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VIII. The Recognition and Enforcement of Foreign Judgments: The Invocation of the ECHR against Recognition and Enforcement

1. Introduction

In the previous chapter, the discussion was limited to the obligation to recognize and enforce foreign judgments, which follows from some of the rights guaranteed in the ECHR. However this does not mean that foreign judgments should always be recognized and enforced, regardless of the circumstances. Quite to the contrary, it is also possible to invoke the rights guaranteed in the ECHR against the recognition and enforcement of foreign judgments. There may even be an obligation for the Contracting Parties to deny recognition and enforcement of foreign judgments violating one of the rights guaranteed in the ECHR. Below, it will be demonstrated that both Article 6 (1) ECHR (in 2), as well as the substantive rights guaranteed in the ECHR (3), may stand in the way of recognition and enforcement.

2. The Invocation of Article 6 (1) ECHR against Recognition and Enforcement

The Court’s case law concerning the question of whether the ECHR contains an obligation to oppose the recognition and enforcement of foreign judgments goes back further than its jurisprudence concerning the obligation to recognize and enforce, even though this has not necessarily resulted in the former having crystallized. This will be demonstrated in the discussion of the Court’s case law concerning Article 6 (1) ECHR.

In Pellegrini v. Italy the Court examined whether the enforcement of a foreign judgment originating from the Vatican regarding the annulment of a marriage would violate Article 6 (1) ECHR, as the proceedings leading up to the judgment in the Vatican had been unfair. This case has already been discussed briefly in this research with regard to the issue of the extra-territorial effects of the ECHR. The applicant alleged that she had not received a fair trial before the

1027 See for an introduction into the recognition and enforcement of foreign judgments supra ch. VII.1. See further supra ch. II.
1028 Pellegrini v. Italy, no. 30882/96, ECHR 2001-VIII.
1029 See supra ch. IV.2.4.2.2.
courts in the Vatican and that the subsequent enforcement of this judgment in Italy violated her rights under Article 6 ECHR.

In 1962 Mrs. Pellegrini married Mr. Gigliozzi in a religious ceremony, which was also valid under the law. In 1987 Mrs. Pellegrini filed for a divorce in Italy. Her petition was granted and her husband was ordered to pay her maintenance. In the meantime, also in 1987, Mr. Gigliozzi sought to have the marriage annulled at a court of the Catholic Church on the ground of consanguinity (on account of his father and her mother being cousins). Mrs. Pellegrini was subsequently summoned to appear before an Ecclesiastical Court to answer some questions about her marriage. She went alone, unaware of the reason why she had been summoned, and had to answer questions about her consanguineous relationship with her husband. The Ecclesiastical Court consequently annulled the marriage on the ground of consanguinity.

Mrs. Pellegrini lodged an appeal against this decision with the ‘Romana Rota’. She complained that she had not been told in advance what the hearing would be about. She had therefore been unable to prepare a defense and had also not been able to seek the advice of a lawyer. Her appeal was declared admissible and she was told that she had twenty days to submit her observations. She did that – still without the assistance of a lawyer – complaining, inter alia, that she neither had enough time nor the facilities to prepare her defense. She also stressed the fact that an annulment would have serious financial consequences. Nevertheless, her appeal was dismissed.

Later, Mrs. Pellegrini was informed by the ‘Romana Rota’ that its judgment had been referred to the Florence Court of Appeal for a declaration of enforcement in Italy. Although in these Italian enforcement proceedings Mrs. Pellegrini again complained about the lack of a fair hearing, the Vatican judgment was declared enforceable in Italy.

Mrs. Pellegrini lodged a complaint against Italy in Strasbourg about a violation of her rights guaranteed in Article 6 (1) ECHR. The Court first noted that its task was not to examine whether the proceedings before the Vatican courts were contrary to Article 6 ECHR, as the Vatican is not a Contracting Party, but rather that its task was to examine whether the Italian courts had duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6 ECHR. The Court added that such a review is required when the enforcement is requested of a judgment
emanating from a country that does not apply the ECHR. After examining the reasoning of the Italian courts, the Court held that they had breached their duty to examine whether the proceedings met the standards of Article 6 ECHR and consequently found a violation of Article 6 (1) ECHR.

In *Pellegrini* the Court thus found that Article 6 (1) ECHR stands in the way of the recognition and enforcement of a foreign judgment emanating from a third country violating the procedural safeguards guaranteed in this Article. However the exact meaning of this judgment is still unclear, particularly because the Court in later judgments has appeared to somewhat distance itself from its findings in this case. This judgment has been much discussed because it has several noteworthy aspects.\(^{1030}\) The Court expressly treated the judgment emanating from the Vatican courts as a judgment from a country that does not apply the ECHR, even though it is questionable whether this is completely justifiable.\(^{1031}\) This raises the question of whether the origin of the foreign judgment – the judgment can either originate from a third country or from another Contracting Party – has consequences for the (standard of) control with regard to Article 6 (1) ECHR.

The Court seems to introduce quite a strict standard with regard to foreign proceedings, as it makes no mention of an attenuated standard – taking into account the fact that the proceedings took place in a third country – which it had done in other cases concerning the right to a fair trial in relation to third countries.\(^{1032}\) Instead, the Court thus appears to insist on full compliance with the procedural standards of the ECHR, as if the proceedings had taken place in Italy rather than

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\(^{1032}\) See *infra* n. 1035
in a State which has not ratified the ECHR. However, as noted above, subsequent judgments of the Court have raised doubts as to the meaning of Pellegrini in this regard.

The confusion over the meaning of Pellegrini may even be traced back to a judgment delivered a mere eight days before the Court handed down its judgment in the Pellegrini case. On that day the Grand Chamber of the Court delivered a judgment in Prince Hans-Adam II of Liechtenstein v. Germany, in which it was indirectly concerned with the enforcement of a foreign judgment. In this case the Grand Chamber appeared to offer a different – less strict – standard with regard to the enforcement of foreign judgments by referring to case law in which a different standard was suggested. It has to be stressed that in Prince Hans-Adam II the Court did not directly deal with the question of the enforcement of a foreign judgment, although the issue did play a significant role in the case.

In Prince Hans-Adam II the applicant, the ruler of Liechtenstein, complained about the right of access to a court and the right to property (Article 6 and Article 1 of Protocol No. I ECHR). The applicant’s father had been the owner of a painting by Pieter van Laer, which had formed part of his family’s art collection since at least 1767. It was displayed in one of the family’s castles in Czechoslovakia. After the Second World War the painting was seized under the so-called ‘Benes Decrees’. The father complained about this seizure, since this decree was only directed at the property of ‘German and Hungarian persons and of those having committed treason and acted as enemies of the Czech and Slovak people’, and he was not a German national. In 1951, however, the Bratislava Administrative Court (in Czechoslovakia) dismissed the appeal lodged by the father.

Forty years later the painting was lent to the municipality of Cologne by the Brno Historical Monuments Office. The applicant requested and received an interim injunction ordering the municipality of Cologne to hand over the painting to a bailiff at the end of the exhibition, pending the dispute over the property rights. The German courts, however, eventually rejected the claims of Prince Hans-Adam II regarding the painting on the basis of the Convention on the

1033 It will be recalled that it has been discussed in ch. IV that the ECHR is indeed applicable to the issue of the recognition and enforcement of foreign judgments emanating from third countries. See supra ch. IV.3.

1034 Prince Hans-Adam II of Liechtenstein v. Germany [GC], no. 42527/98, ECHR 2001-VIII.
Settlement of Matters Arising out of the War and the Occupation of 1954, which excluded German jurisdiction over this case.

The Court in Strasbourg rejected the applicant’s complaint about his right of access to a court, because it found that the exclusion of German jurisdiction was not unreasonable, given the particular status of the Federal Republic of Germany under public international law after the Second World War. In its judgment, however, the Court also had to consider the effect of the judgment of the Bratislava Administrative Court in Germany. This led to the following observation of the Court:

‘[T]he Court observes that the German courts were not required to assess whether the standard of the Bratislava Administrative Court proceedings resulting in the decision of November 1951 was adequate, in particular if seen against the procedural safeguards of the Convention (see, *mutatis mutandis*, *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, p. 34, § 110).’

It is this reference to *Drozd and Janousek v. France and Spain*, in the context of the effect of the foreign judgment in Germany, which has been seized upon by some authors to argue that a different standard with regard to the enforcement of foreign judgments is – or perhaps should be – used by the Court for the enforcement of foreign judgments emanating from third countries.

In *Drozd and Janousek* the Court dealt, *inter alia*, with the issue of the enforcement of an Andorran criminal law judgment by France and Spain. At the time Andorra was not yet a Contracting Party. In deciding whether these two countries could be held responsible for the allegedly unfair proceedings leading up to the judgments that were to be enforced, the Court held that Contracting Parties, in principle, were not required to impose their standards on third countries and that there was thus no obligation to verify whether the proceedings in Andorra were in line with Article 6 ECHR. Such an obligation would also seriously frustrate international co-operation in administrative justice, according to the Court. However, with a reference to the

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1035 *Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, par. 64, ECHR 2001-VIII.
1037 See, e.g., Kinsch 2004 *supra* n. 1031, at p. 224ff. It will, incidentally, be recalled that *Drozd and Janousek* was the source of inspiration for many writers with regard to a possible attenuation of the standards of the ECHR in issues of private international law. See *supra* ch. VI.3.2.
1038 See with regard to this case also *supra* ch. IV.2.4.2.2 and ch. VI.3.2.
standard introduced earlier in _Soering v. the United Kingdom_, the Court held that Contracting Parties are obliged to refuse co-operation ‘if it emerges that the conviction is the result of a flagrant denial of justice’. In these two cases the Court thus introduced the standard of ‘a flagrant denial of justice’. However, despite the reference to this case in _Prince Hans-Adam II_ with regard to the enforcement of a foreign judgment, no mention of such a standard was made by the Court in _Pellegrini_, which similarly concerned the enforcement of a foreign judgment originating from a third country.

One could say that it was certainly a surprise that this attenuated standard of ‘a flagrant denial of justice’ did not return in the Court’s ruling in _Pellegrini_. It raises the question of whether it is, from now on, necessary to examine foreign judgments as if they had not been delivered in a foreign country. This is, of course, the unavoidable consequence of such an interpretation, which is seemingly hard to reconcile with the earlier held standard of control which called for action only in the case of ‘a flagrant denial of justice’. Initially, _Pellegrini_ was met approvingly and hailed as an important judgment. It has since, however, been suggested by the Court that _Pellegrini_ is not much of a departure from its previous case law. Some authors have consequently argued that _Pellegrini_ should be read together with the Court’s decision in _Drozd and Janousek_ and that it is clear from the Court’s later cases that it prefers the standard of ‘a flagrant denial of justice’ with regard to judgments emanating from third countries.

