The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights

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Introduction

Insofar as Article 6 of the (European) Convention on Human Rights and Fundamental Freedoms (ECHR) guarantees the fair trial in civil matters, it provides both parties to the proceedings with a human right against the State to have their respective rights to a fair trial secured. Article 6 therefore applies to a body of the law which may be described as regulating a triangular relationship. In that relationship, the State guarantees fairness in certain relations generally between private parties having opposite interests. The corresponding duty of the State is generally fulfilled, in well-ordered societies and at least for that part of “civil proceedings” that are proceedings between private parties, by the enactment of a body of laws that equitably respects the procedural rights of both parties. With the exception of length of procedure cases, therefore, successful human rights complaints against States with such societies for interference with the right to a fair trial in such proceedings have been rare.

The concept of civil proceedings in this sense covers also the enforcement of final judgments. Final judgments of national courts give the victorious plaintiff, for a number of reasons, a human right to see the judgment enforced within the judgment State. Indeed, it is a “fundamental aspect of the rule of law [...] that a final court judgment should be effective”. In proceedings between private parties, this implies that every Convention State must provide for legal means that are adequate and sufficient for fulfilling

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1 of 4 November 1950, CETS No. 5. All Articles cited are Articles of the ECHR.

2 Cf. ECtHR, Saccoccia v. Austria, 69917/01, 18 December 2008, paras. 61 et seq.

3 ECtHR, Burdov v. Russia, 59498/00, Rep. 2002-III, para. 40.

its positive obligation to provide for the execution of final judicial decisions. Well-ordered societies generally have done so.

While in such societies the enforcement of domestic judgments generally is a matter of course, the enforcement of foreign judgments is not. Indeed, “States have valid reasons to deny foreign judgments the same force they grant their own judgments since the foreign procedure may be viewed as deficient, or the outcome of the foreign litigation may be viewed as objectionable.” From the point of view of general international law, foreign judgments are seen, outside the judgment State, as sovereign acts of a foreign State. Like other sovereign acts, they apply in principle territorially only. Under general international law, therefore, there is no obligation of a State to enforce a foreign judgment within its own territory.

The enforcement of foreign judgments thus is a matter of choice for the States, which choice will be informed by considerations of comity and of reciprocity, both principles not of duty but of prudence and politeness. Indeed, there are strong incentives for such an enforcement: “Parties are interested in transnational legal certainty and in avoiding repeated litigation and conflicting decisions; the general public has an interest in avoiding resources spent on re-litigation and in international decisional harmonies; and States have a common interest in promoting inter-State transactions.” Those incentives are so persuasive that nearly all countries now regularly do enforce foreign judgments that meet certain conditions. A corresponding obligation is provided for in many bilateral and multilateral treaties. In sum, a foreign judgment generally is domestically enforced if it meets the

5 ECtHR, Fociac v. Romania, 2577/02, 3 February 2005, para. 69.


7 Michaels (supra n. 6), para. 7.

8 Ibid.

9 Michaels (supra n. 6), para. 11.
conditions posited in the domestic law of the enforcement State\textsuperscript{10} or if the latter has accepted a treaty obligation to do so\textsuperscript{11}.

The aforementioned triangular nature of the human rights law of fair civil proceedings remains unchanged by the foreign flavour that is the characteristic of the enforcement of foreign judgments (exequatur proceedings). Therefore, whether an enforcement State grants an exequatur or denies it, its decision, be it based on domestic or treaty law, can be attacked, dependent on circumstances, under human rights aspects. If the enforcement State grants an exequatur, it will in most cases interfere with human rights of the judgment debtor. If, on the other hand, an exequatur is denied, that decision might interfere with human rights of the judgment creditor.

The international law principle of the territorial limitation of a State's jurisdiction has been accepted by the ECtHR, in quite different contexts, as valid for the application of the ECHR\textsuperscript{12} which generally should be interpreted as far as possible in harmony with other principles of international law of which it forms part\textsuperscript{13}. In the field here under discussion, in accordance with the triangular nature of the relationship, the Court has developed, in what appears to be well on its way to become “well-established case-law of the court“ (Article 28 (1) (b)), a two-pronged jurisprudence. On the one hand, responding to arguments based on the incompatibility of the foreign judgment proceedings with the ECHR\textsuperscript{14}, the incompatibility of the exequatur proceedings with the ECHR\textsuperscript{15}, or the

\textsuperscript{10} Cf. eg ECtHR, Vrbica v. Croatia, 32540/05, 1 April 2010, paras. 7-10.

