminary Conclusions

It follows from the Court’s case law that Article 8 ECHR clearly may entail an obligation for the Contracting Parties to recognize a foreign family law judgment granting a status or establishing a family relationship, provided that the judgment has been validly acquired abroad and that the parties had a legitimate expectation that the status established in the foreign family law judgment would be recognized. The Court will also take into account how a rejection relates to the social reality of the situation. Although it is clear that the Contracting Parties are not required to systematically recognize foreign family law judgments, it remains an open issue as to what sort of barriers erected in the shape of private international law rules of the Contracting Parties are permissible. What restrictions will be possible will be assessed in relation to the requirements of Article 8 (2) ECHR and will mainly be examined by the Court in relation to the proportionality of a restriction to the obligation to enforce.\textsuperscript{1026}

\textsuperscript{1023} See in this regard, e.g., \textit{Schalk and Kopf v. Austria}, no. 30141/04, 24 June 2010. \\
\textsuperscript{1025} See further with regard on the impact on specific private international requirements \textit{infra} VII.4.5.
5. Conclusion

Article 6 (1) ECHR, Article 1 of Protocol No. 1 ECHR, and Article 8 ECHR all entail an obligation for the courts of a Contracting Party to recognize and enforce foreign judgments, regardless of the origin of such judgments. Article 6 (1) ECHR contains a general obligation in the sense that this Article, in principle, can apply to all sorts of civil judgments. Article 1 of Protocol No.1 and Article 8 ECHR offer a more specific obligation in this regard, as Article 1 of Protocol No.1 ECHR is only concerned with judgments pertaining to some kind of possession, even though this may include a status as heir, while Article 8 ECHR is solely concerned with family law judgments creating a status.

The obligation to recognize and enforce is not absolute. The Court will generally assess a refusal to recognize and enforce a foreign judgment as an interference with one of the afore-mentioned rights. Even though the Court’s approach in this regard will differ somewhat depending on the exact right concerned, it has been demonstrated that the Court’s approach is quite similar. For the obligation following from Article 1 of Protocol No. 1 and Article 8 ECHR, the Court will usually apply its scheme with regard to restrictions to qualified rights, entailing that a restriction to the obligation to recognize and enforce must be in accordance with the law, pursue a legitimate aim, and be necessary in a democratic society. It has been demonstrated that the principle of proportionality plays an important role in the consideration regarding the permissibility of a restriction to the obligation to recognize and enforce foreign judgments.

In some cases concerning Article 8 ECHR the Court has found that the obligation to recognize foreign family law judgments concerns a positive obligation. The emphasis with regard to interferences to a positive obligation is on whether the restriction was proportionate to the legitimate aim pursued. A similar test applies to interferences with the general obligation to recognize and enforce foreign judgments following from Article 6 (1) ECHR. Restrictions under Article 6 (1) must not be arbitrary and must be proportionate to the legitimate aim pursued. In this test the principle of proportionality thus also plays an important role. The Contracting Parties enjoy a margin of appreciation in their assessment of whether a restriction to the obligation to recognize and enforce a foreign judgment is proportionate. The contours of the margin depend on the right guaranteed in the ECHR concerned.
What does all this mean for the private international law systems of the Contracting Parties with regard to the recognition and enforcement of foreign judgments? It has been discussed that England, the Netherlands, and Switzerland, like other countries, adhere more and more to favor recognitionis. This is partly due to international and European instruments, but the national rules of these legal orders also appear to be moving in this direction. This starting point, of course, fits perfectly with the obligation to recognize and enforce (foreign) judgments following from the ECHR. In the Netherlands, however, the official rule with regard to the enforcement of foreign judgments – in the absence of a treaty between the Netherlands and the country of origin of the foreign judgment – is that the judgment creditor, in principle, has to initiate new proceedings in the Netherlands, as enforcement is impossible. This starting point has been mitigated in legal practice. Nevertheless, one may question this starting point in light of the obligation to recognize and enforce.