1039 _Soering v. the United Kingdom_, 7 July 1989, par. 113, Series A no. 161. See with regard to this case also _supra_ ch. IV.2.4.2.2.
1040 See _Drozd and Janousek v. France and Spain_, 26 June 1992, par. 110, Series A, no. 240 (referring to _Soering_).
1042 _Costa supra_ n. 1030, at p. 470ff; Flauss _supra_ n. 1041, at p. 1064.
1043 See _infra_ n. 1047.
One of these instances where the Court suggested that *Pellegrini* fits in with its previous case law is its admissibility decision in *Lindberg v. Sweden*. In this case the Court again had the opportunity to examine the enforcement of a foreign judgment, although this time in altogether different circumstances, because the case did not concern the procedural guarantees of Article 6 (1) ECHR, but rather one of the substantive rights guaranteed in the ECHR, and the judgment originated from another Contracting Party instead of a third country. Nevertheless, the Court, in reiterating its previous case law regarding the enforcement of foreign judgments (and Article 6 ECHR), found that:

‘Comparable issues have previously been examined in the context of co-operation between States inside and outside the Convention territory, notably in the plenary *Drozd and Janousek v. France and Spain* judgment of 26 June 1992 (Series A no. 240) and the *Iribarne Pérez v. France* judgment of 24 October 1995 (Series A no. 325-B). Both cases concerned complaints about the enforcement in a Contracting State of a judgment by a court of a non-Contracting State (in Andorra - before joining the Council of Europe) reached in proceedings claimed to be at variance with due process. The Court attached decisive weight to whether the impugned conviction was the result of a “flagrant denial of justice” (see *Drozd and Janousek*, § 110; and *Iribarne Pérez*, § 31; see also *Pellegrini v. Italy*, no. 30882/96, ECHR 2001-VIII, even though no express mention was made of the said criterion in that judgment).’

Even though the Court acknowledged that no express mention was made of the criterion of a ‘flagrant denial of justice’, it could be argued that the Court here suggests that its judgment in *Pellegrini* does not differ significantly from the other mentioned cases.

However, in another case *post Pellegrini*, concerning the enforcement of a return order in an international child abduction case, *Eskinazi and Chelouche v. Turkey*, the Court once more had the opportunity to further comment on the meaning of *Pellegrini*. In this case the mother, having both French and Turkish nationalities, complained on the basis of both Articles 6 and 8 ECHR against the enforcement of a judgment made by the Turkish courts on the basis of the Hague Child Abduction Convention ordering the return of her daughter to Israel (not a Contracting Party).

Invoking Article 6 ECHR, the mother argued that if her daughter were to return to Israel, the rabbinical courts would have jurisdiction over both the divorce and all matters pertaining to

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1046 This case will be discussed in more detail *infra* VIII.3.1.
1047 See *Lindberg v. Sweden* under ‘The court’s assessment’.
1048 *Eskinazi and Chelouche v. Turkey* (dec.), no. 14600/05, ECHR 2005-XIII (extracts). See also *supra* ch. V.4.3.3.
personal status, which would result in an unfair trial – the supervision over these courts by the Israeli Supreme Court (not a religious court) would be insufficient to prevent this. She further argued that she would miss the benefit of fair proceedings in the Turkish courts to which she had duly committed herself before her husband had started any proceedings.

With regard to this complaint the Court noted that it had previously held in Pellegrini that where the courts of one of the Contracting Parties are forced to enforce a judicial decision originating from a third country, these courts should duly satisfy themselves that the proceedings in that country are in line with the guarantees contained in Article 6 ECHR. However, in Eskinazi and Chelouche the complaint concerned the possible – future – treatment in the Israeli courts. The Court felt that the test in this case, where the applicants’ interests had not yet been decided by the Israeli courts (courts in a non-Contracting Party), should be whether ‘the Turkish authorities had to lend their assistance with Caroline Chelouche’s [the second applicant, the child] return unless objective factors caused them to fear that the child and, if applicable, her mother risked suffering a “flagrant denial of justice”’. The Court added, though, that a ‘denial of justice’ is prohibited by international law and that Turkey should thus make sure that this principle was respected with regard to its international commitments to Israel.

It is interesting that in this case the Court appears to distinguish between the test with respect to the recognition and enforcement of judgments originating from third countries and the test with regard to proceedings in a third country that have yet to take place. In Pellegrini the Court was concerned with a judgment (allegedly) violating Article 6 (1) ECHR that had already been rendered in a third country and, consequently, only had to be enforced in one of the Contracting Parties. In Eskinazi and Chelouche, however, the Court was occupied with a complaint about proceedings that had yet to take place. With regard to such proceedings the Court thus opts for its ‘flagrant denial of justice’ standard.

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1049 See Eskinazi and Chelouche v. Turkey (dec.), no. 14600/05, ECHR 2005-XIII (extracts) under C.
1050 Id. The Court cited the following case law to support its observation: Mamakulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, par. 88, ECHR 2005-I; Einhorn v. France (dec.), no. 71555/01, ECHR 2001-XI; Drozd and Janousek v. France and Spain, judgment of 26 June 1992, par. 110, Series A no. 240, par. 110; and Soering v. the United Kingdom, judgment of 7 July 1989, par. 113, Series A no. 161.
1051 The Court referred to Golder v. the United Kingdom, judgment of 21 February 1975, par. 35, Series A no. 18. See with regard to this case supra ch. V.4.1.1-4.1.2.
This scenario is markedly different from that in *Pellegrini*. The fact, though, that the Court makes this distinction between the two standards in this case could be cited as evidence that there is indeed a distinction between the two tests; otherwise the Court could have observed that the standards were similar, but it did not do so.\(^{1052}\)

Finally, one may deduce from the Court’s admissibility in *Saccoccia v. Austria*\(^ {1053}\) that the Court is aware of the competing standards,\(^ {1054}\) as it first notes *Drozd* and thereafter explicitly refers to its ‘subsequent’ jurisprudence in *Pellegrini*, before observing that ‘in the present case the Court is not called upon to decide in the abstract which level of review was required from a Convention point of view.’\(^ {1055}\) Thus the Court is clearly familiar with the fact that it has created uncertainty with regard to the correct level of review for foreign judgments originating from third countries.

2.1 The Standard of Control following from Article 6 (1) ECHR with regard to the Recognition and Enforcement of Foreign Judgments

What does the choice between the two standards discussed above entail? It has been presented as a choice between ‘the optimal standard’, insisting on full compliance with all the rights guaranteed in the ECHR, and the ‘minimal standard’ (an attenuated standard), insisting on merely the essential guarantees of a fair trial with regard to the recognition and enforcement of a foreign judgment.\(^ {1056}\) It should be clear that even if one were to introduce an attenuated standard, it should not be possible to go below this minimal standard, as the ECHR contains certain minimum guarantees.\(^ {1057}\) It is also important to keep in mind in the discussion of these standards what the goal of the protection of procedural safeguards is in the context of the recognition and enforcement of foreign judgments. The goal is to avoid giving effect to foreign judgments rendered in a manner which is so unfair that the eventual result – the (substantive) judgment – can no longer be trusted.\(^ {1058}\)

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\(^{1052}\) But see Bucher 2011a *supra* n. 1044, at p. 305.

\(^{1053}\) *Saccoccia v. Austria* (dec.), no. 69917/01, 5 July 2011.

\(^{1054}\) Spielmann *supra* n. 1041, at p. 769.

\(^{1055}\) *Saccoccia v. Austria* (dec.), no. 69917/01, 5 July 2011. See under 2.

\(^{1056}\) Kinsch 2007 *supra* n. 1041, at p. 292.

\(^{1057}\) See generally *supra* ch. III.

There are a number of arguments in favor of introducing a less strict standard with regard to foreign judgments compared to domestic judgments. First, where foreign judgments originate from third countries, i.e. non-Contracting Parties, there is a good chance that the procedure leading up to that judgment is not precisely in line with the requirements following from Article 6 ECHR. The State of origin of the judgment has, after all, never signed the ECHR and is thus not obligated to adhere to its requirements, including the procedural safeguards following from Article 6 ECHR. Can one thus consequently ask these judgments to be precisely compatible with the standards of Article 6 ECHR – on penalty of the judgment not being recognized and enforced? This may be a problematic proposition, as it could lead to an increase in the rejection of the enforcement of foreign judgments.

This, of course, does not mean that any judgment falling short of the standards set in Article 6 (1) of the ECHR would be recognized and enforced. This is where the afore-mentioned standard of ‘a flagrant denial of justice’ would come in. If the foreign judgment were to fall short of this more lenient standard, and thus flagrantly violate Article 6 (1) ECHR, then it cannot be recognized and enforced. It is instructive here to refer back to the concurring opinion of Judge Matscher in Drozd and Janousek. He found that a Contracting Party may indeed incur responsibility for allowing the recognition and enforcement of a foreign judgment (originating from a third country), regardless of whether the judgment in question was a civil or a criminal law judgment. However, he added the following to this observation:

‘This must clearly be a flagrant breach of Article 6 [ECHR] or, to put it differently, Article 6 [ECHR] has in its indirect applicability only a reduced effect, less than that which it would have if directly applicable (the theory of the “reduced effect” of ordre public with reference to the recognition of foreign judgments or other public acts is well known to international law).’

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1060 See also supra ch. IV.2.4.2.2.

1061 Concurring Opinion by Judge Matscher in Drozd and Janousek. It is, however, interesting to note that the reduced effect of public policy is restricted to substantive public policy and not to procedural public policy for the simple reason that, while the law applicable to a case may be a foreign law, the procedural rules are always governed by the lex fori. See Kinsch 2007 supra n. 1041, at p. 293. He notes that this is an issue of terminology and that it is not impossible to attenuate the requirements of a fair trial with regard to the recognition and enforcement of foreign judgments.
Judge Matscher thus clearly favors a reduced effect of Article 6 (1) ECHR with regard to situations in which the ECHR is only indirectly applicable, as is the case when recognizing and enforcing foreign judgments emanating from third countries. It should be stressed that the refusal to recognize and enforce foreign judgments is not without consequences – it may ultimately lead to a difference between legal situations in two countries, which is something that should not be allowed readily. If courts are too eager to fend off foreign judgments, this will undoubtedly lead to injustices for individuals, and may also lead to problems for States party to international instruments regarding the recognition and enforcement of foreign judgments. Moreover, it has also been demonstrated above that in some cases the refusal may even lead to a violation of one of the rights guaranteed in the ECHR. However, with respect to this last argument, one should note that it appears, in principle, difficult to argue that there would be an obligation for Contracting Parties to recognize and enforce a foreign judgment violating Article 6 (1) ECHR.

There are also arguments to be made in favor of insisting on full compliance with the standards of Article 6 (1) ECHR, as the Court did in Pellegrini. By either recognizing or enforcing a foreign judgment of a third country, a State gives effect to such a judgment within its territory. In the event of the recognition or enforcement of a foreign judgment violating Article 6 (1) ECHR, it would thus be a court of one of the Contracting Parties that would ultimately breach Article 6 (1) ECHR by giving effect in the forum to such a judgment. One may refer to this as an indirect breach, as Judge Matscher did, but this may be a bit of a misnomer. It is, of course, clear that the court of the receiving State is not responsible in the first place for a fair trial in other countries. That is for the court of origin of the judgment. However, be that as it may, once the receiving court allows the recognition or enforcement of this foreign judgment that violates the rights guaranteed in Article 6 (1) ECHR, one could argue that it takes ownership of that violation and makes the violation its own. After all, by recognizing and enforcing a foreign judgment a State gives effect to such a judgment in the forum – an effect it previously did not have. If that is the case, how fair would it be to the injured party to use a different standard with regard to Article 6

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1062 Then again, many such instruments would probably include a (procedural) public policy exception, which would make it possible for such States to deny recognition to foreign judgments violating Article 6 (1) ECHR. See supra VII.1. In the event that such an international treaty would not contain a public policy exception, one would, incidentally, be faced with the complicated situation of two conflicting international obligations. See supra ch. III.3.1.
(1) ECHR because of the fact that the proceedings concern a foreign judgment from a third State? Once this judgment has been recognized or enforced, the effect of such a judgment is essentially equal to that of a domestic judgment or a foreign judgment from another Contracting Party.