\textsuperscript{11} Cf. eg ECtHR, Maumousseau and Washington v. France, 39388/05, Rep. 2007-XIII.


\textsuperscript{13} ECtHR, Bankovic, para. 57.

\textsuperscript{14} Cf. ECtHR, Pellegrini v. Italy, 30882/96, Rep. 2001-VIII.

\textsuperscript{15} Cf. ECtHR, Ern Makina Sanayi ve Ticaret AS v. Turkey, 70830/01, 3 May 2007.
substantive incompatibility of the final outcome with the ECHR\textsuperscript{16}, it has recognised the value of exequatur proceedings in protecting human rights of the foreign-judgment debtor. On the other hand, responding to arguments ranging from the claim that the denial of recognition of a legal position generated by the foreign decision has violated a substantive human right\textsuperscript{17} to claims that the denial of an enforcement as such violates the right to a fair trial under Article 6 or that other specifics of exequatur proceedings or the law underlying the denial of the exequatur do so\textsuperscript{18}, the Court postulates, in principle, a human right of the foreign-judgment creditor to an exequatur.

For obvious reasons, the opposite rights of creditor and debtor, which must be conceived of as mutually limiting, cannot be raised in one and the same proceedings before the ECHR. Rather, if one of those rights is asserted in a complaint before the Court, the opposite right can only be asserted as a defence, and not by the holder of that right but by the respondent State. Notwithstanding, it falls to the Court to find a balance, \textit{in abstracto}, between the opposite rights. This explains, if such an explanation is necessary, that ECtHR decisions on one of the opposite rights are also relevant to the other. It also inevitably means that the Court has to find a reasonably closed system guaranteeing both rights while at the same time paying due respect to the Convention States' margin of appreciation which, in the case of a conflict between opposite human rights positions, is particularly wide\textsuperscript{19}. Such a system, if in an embryonic stage, can indeed be deduced from the case-law of the Court. The present contribution will discuss how the Court's jurisprudence fits the States' preoccupations on this subject as reflected in general international law and in the international practice.

I. The Protection of Human Rights of the Creditor

I shall start with the second prong: the protection of human rights of the creditor. The States' preoccupations in this area are threefold: they have a common interest in promoting inter-State transactions, and they share an

\textsuperscript{16} Cf. ECtHR, \textit{Saccoccia}.


\textsuperscript{18} ECtHR, \textit{McDonald v. France}, 18648/04 (dec.), 29 April 2008.

\textsuperscript{19} ECtHR, \textit{Evans v. United Kingdom}, 6339/05, 10 April 2007 (GC), para. 77.
interest in avoiding resources spent on re-litigation and in international
decisional harmonies. Also, they share an interest in international legal
certainty. Those preoccupations can be translated into one human rights
case: foreign judgments should be enforced in principle on the same
footing as domestic ones. However, they have not (yet) led to the
emergence of corresponding customary international law rules. The
absence of such rules is in marked contrast to the right to the enforcement of
domestic judgments where, in well-ordered societies, corresponding
domestic rules exist as a matter of course. Indeed, not to require such
enforcement as part of the rights to a fair trial would render many of the
other guarantees of Article 6 largely meaningless. Still, that contrast is not
surprising. It is a particularity of exequatur cases that rights an applicant
may have against the judgment State by the very fact that a court of that
State has rendered a final judgment do not normally exist, under general
international law, against the respondent exequatur State. Indeed, “[t]he
judgments of one State's courts have no force by themselves in another
State.” This is but the consequence of the general principle according to
which sovereign acts apply only territorially.

It is therefore not self-evident that a human rights claim against the
judgment State generated by a judicial decision of that State can be asserted
also against the exequatur State. One question this contribution will try to
answer is whether some specificity of human rights law provides a reason to
see this differently, in other words: whether the human rights concern
identified above has solidified into human rights law. The answer will be
sought on the basis of the Court's relevant case-law which will be first
presented chronologically and then discussed.

1. The Cases

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20 Michaels (supra n. 6), para. 1.