However, the private international law regimes of States regarding the recognition and enforcement of foreign judgments do provide certain restrictions, depending on the applicable regime. For rules on recognition and enforcement one could say generally that foreign judgments will be recognized and enforced unless the foreign judgment would violate the public policy of the forum, the judgment is based on fraud, the court of origin did not have proper jurisdiction or did not apply the correct law, the judgment would be irreconcilable with other judgments in the forum state, or documents instituting the proceedings were not properly served.

It follows from the Court’s case law concerning the obligation to recognize and enforce foreign judgments that these grounds of refusal flowing from the private international law regimes of the Contracting Parties can only be allowed if they comply with the Court’s findings relating to the restrictions to the Articles concerned. The requirement of proportionality is especially important in this regard. A decision not to recognize and enforce must be proportionate to the legitimate aim pursued.

In principle, all the afore-mentioned private international law defenses may be found to provide an impermissible infringement on the obligation to recognize and enforce a foreign judgment.
This has to be decided on a case by case basis. In its case law the Court has, for example, found that the invocation of the substantive public policy exception may result in a violation of the ECHR where this invocation would be arbitrary and would not be proportionate. The choice of law requirement has similarly been found to result in a violation of the obligation to recognize and enforce.

However, the condition of fraud, or *fraude à la loi*, appears to be more or less unaffected, as the Court has held that the ECHR cannot be invoked against a situation to which the applicant has contributed him or herself. The Court has also allowed the invocation of a jurisdiction requirement against the recognition of a foreign judgment on the basis of this latter criterion, as it found that the applicant had contributed to the invocation of this requirement by bringing the case to the wrong court.

Moreover, other grounds of refusal, such as the service of documents or the irreconcilability of decisions, would appear to easily meet the demands of the ECHR with regard to the obligation to recognize and enforce foreign judgments, as the service of documents is essential in ensuring a fair trial, while the irreconcilability of decisions is vested in the rule of law, as a State cannot recognize and enforce two contrary judgments in the same case. It is important to stress that the obligation to recognize and enforce a foreign judgment cannot be upheld if the recognition and enforcement of the judgment in question would result in a violation of one of the rights guaranteed in the ECHR. A final important factor in the determination of whether a refusal to recognize and enforce a foreign judgment would result in a violation is that the rights of others are an important justification for the Court.

It should, finally, be underscored that foreign family law judgments in which a status has been created have a special place in this regard. Such foreign judgments (also) fall under Article 8 ECHR and as the Court has found in *Wagner* and *Négrépontis*, there is a high(er) threshold for the denial of recognition of international family law judgments establishing a family link where parties have a legitimate expectation that the judgment will be recognized and social reality demands recognition. Traditional concerns of private international law, laid down, respectively, in the requirement that the foreign adoption should be in accordance with the *lex fori* (*Wagner*),
and should not violate the public policy exception (Négrépontis), were set aside by the Court, as it held that such restrictions violated the applicants’ rights under Article 8 ECHR. It has been discussed that these findings may usher in a new methodology for private international law in this regard.

It would go too far, however, in my opinion, to speak of a new methodology for private international law in this regard, because in both Wagner and Négrépontis the facts of the cases make it possible for the Court to interpret its own findings in subsequent cases in a more narrow fashion, as the applicants in these cases had a legitimate expectation that the judgments would be recognized. Nevertheless, the Court’s jurisprudence in these cases is certainly a development towards an even more recognition-friendly framework for international foreign family law judgments. Even under such a framework with regard to Article 8 ECHR, an important ground of refusal would remain the rights of others, which may play an important role, particularly in international family law judgments, as, inter alia, follows from Green and Farhat. Moreover, where partial or sufficient effect is given to a foreign family law judgment, as was the case in Harroudj, the Court appears to be less inclined to find a violation of Article 8 ECHR.