If one were to uphold the Court’s line of reasoning in *Pellegrini* these difficulties would be avoided, because the courts would be obligated to scrutinize the foreign judgment in question in full – without having regard to the foreign nature of the judgment. Another issue concerning deviation from the regular standard of Article 6 (1) ECHR is that one could easily argue that Article 6 (1) ECHR already contains some sort of minimal guarantee for the Contracting Parties, which, considering the background of the ECHR, is not an argument that is easily dismissed.1063

A final argument against the use of the standard of ‘a flagrant denial of justice’ concerns the substance of this standard.1064 What makes a violation of Article 6 (1) ECHR so ‘flagrant’ that it cannot be tolerated with regard to a foreign judgment emanating from a third country? Even though the Court has in many instances used the phrase ‘a flagrant denial of justice’, it has never described what this notion exactly means.1065 However, if one were to take *Drozd and Janousek* as a starting point, one could question the usefulness of this criterion.

It will be recalled that *Drozd and Janousek* concerned (criminal) proceedings in Andorra.1066 These proceedings were far from perfect. After having been found guilty, the only appeal open to the applicants was an appeal to the same judges to reconsider their earlier ruling. A final – new – appeal procedure, although officially published in Andorra, appears not to have been

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1063 Kinsch 2007 *supra* n. 1041, at p. 292; H. Muir Watt, 94 *Rev.crit.dr.int.priv.* (2005), p. 321 (note on *Montgomery*: see with regard to a discussion of this case *infra* VII.5.2.2. See, for the background, the position of the ECHR in the legal orders of the Contracting Parties *supra* ch. III.3.)


1065 See in this regard also par. 14 of the joint partly dissenting opinion of Judges Bratza, Bonello, and Hedigan in *Mamatkulov and Askarov v. Turkey [GC]*, nos. 46827/99 and 46951/99, ECHR 2005-I, in which the following is, *inter alia*, stated: ‘What constitutes a “flagrant” denial of justice has not been fully explained in the Court's jurisprudence, but the use of the adjective is clearly intended to impose a stringent test of unfairness going beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself.’

1066 See *supra* n. 1036.
communicated to the applicants.\textsuperscript{1067} They further alleged that the French judge on the Andorran court spoke little Spanish and even less Catalan, the language in which the proceeding was conducted and in which the judgment was delivered. The French authorities denied this allegation, stating that sufficient language skills were one of the requirements for the appointment of a judge in Andorra. The Spanish authorities added that a large part of the proceedings were usually conducted in either Spanish or French, depending on the defendants’ language skills (in this case Drozd and Janousek both spoke Spanish), and that the applicants had at no point requested the assistance of an interpreter. The applicants also claimed that the witnesses had not been isolated before giving testimony, but this was denied by both governments.

It is hard to argue, given this description of the procedure in Andorra, that the proceedings were not deficient. They certainly did not live up to the standards guaranteed in Article 6 (1) ECHR. Apparently, though, the deficiencies in these proceedings were not quite so bad that they constituted ‘a flagrant denial of justice’. It is, in my opinion, not easy to reconcile the fact that the proceedings in \textit{Drozd and Janousek} did not amount to ‘a flagrant denial of justice’ with the Court’s findings in \textit{Pellegrini}.\textsuperscript{1068} The proceedings in both cases showed remarkable deficiencies. The comparison between these two cases may not be entirely fair, in the sense that in \textit{Drozd and Janousek} some of the facts were disputed, while this was not the case in \textit{Pellegrini}. Moreover, one could say that \textit{Drozd and Janousek} is a much older case and that the standards of the Court may thus have changed.\textsuperscript{1069} Nevertheless, if the proceedings with which \textit{Drozd} was concerned did not amount to ‘a flagrant denial of justice’, one has to conclude that a violation of one’s procedural rights in foreign proceedings is not easily categorised as being ‘flagrant’.\textsuperscript{1070}

\textsuperscript{1067} \textit{Drozd and Janousek v. France and Spain}, judgment of 26 June 1992, par. 18, 20, Series A no. 240.
\textsuperscript{1068} See a description of the proceedings in \textit{Pellegrini supra} n. 1028.
\textsuperscript{1069} Although that would make one wonder why the Court keeps referring back to this case without further comment.
\textsuperscript{1070} It should, incidentally, be noted that this argument has conversely been used in order to argue that the test used by the Court in \textit{Pellegrini} should also be read as including the flagrant standard. This has, as discussed above, arguably retroactively also been contended by the Court in \textit{Lindberg}. See Marchadier 2007 \textit{supra} n. 1044, at p. 454-455. However, even though the Court appears to support this argument, the question remains – how it is possible that the proceedings in \textit{Drozd} did not result in a flagrant violation, while the proceedings in \textit{Pellegrini} did? In my opinion, it is difficult to rhyme these divergent results.
Pellegrini, in principle, leaves open the question of whether this standard also applies to foreign judgments originating from another Contracting Party. The Court in Pellegrini explicitly notes, with regard to the review Contracting Parties have to perform, that this review ‘is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention.’ This statement thus appears to entail an obligation to do so – at least with regard to judgments originating from courts of non-Contracting Parties.

Some authors have argued that this finding of the Court should be interpreted as meaning that there is no such obligation for foreign judgments originating from other Contracting Parties. While it would, of course, be possible to review foreign judgments emanating from other Contracting Parties, there would not be an obligation to do so, because the Contracting Parties rendering such judgments could be held directly responsible before the Court in Strasbourg. Other authors, however, do not share this interpretation and to a greater or lesser extent find that the review following from Pellegrini regarding foreign judgments of third countries should also apply to foreign judgments originating from other Contracting Parties.

While the Court has, in my opinion, left this question unanswered, I would argue that the standard of full compliance set in Pellegrini should certainly apply to foreign judgments emanating from other Contracting Parties. It is clear that the procedural safeguards of Article 6 (1) ECHR should already be protected in other Contracting Parties, but this does not always happen. The argument that possible violations of these safeguards should be directly dealt with within the Contracting Party, where these proceedings took place is, in principle, valid, but holds less sway with regard to violations of Article 6 (1) ECHR. One could, for example, not learn of proceedings in another Contracting Party in the event of inadequate notification, until

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1071 Cf. Spielmann supra n. 1041, at p. 767-768.
1072 Pellegrini v. Italy, no. 30882/96, par. 40, ECHR 2001-VIII.
1073 Kinsch 2004 supra n. 1031, at p. 227-228; Sinopoli supra n. 1030, at p. 1162.
1074 Costa is of the opinion that the same standard should apply to all foreign judgments, regardless of their origin. See Costa supra n. 1030, at p. 475. See also Bucher 2011 supra n. 1044, at p. 304. Fawcett finds that, although it is unclear, ‘it is at least arguable that it does so.’ See J.J. Fawcett, ‘The Impact of Article 6 (1) ECHR on Private International Law’, 56 ILCQ (2007), p. 5.
1075 See the illustrations discussed supra V.5.3.1-5.3.2.
1076 One should note that this may be different with regard to a violation of one of the substantive rights guaranteed in the ECHR. See Lindberg v. Sweden infra VII.6.
one is faced with enforcement proceedings. By that time, appeal is usually no longer possible. It may, for example, also be impossible to await proceedings in the country of origin regarding the unfairness of proceedings, as enforcement proceedings may have already been initiated elsewhere. Nevertheless, complaints concerning rights guaranteed in Article 6 (1) ECHR should, in principle, be brought against the Contracting Party of origin of the judgment, as one otherwise runs the risk of being unable to complain successfully in Strasbourg.

2.2 The Invocation of Article 6 (1) ECHR against Recognition and Enforcement – EU and National Jurisprudence

As the discussion below will demonstrate, national courts of the Contracting Parties have quite frequently invoked the right to a fair trial ex Article 6 (1) ECHR or related notions against the recognition and enforcement of foreign judgments. It appears to be generally accepted that the absence of fair proceedings abroad will lead to the non-recognition or non-enforcement of the resulting foreign judgment. The discussion of some examples taken from the case law will, however, commence with a discussion of EU jurisprudence regarding the Brussels (/Lugano) regime, as the European Court of Justice (ECJ) has also been confronted with the impact of Article 6 (1) ECHR on the enforcement of a foreign judgments (2.2.1). Thereafter, one will find some illustrations regarding the invocation of the right to a fair trial against the recognition and enforcement taken from the national case law of the Contracting Parties (2.2.2).

2.2.1 EU Jurisprudence

*Krombach v. Bamberski* concerned the enforcement of a French judgment in Germany. The French proceedings were originally criminal proceedings. The defendant, Krombach, had been ordered to appear before the French courts, but he had refused to do so. Consequently, the French courts had refused the defendant’s request that his counsel be heard in his place, as he had not appeared in person. Krombach was sentenced *in absentia* to 15 years in prison, while he was also ordered to pay damages. Bamberski sought the enforcement of this latter (civil) award in Germany under the Brussels Convention.

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1077 See, e.g., *Maronier v. Larmer* infra n. 1155.
1078 See also *infra* VIII.3.1, particularly the text following n. 1160.
The ECJ had to give a ruling on the interpretation of the public policy exception provided in Article 27 of the Brussels Convention (now Article 34 (1) of the Brussels I Regulation), particularly on whether a court of an EU Member State could take into account the fact that a defendant had been unable to have his defense presented, unless he appeared personally. The ECJ held that this was indeed the case, while noting that in setting limits on the public policy exception (recall that each forum State will, in principle, use its own version of the idea of public policy) it had consistently held that fundamental norms are an integral part of the general principles that it takes into account and that the ECHR and the case law of the Court in Strasbourg are of particular significance in this regard. The ECJ thus held that national courts could take into account the fact that the defendant’s rights under Article 6 (1) ECHR had been violated, as he had been unable to defend himself.

The ECJ’s decision in *Krombach* was followed in *Eurofood*, a case concerning the recognition of insolvency proceedings opened in another (EU) Member State, in which the ECJ found that a Member State may refuse to recognize the opening of insolvency proceedings in another Member State if that decision was taken in flagrant breach of the right to be heard. However, in *Gambazzi* the Court failed to speak out on any misgivings with regard to an English default judgment, but instead opted to leave the issue to the national court. This case concerned an English default judgment which was given against a defendant who, despite entering an appearance, was unable to defend himself due to the fact that he had failed to comply with a previous freezing order.