21 On the latter cf. ECtHR, Hornsby v. Greece, 18357/91, Rep. 1997-II; ECtHR,
Burdov.

22 Michaels (supra n. 6), para. 11.

23 ECtHR, Saccoccia, paras. 60, 61.

24 Michaels (supra n. 6), paras. 1 and 11.
The first relevant decision of the Court was Hussein. In that case, the applicants were a Belgian mother and her daughter who at the relevant time were resident in Germany. The German youth service had brought before a German court paternity and maintenance claims on behalf of the second applicant against the supposed father, a Belgian resident in Belgium. The court granted those claims. The first applicant then demanded exequaturs for the German judgments in Belgium which were denied. The applicants claimed that the denial of the exequaturs as such constituted a violation of their Article 6 rights. The Government answered that the rendering foreign court had no jurisdiction according to the Brussels Convention on which it had erroneously relied. The ECtHR declared not to have jurisdiction to interpret that convention and contented itself with finding that the Belgian proceedings overall had been fair. The applicants further claimed that the respondent State, by denying them the exequatur, had de facto negated rights another European State had recognised, and thereby interfered with their rights to respect for their private and family life and to the peaceful enjoyment of their possessions. The ECtHR accepted, without more, that the denial of the exequaturs had constituted interferences with the rights claimed by the applicants but rejected the application for different reasons.

In the case of Wagner, a Peruvian family court had pronounced the full adoption of the second applicant, then aged three years, by the first applicant, a Luxembourgish single woman, with all the normal legal consequences of an adoption. From then onwards, the applicants lived together as a family. The courts in Luxembourg denied the exequatur for the Peruvian decision the applicants had requested. In doing so, the courts relied on Luxembourgish substantive law, applicable according to Luxembourgish private international law, according to which a single person could not obtain a full adoption. The ECtHR considered the denial an interference

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25 ECtHR, Hussein, En Droit, para. 3.


27 ECtHR, Hussein, En Droit, para. 5.

28 Ibid. — Like the grant of an exequatur (cf. infra note 107), also its denial does not necessarily interfere with a protected right. If the exequatur is denied in a case like Saccoccia, no individual will be the victim of such a decision, and a possible right of the US of A is not protected under the ECHR.
with the applicants' right to respect of their family life, referring to Hussin\textsuperscript{29} without giving further reasons, and in the end upheld the application.

In \textit{McDonald}, an American diplomat had married a French woman. While working at the US consulate general in Marseille, he instituted divorce proceedings against his wife. His action was rejected by the Marseille court. None of the parties appealed. The applicant then started new divorce proceedings in Florida of which he was a native and where he resided temporarily. In those proceedings, the Florida court pronounced the dissolution of the applicant's marriage. The applicant's request for an exequatur in France was rejected primarily because, under French law, the Florida court had no jurisdiction. The \textit{Cour de cassation} held that the French exclusive jurisdiction for actions against French nationals was no more exorbitant than the jurisdiction of the US court according to the law of Florida which was based on the applicant's temporary residence there\textsuperscript{30}. The applicant claimed before the Court that the application of the provision providing for exclusive French jurisdiction interfered with his right to a fair trial in combination with the prohibition of discrimination. The Court recognised that there was, in the denial of an exequatur, an interference with the right to a fair trial, without giving any further specification\textsuperscript{31}, but rejected the application for different reasons.

In \textit{Dinu}, a Romanian court had ordered the Romanian husband of the applicant to pay maintenance for their common child who was raised by the applicant\textsuperscript{32}. Relying on the New York Convention\textsuperscript{33}, the applicant undertook to have the Romanian judgment enforced against her husband who resided in France. Her sustained efforts were largely unsuccessful. Similarly, in \textit{Romanczyk}, the Polish husband of the applicant had been ordered by a Polish court to pay maintenance for their common child\textsuperscript{34}. Here again, the

\begin{itemize}
\item \textsuperscript{29} ECtHR, \textit{Wagner}, para. 123.
\item \textsuperscript{30} ECtHR, \textit{McDonald}, En Fait, para. A.
\item \textsuperscript{31} ECtHR, \textit{McDonald}, En Droit, para. B.
\item \textsuperscript{32} ECtHR, \textit{Dinu v. France and Romania}, 6152/02, 4 November 2008.
\item \textsuperscript{33} Convention on the Recovery Abroad of Maintenance of 20 June 1956, UNTS vol. 268, p. 3.
\item \textsuperscript{34} ECtHR, \textit{Romanczyk v. France}, 7618/05, 18 November 2010.
\end{itemize}
applicant tried largely unsuccessfully, using the mechanism of the New York Convention, to make her husband pay, who again resided in France. In both cases, the applicants claimed that the respondent State(s) had been negligent in their duty to assist them in the enforcement of the final domestic maintenance judgments and thereby interfered with their rights to a fair trial. The Court agreed, and upheld the applications.