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1081 See supra ch. II.5.
1082 See par. 25 of *Krombach v. Bamberski* (supra n. 1079).
1083 It is in this regard, incidentally, also interesting to note that the French (criminal) proceedings leading up to the enforcement proceedings in Germany have been condemned by the Court in Strasbourg. See *Krombach v. France*, no. 29731/96, ECHR 2000-II.
1086 One may note that from the perspective of the ECHR, it could be argued that the applicant had contributed to his inability to participate in the proceedings, which, as we have previously seen, could make the (successful) invocation of the ECHR difficult. See, e.g., *McDonald v. France* (supra n. 882).
In *Krombach* the ECJ thus acknowledged that the public policy exception in the Brussels (Lugano) regime may be invoked against the recognition and enforcement of foreign judgments where the recognition and enforcement would lead to a manifest breach of a rule that is a fundamental part of the legal order of the State.\(^\text{1087}\) It will be recalled that all States falling under this Brussels/Lugano regime are also Contracting Parties to the ECHR. The ECJ in *Krombach* also emphasized that fundamental rights are an integral part of the principles of law that the ECJ aims to ensure and that the ECHR has a particular significance in this regard. While this case was, in principle, thus only concerned with the defendant’s right to have his defense presented, one could easily argue that given the ECJ’s emphasis of the significance of the rights guaranteed in the ECHR generally, and specifically the right to a fair trial, this finding may be interpreted more broadly.\(^\text{1088}\)

There are two issues that need to be further discussed in relation to the ECJ’s findings in *Krombach* concerning the invocation of Article 6 (1) ECHR against the recognition and enforcement of foreign judgments. These two issues have previously also been addressed in relation to the Court’s case law.\(^\text{1089}\) First, the standard of control with regard to Article 6 (1) ECHR will be discussed. Thereafter, the issue of whether Contracting Parties have an obligation to refuse the recognition and enforcement of foreign judgments emanating from other Contracting Parties will be examined.

In *Krombach* the issue of a possibly reduced effect of Article 6 (1) ECHR was not discussed at all. It has been argued that this was, in fact, the standard of control with regard to Article 6 (1) ECHR, which would be evidenced by the fact that the French decision in question was so clearly


\(^\text{1088}\) Whether it would possible to invoke one of the substantive rights guaranteed in the ECHR is difficult to say on the basis of *Krombach*. One of the issues that could make this difficult is the so-called local remedy argument. See further infra VII.6. See, however, also *Régie Nationale des Usines Renault SA v. Maxicar SpA*, Case C-38/98, ECR I-2973. In any event, the ECJ has held that it is ultimately up to the national courts to decide what public policy exactly entails. See *Gambazzi* (supra n. 1085).

\(^\text{1089}\) See supra VIII.2.1.
in violation of the rights guaranteed in Article 6 (1) ECHR. However, it could also be argued that there is no need for the attenuation of the standard of control with regard to Article 6 (1) ECHR, as all the Member States of the EU are also Contracting Parties and therefore there is no need to deviate from the standards set in Article 6 (1) ECHR. The latter is far more likely. Why would the standard of control possibly be mitigated in such cases? All the arguments regarding attenuation on the basis of the possible differences between legal systems are certainly not valid with regard to other Contracting Parties.

The second issue is whether there is an obligation to refuse the recognition and enforcement of foreign judgments. One should note that the ECJ in Krombach held that national courts are entitled to take a violation of the right to a fair trial into account, but this does not indicate an obligation to do so. From the perspective of the ECJ there is thus no such obligation. It is merely a possibility. For an answer to this question, one would thus have to refer back to the Court’s case law. It will be recalled that the Court’s case law is also inconclusive, but I have argued that there indeed should be such an obligation.

2.2.2. National Jurisprudence of the Contracting Parties

It is not too difficult to find examples of the invocation of Article 6 (1) ECHR or a comparable notion against the recognition and enforcement of foreign judgments, as the fairness of the proceedings abroad is a requirement in all three legal orders under analysis. Below, a few such instances will be discussed.

The English courts have examined Article 6 (1) ECHR as a bar to the recognition and enforcement of foreign judgments in a number of cases, some of which will be discussed below. English courts have, inter alia, dealt with the enforcement of a foreign judgment emanating from another Contracting Party as well as the enforcement of a foreign judgment originating from a third country.

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1091 See further supra V.5.1.
Maronier v. Larmer concerns the enforcement of a Dutch judgment in England on the basis of the Brussels Convention. Larmer was a dentist who worked in Rotterdam between 1978 and 1991. In 1983 Maronier, a patient, filed a complaint against him and was awarded a modest sum of money in a complaints procedure in the Netherlands. In 1984 Maronier started proceedings at the court in Rotterdam for a larger sum. These proceedings were stayed in 1986 at his request. Larmer moved to England in 1991. By that time, the proceedings had been dormant for five years. In 1998 the proceedings in the Netherlands were reactivated by Maronier. Larmer, however, was unaware that the proceedings had been reactivated and only became aware of the (now final) judgment against him when the order for registration was served on him in England.

In the first instance the order for registration was set aside. Maronier appealed against this decision, but the Court of Appeal held that the order had correctly been set aside in the first instance, as the respondent had not received a fair trial in the Netherlands, as required by Article 6 (1) ECHR. The Court of Appeal therefore held that the recognition of the foreign judgment would violate the public policy requirement of Article 27 (1) of the Brussels Convention. In doing so, the Court of Appeal considered – before discussing Krombach – that courts ‘should apply a strong presumption that the procedures of other signatories of the Human Rights Convention are compliant with Article 6 [ECHR].’ However, the Court of Appeal found that this presumption is not irrefutable.

In Government of the United States of America v. Montgomery (No.2) the (then) House of Lords had to decide on whether the enforcement of an American judgment would violate Article 6 (1) ECHR. Article 6 (1) ECHR had been discussed before the Court of Appeal in this case, but no mention had been made of the two arguably most important judgments of the Court in this regard – Drozd and Janousek and Pellegrini. These two cases were discussed before the House of Lords. The House of Lords ultimately held in this case, which concerned a judgment emanating from a third country, that a judgment originating from the United States could only be

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1093 At [28-30].
1094 At [25].
1096 Government of the United States of America v. Montgomery (No.2) [2003] EWCA 392. It should be noted that Soering v. the United Kingdom was discussed by the Court of Appeal. See with regard to Drozd and Janousek and Pellegrini supra VIII.2.1.
refused enforcement relying on Article 6 (1) ECHR if the procedural shortcomings of such a judgment were ‘flagrant’. It will be recalled, though, that in Pellegrini no reference was made to a ‘flagrant denial of justice’. 1097 Nonetheless the House of Lords in Montgomery held that the Court’s judgment in Pellegrini was not applicable by finding that the Court’s ruling in Pellegrini relied on the special relationship between Italy and the Vatican. 1098 However, as has been set out above, the Court in Pellegrini specifically treated the decision of the Vatican courts as a foreign judgment emanating from a third country, 1099 which made this finding of the House of Lords at the time questionable.

The English case law concerning the recognition and enforcement of a foreign judgment violating Article 6 (1) ECHR is thus not entirely unambiguous. In Maronier v. Larmer the English Court of Appeal found in a case concerning the enforcement of a judgment originating from another Contracting Party that the enforcement of this judgment would violate Article 6 (1) ECHR and, therefore, public policy. 1100 The findings of the Court of Appeal have been criticized, though, for taking ‘human rights law less seriously’ and reducing the impact of Krombach. 1101 This critique was mostly aimed at the Court of Appeal’s finding of there being ‘a strong presumption that the procedures of other signatories of the Human Rights Convention are compliant with Article 6 [ECHR]’, 1102 as no mention of such a presumption was made in Krombach. 1103

However, in my opinion, the Court of Appeal’s consideration has little impact, as – presumption or no presumption – it will always be for the defendant to demonstrate a violation of Article 6 (1) ECHR. Since the Court of Appeal’s findings it has been held that such situations, where the foreign judgment emanates from another Contracting Party, offer ‘little difficulty’ to the English

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1097 See supra VIII.2.
1099 See supra n. 1031.
1101 Fawcett supra n. 1074, at p. 26-27.
1103 See supra VII.5.2.1.
Indeed, there is, in principle, no reason to assume that a different standard regarding Article 6 (1) ECHR should be applied in such a case where the country of origin is also a Contracting Party.

While the standard of control is clear where other Contracting Parties are concerned (full compliance), the situation is less clear where judgments emanating from third countries are at issue. As discussed above, the House of Lords in Government of the United States of America v. Montgomery (No.2), a case concerning a judgment emanating from a third country, held that such a judgment could only be refused, relying on Article 6 (1) ECHR, if the procedural shortcomings of such a judgment were ‘flagrant’. This finding has rightfully been criticized on account of the House of Lords’ interpretation of Pellegrini. At the time there was no indication that the ‘flagrant’ criterion should be used in such cases. However, could it be that the House of Lord’s finding has been somewhat vindicated retrospectively in light of the Court’s subsequent backing off of the standard it set in Pellegrini? As was discussed above, it appears as if the Court has aimed to soften its stance with regard to its judgment in Pellegrini, even though its exact opinion has to be further clarified. Nevertheless, what is clear is that the House of Lord’s (re)construction of Pellegrini at the time was incorrect.

In concluding this discussion of English case law, one could state that it is generally accepted that a foreign judgment will not be recognized and enforced in England if the defendant has been denied a fair trial, regardless of the origin of the judgment. It should, incidentally, be noted that a defendant’s right to a fair trial is not only embodied in Article 6 (1) ECHR, but can also be founded upon common law principles.

In the Netherlands, Article 6 (1) ECHR has also occasionally been invoked against the recognition and enforcement of foreign judgments. The Hoge Raad has, for example, recently

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1107 See *supra* VII.5.
1108 See, e.g., Dicey, Morris and Collins *supra* n. 1104, at p. 63ff.
1109 See, e.g., Fentiman 2010 *supra* n. 1058, at p. 703.
examined the enforcement of a German judgment, a so-called *Anerkenntnisurteil*, on the basis of Article 38 of the Brussels I Regulation in light of Article 6 (1) ECHR.\(^{1110}\) In short, such a judgment entails a judgment by confession. In accordance with the relevant German rules, such a judgment does not give any reasons. In the Dutch enforcement proceedings in the first instance, the district court in Rotterdam had found that the judgment, which did not give any reasons, violated the fundamental principles of a fair trial and, thus, Dutch public policy. The enforcement was therefore denied on the basis of Article 34 (1) of the Brussels I Regulation.

However, on appeal before the *Hoge Raad*, the court found that in the present case it could not be assumed that the lack of reasons was in violation of the right to a fair trial following from Article 6 (1) ECHR. Whether or not the lack of reasons in a judgment leads to a violation of public policy depends on the specific circumstances of the case and the manner in which the case has been litigated, according to the court.\(^{1111}\) In the event of such a judgment by confession, a statement of reasons is not necessary, as the defendants have in such cases acknowledged the claim.

A pertinent example of the successful invocation of Article 6 (1) ECHR against the enforcement of a foreign judgment in the Netherlands can be found in one of the many installments of the famous *Yukos* case, the fall-out of which has led not only to many cases in the Netherlands,\(^ {1112}\) but also in other parts of the world.\(^ {1113}\) The district court in Amsterdam had, *inter alia*, to decide whether it could recognize the Russian judgment in which the bankruptcy of the Yukos company was declared.\(^ {1114}\) Yukos Oil has been established in the Russian Federation in 1993 and was later privatized. It was the only shareholder of Yukos Finance, a company based in Amsterdam. In 2003 the Russian authorities, after initially having communicated that Yukos Oil did not owe the State any more taxes, re-examined this decision and found that the company owed the State a huge sum.


\(^{1111}\) HR 18 March 2011, *RvdW* 2011, 392. See no. 3.2.

\(^{1112}\) See, e.g., Gerechtshof Amsterdam 10 May 2011, *RN* 2011, 82; Rechtbank Amsterdam 17 March 2011, *LJN* BP8070; HR 7 January 2011, *NJ* 2011, 134 – just to name three recent cases concerning *Yukos*.


In the proceedings before the Russian courts, the Russian tax authority produced many pages of evidence, leaving the defense with virtually no time to review it all. Multiple requests for an extension were denied by the Russian court, which found in favor of the tax authority. Yukos, incidentally, filed an application in Strasbourg against this decision.\footnote{OAO Neftyanaya Kompaniya Yukos v. Russia, no. 14902/04, 20 September 2011. The Court has recently held that in this case Russia did not misuse legal proceedings to destroy Yukos, but it did find violations of Articles 6 (1) and (3) ECHR, the right to a fair trial; Article 1 of Protocol No. 1 ECHR, the right to property, regarding the imposition and calculation of penalties in the 2000-2001 tax assessments; and Article 1 of Protocol No. 1 ECHR, in the sense that the enforcement proceedings were disproportionate. Neither a violation was found of Article 1 of Protocol No. 1 ECHR, with regard to the rest of the tax proceedings, nor with regard to Article 14 ECHR taken in conjunction with this Article. Unanimously, no violation of Article 18 ECHR was found.} The Russian authorities, however, did not allow Yukos to await the result of these proceedings. The Russian tax procedures were followed by an insolvency procedure in Russia. In 2006 Yukos Oil was declared bankrupt by a Russian court.

In the subsequent Dutch procedure the court focused mainly on whether the insolvency judgment could be recognized in the Netherlands. The court held that it was clear in the tax proceedings in Russia the right to a fair trial \textit{ex} Article 6 (1) ECHR had been violated. The court concluded that this lack of fair proceedings ultimately stood in the way of the recognition of the bankruptcy judgment, as the tax assessments had been primarily responsible for the company’s bankruptcy.

Finally, the Dutch Rechtbank Zwolle-Lelystad has refused to enforce a Norwegian alimony judgment on the basis of Article 6 (1) ECHR.\footnote{Rb. Zwolle-Lelystad, 20 July 2005, \textit{NIPR} 2005, 327.} The LBIO, the Dutch agency concerned with the collection of such judgments, requested the enforcement of a final Norwegian judgment against a man living in the Netherlands. The request was based on the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations.\footnote{Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, concluded on 2 October 1973, entry into force 1 August 1976.} Both the Netherlands and Norway are party to this Convention. The court agreed with the defendant that the execution of the Norwegian judgment in the Netherlands would violate Dutch public policy, as the man had not been heard in the Norwegian procedure. The man had, at the request of the Norwegian court, sent his last three pay stubs. The Norwegian court had subsequently based the amount of the alimony on this, without having a further hearing. The Dutch court held
that the man could have expected to be properly heard in the proceedings and that the Norwegian proceedings had thus violated Article 6 ECHR.

In the Netherlands one of the requirements for the recognition and enforcement of foreign judgments is that the foreign judgment does not violate public policy. Moreover, if the foreign proceedings do not meet the standards of what in the Netherlands would be deemed a fair trial, a foreign judgment cannot be recognized.1118 The impact of Article 6 (1) ECHR in this regard is evidenced by the case law discussed above.1119 The finding in the Yukos case demonstrates that courts in the Netherlands are willing to go to great lengths with regard to Article 6 (1) ECHR, in the sense that the Dutch court was unwilling to enforce a foreign judgment (the bankruptcy judgment) of which the underlying proceedings had not been unfair, but where the preceding tax proceedings leading to the bankruptcy were.1120

In Swiss case law, Article 6 (1) ECHR has also been discussed in relation to the recognition and enforcement of foreign judgments. In a case concerning the enforcement of an English judgment under the Lugano Convention, the Swiss Tribunal fédéral held that a violation of procedural public policy in the Swiss understanding can occur only if fundamental and generally accepted procedural principles have been violated. According to the Tribunal, these principles of a fair trial include in particular the right to be heard, the equal treatment of parties, respect for the law on evidence, and the right to defense, all as recognized in the ECHR.1121 In a later case the court held that the principle of independence and impartiality of the judge should also be included.1122

1119 But see Rosner supra n. 1118, at p. 46ff., who is critical in relation to the usefulness of the standard of Article 6 (1) ECHR.
1120 See with regard to this case T.M. Bos, ‘Het faillissement van YUKOS en de beginselen van een behoorlijke procesorde’ [The insolveny of YUKOS and the principles of due process], 139 WPNR (Weekblad voor privaatrecht, notariaat en registratie) (2008), p. 41-43.
1122 Judgment of the Tribunal fédéral, 4A.305/2009, 5 October 2009 (unpublished), c.4, see particularly c.4.1. Both these cases, incidentally, refer with regard to the notion of a violation of public policy to ATF 126 III 249, a case concerning procedural public policy in relation to arbitration.
In a case concerning the enforcement of an American default judgment which did not cite any reasons, the Tribunal fédéral found that the defendant could not rely on Article 6 ECHR with regard to this lack of reasoning, as the absence thereof does not always violate Swiss public policy.\(^{1123}\) If the defendant was aware of the trial and had the opportunity to participate, but knowingly relinquished this opportunity, such a default judgment does not violate Swiss public policy.

The Tribunal fédéral has further stated generally with regard to the recognition and enforcement of foreign judgments that ‘Swiss public policy entails compliance with the fundamental procedural rules derived from the constitution, including the right to a fair trial and the right to be heard.’\(^{1124}\) This case concerned, incidentally, the recognition of a repudiation. Reference was also made to the equality of spouses, although the ECHR was not expressly discussed on this issue.\(^{1125}\) Procedural public policy has also been invoked against a repudiation which had not been notified to the spouse, who was consequently unaware of any proceedings.\(^{1126}\)

In Article 27 (2) of the Swiss Private International Law Act it is explicitly stated that the recognition of a foreign decision must be denied if a party establishes that such a decision was given in violation of the fundamental principles concerning the Swiss concept of procedural law. This would include not having had the opportunity to defend oneself.\(^{1127}\) There has been some discussion in Switzerland whether the requirements enumerated in Article 27 of the Swiss Private International Law Act should be considered exhaustive, particularly in light of the new Swiss Constitution, in which the procedural guarantees were further strengthened.\(^{1128}\) In any event, the Swiss Tribunal fédéral has reiterated that ‘Swiss public policy entails compliance with the fundamental procedural rules derived from the constitution, including the right to a fair

\(^{1123}\) ATF 116 II 625, 630-632.

\(^{1124}\) ATF 126 III 327, 330 (referring to ATF 126 III 101, 3 –b, p. 107-108 and ATF 122 III 344, 4a, p. 348-349).

\(^{1125}\) See also infra VII.6.3.


\(^{1127}\) See Article 27 (2) –b of the Swiss Private International Law Act.

trial and the right to be heard.'\textsuperscript{1129} It has been argued that this reference to a fair trial is consistent with the Court’s approach in 
\textit{Pellegrini}, except for the fact that the Swiss judge does not examine the requirements listed in Article 27 (2) of the Swiss Private International Law Act \textit{ex officio}.\textsuperscript{1130} In this regard the Swiss Act deviates from the previous practice of the Swiss \textit{Tribunal fédéral}, which did examine such procedural safeguards \textit{ex officio}.\textsuperscript{1131}

One could thus argue that, despite the wording of Article 27 (2) of the Swiss Private International Law Act, the Swiss courts may have to return to this old practice in order to avoid a possible violation of Article 6 (1) ECHR. On the other hand, one may question whether this issue would ever really become a problem before the Court in Strasbourg, as an applicant would have to demonstrate to the Court that he or she had already complained about the alleged violation in the national proceedings. It has been noted that Article 27 (2) of the Swiss Private International Law Act is quite often invoked before the \textit{Tribunal fédéral}, yet it is only rarely admitted.\textsuperscript{1132} While according to some the exact content of the requirements of Article 27 (2) of the Swiss Act is somewhat vague, it appears to be clear that the requirements listed there should at least correspond with the minimal requirements of Article 6 (1) ECHR.\textsuperscript{1133}

\textbf{2.3 The Manner of Invocation of Article 6 (1) ECHR regarding Recognition and Enforcement}

A final issue that needs to be discussed in relation to the jurisprudence of the national courts of the Contracting Parties regarding the invocation of Article 6 (1) ECHR against the recognition and enforcement of foreign judgments is the method used by national courts. It follows from the discussion of the jurisprudence above that national courts always refer to the public policy exception in order to invoke the right to a fair trial against the recognition and enforcement of foreign judgments. Article 6 (1) ECHR is generally regarded as being a part of procedural public policy. However, it is interesting to pose the question as to whether it would also be possible to

\begin{small}
\textsuperscript{1129} ATF 126 III 330 (‘l’ordre public Suisse exige le respect des règles fondamentales de la procedure déduite de la constitution, notamment le droit à un process equitable et celui d’être entendu.’) [referring to ATF 126 III 101, 3 –b, p. 107-108 and ATF 122 III 344, 4a, p. 348-349].
\textsuperscript{1131} Id. Cf. Volken \textit{supra} n. 1128, at p. 394.
\textsuperscript{1132} See ATF 111 Ia 12 as an example of a case in which it was admitted. Cf. Dutoit \textit{supra} n. 1130, at p. 108 and Volken \textit{supra} n. 1128, at p. 394, 398.
\textsuperscript{1133} See S. Othenin-Girard, \textit{La reserve d’ordre public en droit international privé suisse} (Zürich, Schulthess 1999), p. 108.
\end{small}
directly apply the rights guaranteed in the ECHR. Could Article 6 (1) ECHR have an autonomous role here? This is, of course, particularly interesting with regard to international instruments lacking such an exception. This may additionally become an important issue because of the desire to further streamline the recognition and enforcement of foreign judgments within the European Union.