Negrepontis-Giannisis concerned an adoption between consenting adults, an uncle (a bishop of the Greek Orthodox church in the US) and his nephew, pronounced by a US court after an investigation by social workers into their family life. After the intestate death of the uncle, in a dispute between the adopted son and other relatives of the deceased over the latter's inheritance, the validity of the adoption was contested before the Greek courts and ultimately denied by the Areopag for the reason that the uncle, according to rules of canon law going back to the 7th and 9th centuries, by becoming an orthodox monk, more exactly: by getting tonsured, had died the civil death and thereafter was not able to adopt anybody. Those rules, the Areopag held, were part of the Greek international ordre public. The Court, without examining whether there really was a father-and-son relationship between uncle and nephew, found that the American act of adoption was presumed to render effects, and that the Greek refusal to recognise the adoption was an evident interference with the nephew's family life. Finding further that in the more than 20 years between the adoption and the inheritance dispute nobody had doubted the reality of the relations between the adoptive father and his son, the Court concluded that the interference with the family life of the son was not necessary in a democratic society, and upheld the application.

2. Discussion

The applicants' claims related above fall in two categories. While all the applicants claimed that the denial of an exequatur by the respondent State interfered with one or more human rights, those human rights were substantive rights in some cases, especially the right to respect for family or

36 ECtHR, Negrepontis-Giannisis, para. 28.
37 ECtHR, Negrepontis-Giannisis, para. 58.
38 ECtHR, Negrepontis-Giannisis, paras. 75 et seq.
private life or the right to the peaceful enjoyment of possessions, and the adjective right to a fair trial in other cases. Thus it is possible to distinguish between collateral claims to an exequatur in which substantive human rights provisions are claimed to demand an exequatur, and principal claims where the denial of an exequatur is considered as an interference with the right to a fair trial. Concerning the latter, the term “principal claim“ appears to be justified: as the Court sees the enforcement of a final judgment as part of the “trial“\footnote{ECtHR, Romańczyk, para. 53.}, the guarantee of the right to its enforcement is a principal function of Article 6 at least in domestic cases. The Court's jurisprudence treats both categories largely the same.

a) The Interference, or the Question of a \textit{Prima Facie} Right to an Exequatur

aa) When an applicant claims that the respondent State, by denying her an exequatur for a foreign judgment, interferes with a human right, the Court regularly recognises\footnote{ECtHR, Hussin, En Droit, para. 5; ECtHR, \textit{McDonald}, En Droit, para. B.} or considers\footnote{ECtHR, \textit{Wagner}, para. 123.} that that denial indeed constitutes such an interference, without however giving any detailed reasons. This lack of any relevant detailed reasoning may correspond to the general practice of the Court to give an extremely concise treatment to the question of interference, reserving the in-depth argumentation to the discussion of the proportionality of the latter. Nonetheless, the Court's decisions on collateral claims necessarily imply, as will be shown instantly, that it recognises a right to an exequatur, developed as a collateral procedural right to protect the substantive right at issue. The denial of an exequatur, even if done expressly, is of the nature of an omission to act ie an omission to enforce the foreign judgment, in contrast to its granting which clearly is a positive action of the State. Such an omission can constitute an interference with a human right only in the face of an obligation to act. Therefore, whenever the Court finds the denial of an exequatur to interfere with a substantive human right, it necessarily must have assumed a right to an exequatur collateral to that right. It also follows that the corresponding obligation of the State is a positive obligation.

In deciding on principal claims, the same result is expressed more explicitly in the Court's jurisprudence. In \textit{McDonald}, the Court recalls, referring to \textit{Pellegrini}, that it has already decided that in the case of a dispute of a
serious nature concerning civil rights and obligations, Article 6 applies as well to the enforcement of national judgments determining civil rights and obligations as to the enforcement of comparable foreign judgments\(^{42}\). This “reminder” is repeated, almost \textit{verbatim}, in \textit{Negrepontis-Giannisisis}, with that important difference that the “reminder” was \textit{obiter} in \textit{McDonald} but part of the \textit{ratio decidendi} in \textit{Negrepontis-Giannisisis}\(^{43}\). By evoking expressly the “enforcement” of judgments, it must be taken to refer to that aspect of Article 6 according to which a judgment creditor has the right to see a final judgment enforced. However, the reference to \textit{Pellegrini} does not appear to support the Court’s finding. \textit{Pellegrini} deals only with the guarantees proceedings outside the legal space of the Convention must fulfill in order that a resulting judgment may be enforced within that space but not with a requirement that such a judgment be enforced within the latter\(^{44}\). Be that as it may, with its “reminder” the Court clearly postulates a principal right to an exequatur.

This conclusion is further comforted by another clause of the decision in \textit{McDonald}. Before finding the application manifestly ill-founded, for a number of reasons, the Court recognised that there was, in the denial of an exequatur, an interference with the right to a fair trial, without giving any further specification\(^{45}\). The Article 6 right in question cannot relate to the foreign judgment proceedings which had granted the applicant's request, in contrast to \textit{Pellegrini} where the foreign proceedings had denied the applicant's request and the Court had to deal with the grant of an exequatur. Neither can it relate to the exequatur proceedings as such as the applicant did not raise any complaints against those proceedings, in contrast to the applicant in \textit{Saccoccia}. Rather, the applicant's complaint had been that the French rules on jurisdiction prevented the enforcement of foreign judgments against French nationals and thereby violated Article 6, read in conjunction with Article 14, by unjustifiably discriminating in favour of French nationals. This complaint relates to the interface between those two proceedings ie the weight that the judgment proceedings should be accorded in the enforcement proceedings. In purely domestic settings, of course, this

\(^{42}\) ECtHR, \textit{McDonald}, En Droit, para. B.

\(^{43}\) ECtHR, \textit{Negrepontis-Giannisisis}, paras. 89 et seq.

\(^{44}\) Cf. ECtHR, \textit{Pellegrini}, paras. 40 et seq.

\(^{45}\) ECtHR, \textit{McDonald}, En Droit, para. B.
weight is decisive: Article 6 requires that a final judgment be enforced\(^{46}\). In contrast, under general international law this weight is nil as there is no requirement under that body of law that any State enforce a foreign judgment\(^{47}\). Under human rights aspects, the Court appears to assimilate foreign judgments to domestic ones. Indeed, it “sees no need to come to a different conclusion for exequatur proceedings”\(^{48}\). The only aspect of the legal situation generated by the American divorce decision and capable of being subsumed under Article 6 is exactly the aspect of the applicant’s having secured that (final) decision. To grant human rights protection to that aspect, albeit only provisionally, is protecting a principal human right to an exequatur.

A further facet is added to the story by *Dinu* which was an application against both the judgment and the enforcement States. It is remarkable because the Court's judgment in that case does not differentiate at all between the two respondents. Rather, it clearly presupposes an Article 6 duty of the enforcement State to grant an exequatur. Indeed, the Court holds against that State that by not granting a timely exequatur it had not done everything necessary for a speedy enforcement of the (foreign) court decisions in favour of the applicant\(^{49}\). In addition, the Court buttresses its decision concerning the exequatur proceedings with references to four former judgments on purely domestic proceedings (but not to *Hornsby*)\(^{50}\).

Similarly, in *Romanczyk*, the Court, this time referring to three (different) former judgments on purely domestic proceedings including *Hornsby*, and quoting the latter, finds that the enforcement of a judgment given by any court must be regarded as an integral part of the “trial“ for the purposes of Article 6\(^{51}\). However, while *Hornsby* concerned a purely domestic case ie the enforcement of a Greek judgment in Greece, *Romanczyk* concerned the enforcement of a Polish judgment in France. So here the meaning of “any“

\(^{46}\) Cf. text at n. 4 and 23.

\(^{47}\) Cf. text at supra n. 24.

\(^{48}\) ECtHR, *Saccoccia*, para. 62.

\(^{49}\) ECtHR, *Dinu*, paras. 55-57.