2.4 The Abolition of the Exequatur Procedure

The importance of the role of the public policy exception and Article 6 (1) ECHR is illustrated by the recent debate on the wisdom of the abolition of the exequatur procedure in the Brussels I Regulation. Ever since the so-called ‘Tampere resolution’ the EU has moved towards the further simplification of the recognition and enforcement of foreign judgments within the EU and the (gradual) abolition of exequatur in several separate instruments. Instruments in which the exequatur procedure has been omitted include the European Enforcement Order for Uncontested Claims, the European Order for Payment Procedure, and the European Small Claims Procedure. These all deal with different types of judgments, although their general functioning is largely the same: judgments based on these instruments are immediately enforceable in other Member States, and may only be challenged in the Member State of origin on certain established grounds. They may explicitly not be challenged in the receiving Member State. In addition to these instruments concerning civil procedure, there is also an instrument

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1134 See in this regard also the discussion infra VII.6 on the public policy exception and the invocation of the substantive rights guaranteed in the ECHR.
1135 This issue would, of course, also raise issues concerning hierarchy. See in this regard supra ch. III.3.1.
relating to maintenance obligations, which basically extends similar rules to their enforcement.1142

The issue that has become the focus of some debate is whether these instruments, or this movement in general towards automatic recognition and enforcement within the European Union, which may only be challenged in the State of origin, jeopardise the protection of (procedural) human rights, and particularly Article 6 (1) ECHR.1143 Incidentally, it could be argued that these new EU instruments actually also promote human rights, as Article 6 (1) ECHR also entails a right to enforcement of judgments. These new instruments in which the *exequatur* procedure is abolished would thus consequently protect the human rights of the creditors of judgments in the EU.1144 However this argument is somewhat unconvincing, because, as has been discussed above, Article 6 (1) ECHR does not entail a blanket right to enforcement of (foreign) judgments; particularly if such a judgment were to violate Article 6 (1) itself, it is unthinkable that one could invoke Article 6 (1) ECHR to enforce this judgment.1145

Moreover, one could hardly argue that these new instruments are necessary for the protection of the rights of creditors. While under the old regime (the current Brussels I Regulation) there is an *exequatur* procedure, this is not much of an inconvenience for creditors: it has been reported that the overwhelming majority of cases are successful and that a decision usually merely takes a few weeks.1146 Interestingly enough, the Commission uses this as an argument in favour of abolishing *exequatur*: the vast majority of cases is successful, so these proceedings merely hinder the free movement of judgments within the EU. One could, of course, also argue the other way around: it is hardly an inconvenience for creditors, while in those rare cases in which the

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1143 See the contributions cited *supra* n. 1137. See with regard to the afore-mentioned European Enforcement Order, the Payment Procedure and Small Claims Procedure: L. van Bochove, 'Het ontbreken van de openbareorde-exceptie in de nieuwe generatie Europese procesrechtelijke verordeningen in het licht van artikel 6 lid 1 EVRM' [The lack of a public policy exception in the new generation of European procedural regulations], 25 *NIPR* (2007), p. 331-339.
1144 See Cuniberti and Rueda *supra* n. 1137, at p. 294.
1145 See *supra* VII.2. See also Cuniberti and Rueda *supra* n. 1137, at p. 294 and the writers cited there.
procedural safeguards following from Article 6 (1) ECHR are violated, Article 6 (1) ECHR may provide an escape hatch.

However, despite all this, the Commission initially envisaged the abolition of *exequatur* in the Brussels I Regulation. Without any form of *exequatur*, judgments would move freely within the EU. This would leave judgment debtors with less of an opportunity to challenge such judgments, even if the proceedings leading up to these judgments were contrary to Article 6 (1) ECHR. Originally only a very limited possibility for debtors to challenge judgments was envisioned, which indeed raised questions with regard to Article 6 (1) ECHR. However, the Recast still offers a safety mechanism for the debtor in Article 45, which alleviates concerns with regard to Article 6 (1) ECHR. Not only has a public policy exception been maintained, but procedural guarantees have also been safeguarded.

While a solution concerning Article 6 (1) ECHR has thus been provided in the latest proposal of the Brussels I Regulation, issues in this regard may still occur in relation to the three aforementioned instruments in which *exequatur* proceedings have (already) been abolished. Germany was, incidentally, so concerned about the possibility that the abolition of the public policy defense in the European Enforcement Order would allow for the enforcement of foreign judgments violating the ECHR that it has retained defenses at the ‘actual enforcement’ stage if the debtor was unable to raise such a defense during the proceedings in the State of origin. One may wonder whether the Commission welcomes this possibility. Despite the fact that *exequatur* would be abolished and that the public policy exception would be eliminated, one would still be left with a stage at which one could object to the enforcement of the judgment,

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1148 See article 45 (1) (a) of the Recast (supra n. 1136). See also art. 46 Recast.
1149 See article 45 (1) (b) of the Recast (supra n. 1136). The irreconcilability of judgments has also been included in art. 45 (1) (c).
1150 See supra n. 1139; 1140; 1141.
1151 See supra n. 1139.
albeit on a limited ground. Nevertheless, I would argue that this, or a similar solution,\textsuperscript{1153} is absolutely necessary from the point of view of the protection of the rights guaranteed in Article 6 (1) ECHR.\textsuperscript{1154}

2.5 Preliminary Conclusions

It is clear that on the basis of Article 6 (1) ECHR Contracting Parties may refuse the recognition and enforcement of foreign judgments. It follows from the Court’s judgment in \textit{Pellegrini} that there is even an obligation to do so with regard to foreign judgments violating Article 6 (1) ECHR originating from third countries. Moreover, there is a good argument to be made that this obligation also applies to judgments from other Contracting Parties, even though the Court has not yet spoken on this issue.

The exact standard that should be applied to foreign judgments is, however, unclear. The Court has in its jurisprudence following \textit{Pellegrini} cast some doubt on the exact meaning of this judgment. Although the Court in \textit{Pellegrini} insisted on full compliance with the rights guaranteed in Article 6 ECHR, it has been argued that it follows from the Court’s subsequent case law (based on case law preceding \textit{Pellegrini}) that the obligation to refuse enforcement of foreign judgments emanating from third countries only exists in cases in which there has been ‘a flagrant denial of justice’.

One could say that the uncertainty with regard to the exact meaning of the Court’s case law is, in a way, echoed in the case law of national courts of the Contracting Parties. While national courts have little trouble invoking the rights guaranteed in Article 6 (1) ECHR against the recognition and enforcement of foreign judgments, there appears to remain at least some uncertainty in the case law concerning the issue of the standard of control.

\textsuperscript{1153} See, e.g., Beaumont and Johnston \textit{supra} n. 1137, at p. 273, who argue (in relation to earlier plans regarding the Brussels I Regulation) for an exception similar to Article 20 of the Hague Child Abduction Convention, which allows for a refusal to return a child if such a return would be impermissible on the basis of ‘the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.’

\textsuperscript{1154} See with regard to the necessity hereof also the ECJ’s case law in \textit{Krombach v. Bamberski} and the English case \textit{Maronier v. Larmer}. Both cases concern the enforcement of a foreign judgment violating Article 6 (1) ECHR based on the Brussels regime and are discussed \textit{supra} VIII.2.2.1-VIII2.2.2.
3. The Invocation of the Substantive Rights Guaranteed in the ECHR against the Recognition and Enforcement of Foreign Judgments

The invocation of Article 6 ECHR, which guarantees the procedural right to a fair trial, against the recognition and enforcement of foreign judgments has been discussed above. Whether or not it is possible to invoke one of the substantive rights guaranteed in the ECHR is a separate issue. Contrary to the situation in which one of the procedural rights of the ECHR is in play, one would not only have to look at the procedure which led to the foreign judgment, but also assess whether the application of that judgment would infringe one of the (substantive) rights guaranteed in the ECHR.

It follows from the Court’s case law that with regard to the invocation of one of the substantive rights guaranteed in the ECHR against the recognition and enforcement of foreign judgments it is necessary to make a distinction depending on the origin of the judgment. Therefore, first the invocation of the ECHR against a foreign judgment emanating from another Contracting Party will be discussed (3.1). Thereafter, the invocation against a foreign judgment originating from a non-Contracting Party will be examined (3.2). This will be followed by a brief discussion of case law of the national courts of the Contracting Parties (3.3).

3.1 The Invocation of Substantive Rights guaranteed in the ECHR against a Judgment of another Contracting Party

The issue of the invocation of substantive rights against recognition and enforcement has not been often discussed by the Court. By its own acknowledgment, many questions remain unanswered. In *Lindberg v. Sweden*, the Court examined a case in which the applicant invoked one of the substantive rights of the ECHR to stave off the recognition of a Norwegian judgment in Sweden. *Lindberg* thus concerned the enforcement of judgment originating from another Contracting Party. The applicant complained under Article 13 ECHR (the right to an effective remedy) in conjunction with Article 10 ECHR (freedom of expression) that the Swedish Supreme Court had failed to carry out a proper review of his claim that the judgment of a Norwegian Court had violated his rights under Article 10 ECHR.

Lindberg, a Norwegian national residing in Sweden, had travelled aboard a seal hunting vessel in the capacity of seal hunting inspector. After the hunting season he wrote an inspection report. The *Bladet Tromsø*, a Norwegian newspaper, published twenty-six articles on Mr. Lindberg’s inspection, including the entire report. The report contained information about several breaches of the seal hunting regulations and received a lot of media attention. Thereafter, Mr. Lindberg also introduced a film entitled ‘Seal Mourning’, which contained footage shot by him of certain breaches of hunting regulations. Clips from the film were broadcast by a Norwegian television station and later the entire film was broadcast by a Swedish television station.

In reaction to all this, nineteen crew members of the ship brought – largely with success – a series of defamation proceedings in Norway against Mr. Lindberg and a number of media corporations and companies, including the *Bladet Tromsø*. The Norwegian Court ordered Mr. Lindberg to pay compensation to the nineteen crew members. Leave to appeal to the Norwegian Supreme Court was denied and the decision became final. Mr. Lindberg subsequently lodged an application with the former European Commission of Human Rights alleging violations of Articles 6, 10, and 13 ECHR. The Commission, however, declared the application inadmissible as it had been lodged out of time.1156

Lindberg’s case against Sweden was concerned with the Swedish courts’ refusal to prevent the enforcement of the Norwegian judgment against him in Sweden. The crew members had requested the Swedish Enforcement Office to execute the award of compensation and costs made in the Norwegian judgment. The Enforcement Office ordered Mr. Lindberg to pay. Mr. Lindberg lodged a judicial appeal against that decision, arguing that the Norwegian judgment violated his freedom of expression under Article 10 ECHR. This appeal was, however, dismissed by successive courts in Sweden, which, *inter alia*, held that public policy considerations did not prevent the execution of the Norwegian judgment in Sweden.

1156 *Lindberg v. Norway* (dec.), no. 26604/95, 26 February 1997. Incidentally, the defamation case against the newspaper *Bladet Tromsø* and its former editor also went to Strasbourg and eventually reached the Grand Chamber, which found that there indeed had been a violation of Article 10 ECHR in this case. See *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III.
Mr. Lindberg brought proceedings before the Court in Strasbourg. The Court first considered whether he actually had an arguable claim, since this is a requirement for the applicability of Article 13 ECHR. Although the Court showed great reservations as to whether this was the case, it ultimately found that that it did not need to decide on this issue and proceeded on the assumption that Article 13 ECHR was applicable.\textsuperscript{1157} The Court subsequently held that, for Article 13, it only needed to examine whether the scope of the review carried out by the Swedish courts was sufficient to conclude that the applicant had had an effective remedy in Sweden. After referring to the fact that it had previously decided comparable issues,\textsuperscript{1158} the Court ultimately held that it was not necessary to delve into unanswered questions concerning the impact of the ECHR on the recognition and enforcement of foreign judgments. The Court stated:

‘However, the Court does not deem it necessary for the purposes of its examination of the present case to determine the general issue concerning what standard should apply where the enforcing State as well as the State whose court gave the contested decision is a Contracting Party to the Convention and where the subject-matter is one of substance (i.e., here, the freedom of expression) rather than procedure. In the particular circumstances it suffices to note that the Swedish courts found that the requested enforcement (in respect of the award of compensation and costs made in the Norwegian judgment) was neither prevented by Swedish public order or any other obstacles under Swedish law. The Court, bearing in mind its findings above as to whether the applicant had an arguable claim, does not find that there were any compelling reasons against enforcement.’

The Court thus recognizes that there are many interesting issues left unanswered up until this point with regard to the recognition and enforcement of foreign judgments. Alas, given the particular circumstances of \textit{Lindberg}, as will be discussed hereafter, there was no need for the Court to delve deeper into this issue.

It should be reiterated that \textit{Lindberg} concerned the recognition of a foreign judgment emanating from another Contracting Party. This appears to be decisive in the Court’s decision: namely, the Court noted that any complaint directed against the findings of the Norwegian courts should have been addressed in an application pursued against Norway in Strasbourg, which the applicant, of course, had attempted to do.\textsuperscript{1159} To allow him to bring up this argument again in the Swedish proceedings would have amounted to a second chance, ‘an undue possibility’ in the words of the Court, which would carry ‘the risk of upsetting the coherence of the division of roles between

\textsuperscript{1157} See with regard to the reasoning of the Court on Article 13 ECHR in this case Spielmann \textit{supra} n. 1041, at p. 773.
\textsuperscript{1158} See \textit{supra} n. 1047.
\textsuperscript{1159} See \textit{supra} n. 1156.
national review bodies and the European Court, making up the system of collective enforcement under the Convention.\footnote{Lindberg v. Sweden (dec.), no. 48198/99, 15 January 2004.}

The Court thus essentially applied the ‘local remedy rule’ – the necessity to first exhaust national procedures – which can be found not only in the ECHR\footnote{See Art. 35 (1) ECHR. See with regard to this requirement also supra ch. III.2. This requirement is, incidentally, also included in a number of other human rights treaties. See, e.g., art. 46 of the Inter-American Convention on Human Rights and Art. 5 of Optional Protocol I of the International Covenant on Civil and Political Rights.} but also in international law,\footnote{See, e.g., C.F. Amerasinghe, Local Remedies in International Law (Cambridge, Cambridge University Press 2004).} and is equally recognized when it comes to the recognition and enforcement of foreign judgments.\footnote{See, e.g., the so-called Schlosser Report, an explanatory report on the Brussels Convention, OJ 1979, C 59/71, no. 192.} The Court’s finding could be interpreted as excluding any viable invocation of one of the substantive rights guaranteed in the ECHR against the recognition and enforcement of foreign judgments originating from other Contracting Parties before the Court in Strasbourg. After all, in all these cases it would be possible (and necessary) to bring a complaint in Strasbourg instead of waiting for enforcement proceedings in another Contracting Party. This would, incidentally, be different with regard to the invocation of Article 6 (1) ECHR, as in the absence of a fair trial the substantive issues have not been properly decided upon, and it may be impossible to rectify such a situation in the State of origin because, for example, one may not have been properly served and thus unaware of any proceedings, until it is too late.\footnote{See, e.g., Maronier v. Larmer, supra n. 1092.}

3.2 The Invocation of Substantive Rights guaranteed in the ECHR against a Judgment of a Third Country

There are few cases in which substantive rights have been invoked against the recognition and enforcement of foreign judgments originating from a third country. One is a case concerning the recognition of an Algerian repudiation in France, although this case was ultimately struck out of the list as a friendly settlement had been reached. In \textit{D.D. v. France},\footnote{D.D. v. France (dec.), no. 3/02, 8 November 2005.} the Court had to consider whether a divorce in Algeria by way of repudiation could be recognized in France. The wife complained about the incompatibility of a repudiation with Article 5 of Protocol No. 7 ECHR, which guarantees equality between spouses. The Court ultimately decided to strike this

\footnote{1160 Lindberg v. Sweden (dec.), no. 48198/99, 15 January 2004. \footnote{1161 See Art. 35 (1) ECHR. See with regard to this requirement also supra ch. III.2. This requirement is, incidentally, also included in a number of other human rights treaties. See, e.g., art. 46 of the Inter-American Convention on Human Rights and Art. 5 of Optional Protocol I of the International Covenant on Civil and Political Rights. \footnote{1162 See, e.g., C.F. Amerasinghe, Local Remedies in International Law (Cambridge, Cambridge University Press 2004). \footnote{1163 See, e.g., the so-called Schlosser Report, an explanatory report on the Brussels Convention, OJ 1979, C 59/71, no. 192. \footnote{1164 See, e.g., Maronier v. Larmer, supra n. 1092. \footnote{1165 D.D. v. France (dec.), no. 3/02, 8 November 2005.}}}}
case out of the list, but not before noting – and implicitly endorsing – the recent change in the case law of the French Cour de Cassation which no longer allowed the blanket recognition of such divorces, but instead found that even if the foreign decision had been the result of a fair and adversarial procedure, such a unilateral repudiation by the husband without giving any legal effect to possible opposition to such a decision by the woman would violate Article 5 of Protocol No. 7 ECHR.

Another case in which the invocation of one of the substantive rights guaranteed in the ECHR has been discussed is Saccoccia v. Austria, a case considered previously in relation to the applicability of Article 6 (1) ECHR to enforcement proceedings in Chapter VII. The Court also examined the execution of an American forfeiture order in light of Article 1 of Protocol No. 1 ECHR. The applicant had asserted that he had been the owner of his assets and that the forfeiture order amounted to an interference of his right to property. However, the Court dismissed the arguments based on the right to property. The Court did agree with the applicant that the confiscation of his assets interfered with his right to peaceful enjoyment of his possessions. However, referring to its standard case law concerning Article 1 of Protocol No. 1 ECHR, it held that the forfeiture fell within the State’s right ‘to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.’ Moreover, the Court held that this interference had a basis in Austrian law. Finally, the Court established that the confiscation had the legitimate aim of enhancing international co-operation and making sure that the money made in drug trafficking was actually forfeited. The Court thus found, bearing in mind also the margin of appreciation of States in this regard, that the forfeiture order struck a fair balance between the applicant’s rights under Article 1 of Protocol No. 1 ECHR and the interests of the community as a whole. There was thus no violation of Article 1 of Protocol No. 1 ECHR in this case.

1166 Saccoccia v. Austria, no. 69917/01, 18 December 2008.
1167 See supra n. 911.
1168 Saccoccia v. Austria, no. 69917/01, par. 86, 18 December 2008 (citing AGOSI v. the United Kingdom, 24 October 1986, par. 48, Series A no. 108, and Air Canada v. the United Kingdom, 5 May 1995, par. 29-30, Series A no. 316-A.).
Saccoccia thus concerns the invocation of one of the substantive rights guaranteed in the ECHR against the enforcement of a foreign judgment emanating from a third country. What is the standard of control used by the Court in this regard? In its examination of the complaint under Article 1 of Protocol No. 1 ECHR, the Court appears not to really deviate from the standard it would have used in a purely national case. It follows its standard approach with regard to interferences to the right to property. The only reference to the international dimension of the case follows in the Court’s assessment of the legitimate aim of the enforcement of the order. The Court cites, as the legitimate aim, the enhancement of international co-operation to ensure that assets derived from drug dealing were actually forfeited, which falls within the general interest of combating (international) drug trafficking.

The Court held that a fair balance had to be struck between the applicant’s rights to peaceful enjoyment of his property and the general interest of combating drug trafficking, where the Contracting Parties enjoy a wide margin of appreciation. The Court thus does not appear to use a different standard than it would have used in a forfeiture procedure in a domestic case, although one should note that it extends a wide margin of appreciation to the Contracting Parties in this case on account of the fight against international drug trafficking and the difficulties authorities face here. Thus one may conclude that this is a very specific example of the invocation of one of the substantive rights guaranteed in the ECHR, and one that may be easily distinguished from other cases. Moreover the Court’s assessment was, of course, limited to Article 1 of Protocol No. 1 ECHR. It can certainly not be excluded that the invocation of other substantive rights would lead to a different, possibly stricter sort of review.

When considering the impact on the recognition and enforcement of foreign judgments of the substantive rights guaranteed in the ECHR, one should not fail to mention that substantive rights may also be involved where the recognition and enforcement of a foreign judgment would infringe upon the rights of others. These rights of others may also be protected under the ECHR, and could consequently stand in the way of recognition and enforcement. Prime examples of such situations can, of course, be found in the area of international family law. Examples include

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1169 See with regard to this case also Spielman supra n. 1041, at p. 771.
1171 See supra VII.3.1. See generally also supra ch. III.3.5.1.2.
cases concerning international child abduction where the rights of the stay-behind parent and the abducting parent, but above all the child(ren), may be in conflict with each other.\textsuperscript{1172}

In cases in which more than one of the rights guaranteed in the ECHR is involved, the Court generally has to perform a balancing test in which the interests of all involved are weighed.\textsuperscript{1173} The Court will thus review whether a fair balance has been struck. Such a test has to be performed \textit{in concreto}, and the result thus depends on the specific circumstances of the case. However, one could note that in the afore-mentioned cases in which the rights of children were involved, the best interests of the child always prevailed.\textsuperscript{1174}

Even though the Court has in its case law at this point in time more or less discussed the different scenarios it distinguished in \textit{Lindberg}, it has certainly not dealt with this topic exhaustively. Incidentally, in the literature this topic has generally been treated as similar to, and together with, the issue of the impact of the ECHR on the applicable foreign law.\textsuperscript{1175} It is true that the issue of the impact of substantive rights with regard to the recognition and enforcement of foreign judgments, particularly where these originate from third countries, raises similar questions, such as whether there should be attenuation of the standards of the ECHR and the manner of invocation of the rights guaranteed in the ECHR. These questions have been discussed in the previous chapter and a discussion here would roughly follow a similar path.\textsuperscript{1176}

However, one possible \textit{caveat} should be discussed here. It may not be entirely correct to treat these two issues as entirely the same, as one should not overlook the differences between the application of a foreign law and the recognition and enforcement of foreign judgments violating

\textsuperscript{1172} It should be understood that in cases concerning international child abduction the ECHR can be invoked by both the parent whose child has been abducted and the abducting parent. Examples of the former situation include, e.g., \textit{Iglesias Gil and A.U.I. v. Spain}, no. 56673/00, ECHR 2003-V and \textit{Ignaccolo-Zenide v. Romania}, no. 31679/96, par.94, ECHR 2000-I. Examples of the latter situation include, e.g., \textit{Maumousseau and Washington v. France}, no. 39388/05, ECHR 2007-XIII and \textit{Neulinger and Shuruk v. Switzerland [GC]}, no. 41615/07, ECHR 2010-. See also, e.g., \textit{Pini} (supra n. 906; discussed in more detail supra VII.4).

\textsuperscript{1173} See generally supra ch. III.3.5.1.2.

\textsuperscript{1174} Id.


\textsuperscript{1176} See supra ch. VI.3.2.1.
one of the rights guaranteed in the ECHR, because this may have an impact on the standard of control. It has been remarked that there is, in principle, not much difference between either applying a foreign law or recognizing and enforcing a foreign judgment that possibly violates the ECHR. This is correct in the sense that ultimately in both instances a court would in this way give effect to the repugnant foreign norm by either applying a foreign law or by recognizing and enforcing a foreign judgment.

However, one could interject that there is a crucial difference, in that in the case of the recognition and enforcement of foreign judgments, two competing obligations following from the ECHR may play a role: the obligation to recognize and enforce, and the obligation to deny such judgments in the event that they would violate the ECHR. This does not apply to the issue of applicable law. It could therefore be argued that Contracting Parties should be even more careful with regard to denying enforcement to foreign judgments on the basis of the substantive rights guaranteed in the ECHR. However, this is not an incredibly useful distinction, because as has already been discussed above, it would appear obvious that there is no obligation to recognize and enforce foreign judgments where this would result in a violation of the ECHR.

3.3 The Invocation of Substantive Rights Guaranteed in the ECHR – National Jurisprudence

Perhaps surprisingly, there is not a lot of case law to be found in England, the Netherlands, or Switzerland in which the invocation of one of the substantive rights guaranteed in the ECHR against the recognition and enforcement of foreign judgments is explicitly discussed. In all three countries, though, the principle that public policy will oppose the recognition and enforcement of foreign judgments violating human rights has been generally accepted. However, the exact interpretation of this principle and the role of the ECHR remain unclear.

There appear to be few cases in which one of the substantive rights guaranteed in the ECHR is successfully invoked against the recognition and enforcement of foreign judgments.

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1178 See supra VII.2-VII.4.
1179 See, e.g., Dicey, Morris and Collins supra n. 1104, at p. 632. See additionally the examples discussed infra.
1180 Cases concerning international child abduction are the exception hereto. See in the English case law, e.g., Re J (A Child) [2005] UKHL 40, although this case concerned mostly an issue of discrimination; see in the Dutch case
However, an example of the invocation of one of the substantive rights guaranteed in the ECHR against at least part of the effect of the recognition of a foreign judgment can be found in a Dutch case before the Rechtbank Utrecht. In this case a Dutch woman married a Turkish man in Turkey. In accordance with the Turkish law on names her last name was altered. When registering her marriage upon her return in the Netherlands, the registrar registered her changed (Turkish) name. Her birth certificate was later also amended to reflect this. The woman argued that the change of her name made in the birth certificate was discriminatory.

The district court found that, in principle, a change of the last name as a result of a change of one’s personal status outside of the Netherlands has to be recognized. In accordance with Turkish law, the woman received the last name of her husband; Turkish law did not at the time offer the possibility to the woman to keep her own name. However, the district court observed the judgment of the Court in Strasbourg in Ünal Tekeli v. Turkey, in which the Court held that the Turkish law in this regard violates Article 14 ECHR taken in conjunction with Article 8 ECHR. Although this judgment, in principle, only binds the parties, it is an important source for interpretation of the ECHR, according to the district court. The district court found that the obligatory change of the woman’s last name was a violation of the equality between man and woman and that the application of the relevant Turkish rules should be held to be in violation of Dutch public policy. The registrar was ordered to strike the change in the last name of the woman.

A similar case was decided by the Gerechtshof ‘s-Gravenhage. This case concerned the registration of a Hungarian marriage in the Netherlands. According to the Hungarian marriage certificate, the woman had chosen the man’s last name. She later claimed to have been unaware of the possibility to keep her own name under Hungarian law. The registrar registered the chosen name, but the district court ordered the name to be changed. The registrar appealed. The appeal court noted that the woman was insistent on keeping her own name, as a change of her family

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1182 Ünal Tekeli v. Turkey, no. 29865/96, ECHR 2004-X (extracts). Cf. Losonci Rose and Rose v. Switzerland, no. 664/06, 9 November 2010. This latter judgment is discussed supra ch. VI.4.
name would be reflected in her birth certificate. The appeal court held that the findings of the Court in Strasbourg in *Burghartz v. Switzerland*\(^{1184}\) and *Stjerna v. Finland*\(^ {1185}\) indicated that the impossibility for the woman to choose her family name is discriminatory. In such instances, the registrar has to apply Dutch law to the choice of a name. Ultimately, the appeal court found that not allowing the woman in this case to choose her own last name amounted to an unjustified interference of her rights under Article 8 (2) ECHR.

It is interesting to note with regard to these two Dutch cases that the relevant decisions emanated respectively from Turkey and Hungary, both Contracting Parties. It has been discussed that the invocation of one of the substantive rights guaranteed in the ECHR may be rebutted by the local remedy argument, which is also included in the ECHR.\(^ {1186}\) Formally speaking, the Dutch courts in these cases thus could have argued that any complaints directed against the relevant Turkish and Hungarian rules regarding names should have been handled in Turkey and Hungary. In both these cases the women could have turned to the authorities in these countries, but apparently they did not spring into action until their return to the Netherlands. Nevertheless, the Dutch courts did not hold this against the litigants. What distinguishes these cases from the Court’s decision in *Lindberg*, though, is that in *Lindberg* enforcement was requested against the applicant. In these cases, the litigants themselves requested the recognition of the foreign decision, or to be more precise the recognition of their status acquired abroad, and only invoked the ECHR against one of the effects of the recognition (but not the recognition itself).

It is, in my opinion, certainly defensible that the national courts of Contracting Parties should not rely on this local remedy argument with regard to the recognition and enforcement of foreign judgments originating from a third country. While there may not be an obligation for national courts to deny recognition to such judgments, the recognition and enforcement would still result in the rights of a party under the ECHR being violated, which, in principle, should be avoided. It is therefore conceivable that national courts would deny recognition and enforcement in such cases, at least to a certain extent.

\(^{1184}\) *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A-280-B.

\(^{1185}\) *Stjerna v. Finland*, judgment of 25 November 1994, Series A-299-B.

\(^{1186}\) See supra VIII.3.
As has already been mentioned above, the Swiss *Tribunal fédéral* has, in a case concerning the recognition of a Lebanese repudiation, invoked both substantive and procedural public policy, as it held the recognition to be intolerably incompatible with the Swiss conceptions of justice.\(^{1187}\) Although in this regard reference was, *inter alia*, made to the equality of spouses, no express reference was made to this right as guaranteed in the ECHR. Incidentally, in its invocation of procedural public policy, the *Tribunal fédéral* also did not expressly rely on Article 6 (1) ECHR, but rather on provisions containing similar rights in the Swiss Constitution. Regardless, the *Tribunal fédéral* has in the *Bertl* case found that human rights are an integral part of Swiss public policy.\(^{1188}\) It is, finally, interesting to note that with the exception of French case law, the rights guaranteed in the ECHR are not often invoked against the recognition of repudiations.\(^{1189}\)

**4. Conclusion**

In this chapter the second aspect of the impact of the ECHR on the issue of the recognition and enforcement of foreign judgments has been examined. This aspect concerns the role of the rights guaranteed in the ECHR opposing the recognition and enforcement of foreign judgments. It has been demonstrated that both the procedural right of Article 6 (1) ECHR, which guarantees the right to a fair trial, and the substantive rights guaranteed in the ECHR may be invoked against the recognition and enforcement of foreign judgments. It follows from the discussion of the case law in this chapter that the substantive rights of Article 8 ECHR, the right to family life, and Article 1 of Protocol No. 1 ECHR are particularly relevant in this regard, but in principle all the substantive rights guaranteed in the ECHR which may be invoked in private law cases can be applied to oppose recognition and enforcement of foreign judgments.

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\(^{1187}\) ATF 126 III 327.

\(^{1188}\) ATF 103 Ia 199, 205 (*Bertl*).

The most important questions in relation to the rules on recognition and enforcement of the Contracting Parties concern what exactly the standard of control should be with regard to the rights guaranteed in the ECHR. This standard of control will differ depending on whether Article 6 (1) ECHR or one of the substantive rights guaranteed in the ECHR is concerned. The distinction between cases dealing with, on the one hand, the recognition and enforcement of foreign judgments originating from third countries and, on the other, cases dealing with judgments originating from other Contracting Parties, is also very important.

It has been discussed with regard to the impact of Article 6 (1) ECHR that the Court in *Pellegrini* initially appeared to insist on full compliance with the procedural safeguards as set out in Article 6 (1) ECHR, particularly for foreign judgments emanating from third countries. This means that in the assessment by a court of whether a fair trial preceded the judgment, a foreign judgment is treated as if it concerned a domestic judgment.

However, the Court may have changed its approach somewhat in subsequent case law by again referring to the standard of ‘a flagrant denial of justice’, to which it adhered in earlier case law. This standard, which the Court has introduced in cases regarding the extra-territorial effect of the ECHR, entails a threshold with regard to Article 6 (1) ECHR in the sense that a violation of that provision may only be found in the event of ‘a flagrant denial of justice’. However, what a ‘flagrant denial of justice’ exactly entails is unclear. Moreover, there are, in my opinion, good arguments to insist on full compliance with regard to procedural shortcomings in foreign proceedings.

*Pellegrini* is, in principle, concerned with the recognition and enforcement of foreign judgments emanating from third countries, and essentially leaves unanswered the question of whether the standard of full compliance would also apply to foreign judgments emanating from other Contracting Parties. However, as the procedural safeguards *ex* Article 6 (1) ECHR should already be protected in other Contracting Parties, there is, in my opinion, no reason to mitigate the standard of control regarding Article 6 (1) ECHR for foreign judgments originating from other Contracting Parties.
Another issue concerning the recognition and enforcement of foreign judgments originating from other Contracting Parties is the so-called ‘local remedy’ rule. Is it possible to invoke Article 6 (1) ECHR against such foreign judgments? After all, should complaints directed against the procedure in the Contracting Party of origin of the judgment not also have been brought in that Contracting Party? This argument is, in principle, valid with regard to Article 6 (1) ECHR, and it may thus be possible that the Court would deny such complaints for this reason, if they were ever to reach Strasbourg. Then again, there may be situations in which it would still appear to be possible to invoke Article 6 (1) ECHR, for example when a party has not been properly notified of proceedings against him or her. It follows, incidentally, from the discussion of national case law on this topic that national courts are nevertheless willing to deny the recognition and enforcement of foreign judgments emanating from other Contracting Parties on this basis.

There may be even more uncertainty with regard to the invocation of the substantive rights guaranteed in the ECHR. It follows from the Court’s case law that a distinction should be made between judgments originating from other Contracting Parties and judgments originating from third countries. It would appear to be impossible to complain before the Court in Strasbourg about a foreign judgment emanating from another Contracting Party violating one of the substantive rights guaranteed in the ECHR, because of the local remedy argument. A complaint about such a violation should have been brought in the Contracting Party of the origin of the judgment. This does not, however, necessarily mean that the national courts of the Contracting Parties should recognize and enforce such judgments, as even though the applicant should have brought a complaint elsewhere, the Contracting Party would still give effect to a foreign judgment violating a right guaranteed in the ECHR.

The Court has added little on the invocation of substantive rights guaranteed in the ECHR against foreign judgments emanating from third countries. The only truly relevant case of the Court on this topic concerned the very specific issue of the combat against international drug trafficking. The Court found no violation of the right to property in this case, because Contracting Parties enjoy a wide margin of appreciation in this area. This case therefore does not really provide much clarity on the issue. Remarkably, in the national case law of England, the Netherlands, and Switzerland there is also not much case law to be found in which the
substantive rights guaranteed in the ECHR are being invoked against the recognition and enforcement of foreign judgments. While the possibility of the invocation of these rights appears to be accepted, the national case law does not offer further guidance into the issues surrounding the invocation of these rights. It has been found, though, that these issues, in principle, will be similar to those concerning the invocation of the ECHR against the foreign applicable law violating the ECHR.