\(^{50}\) ECtHR, *Dinu*, para. 55.

\(^{51}\) ECtHR, *Romanczyk*, para. 53.
court has been enlarged, rather surreptitiously, to include also foreign
courts. As an aside, the fact that in both those cases the enforcement State
had bound its international law discretion by ratifying the New York
Convention did not play any role in the Court's reasoning.

bb) In all those cases the Court, whether deciding on collateral or principal
claims, clearly stipulates that human rights law requires the enforcement
also of foreign judgments and thereby postulates a right to an exequatur. In
most of them, this point forms part of the ratio decidendi. The overall
impression from the cases related above is that the Court simply sees no
relevant difference between the enforcement of domestic judgments and the
granting of an exequatur. Indeed, it has expressly stated so in a different
case52. This impression is reinforced by the references the Court gives to
buttress its relevant judgments. Those references are not the same in any
two cases and, the misleading reference to Pellegrini apart, invariably to
purely domestic cases.

Considering exclusively the human rights of the judgment creditor, there is
indeed a case to treat foreign judgments exactly like domestic ones in this
sense that the judgment creditor has a human right to see also her foreign
judicial title honoured; that was the human rights concern identified above53.
However, in view of the triangular relationship regulated by Article 6 one
would expect the Court to explain its interpretation of Article 6 in some
detail. One reason for that expectation is that the Court's jurisprudence
denies the States the discretion not to enforce a foreign judgment which they
enjoy, in the absence of relevant domestic law or treaties, under general
international law. A connected reason is that it is not self-evident that a
human rights claim against the judgment State generated by a judicial
decision of that State can be asserted also against the exequatur State.
Disappointingly, the Court's relevant judgments do not contain any real
explanation. McDonald was the only case where the respondent government
expressly argued that the ECHR does not provide for a right to an exequatur
and does not purport to govern the substantive conditions under which a
State may refuse to enforce a foreign decision. However, the Court did not
answer that argument directly54. Neither was there a need for it to do so as it

52 Cf. text at supra n. 48.

53 Cf. text at supra n. 21.

54 ECtHR, McDonald, En Droit, para. A.
rejected the application anyway. So we must look for an explanation outside
the immediately relevant jurisprudence of the Court.

The starting point must be that the Court's assumption of a principal or
collateral right to an exequatur is not self-evident. Indeed, it is in stark
contrast to the relevant principles of general international law under which,
as quoted above, “[t]he judgments of one State's courts have no force by
themselves in another State”\textsuperscript{55}. So when the Court assumes, without more, a
collateral or a principal right to an exequatur, thereby granting foreign
judgments \textit{prima facie} force in the exequatur State, it obviously does not
follow the guidance of general international law.

A different possible basis of the Court's approach can be found in a well
known jurisprudence of the Court which the Court however does not refer to
in the present context. “The Court, in defining the meaning of ... notions in
the text of the [ECHR], must take into account elements of international law
other than the [ECHR] ... The consensus emerging from specialised
international instruments and from the practice of [Convention States] may
constitute a relevant consideration for the Court when it interprets the
provisions of the [ECHR] ...”\textsuperscript{56}. While there is no obligation whatsoever to
grant an exequatur under general international law, international practice,
based on domestic law and a plethora of bi- and multilateral treaties, is quite
different\textsuperscript{57}. As the enforcement of foreign judgments, whether on the basis
of such treaties or autonomously, is widely provided for in domestic law
once certain conditions are fulfilled, it may be said that those provisions
“denote a continuous evolution in the norms and principles applied in
international law or in the domestic law of the majority of [Convention
States]” and that there is, in this area, “common ground in modern
societies”\textsuperscript{58}. Not to consider such a consensus and thus not “to maintain a
dynamic and evolutionary approach [to the interpretation of the ECHR]
would risk rendering [the Court] a bar to reform or improvement”\textsuperscript{59}. In a

\begin{footnotesize}
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\item[55] Michaels (supra n. 6), paras. 1 and 11.
\item[56] ECtHR, \textit{Demir and Baykara v. Turkey}, 34507/97, 12 November 2008, para. 85.
\item[57] Cf. Michaels (supra n. 6), paras. 13 \textit{et seq}.
\item[58] ECtHR, \textit{Demir and Baykara}, para. 86.
\end{itemize}
\end{footnotesize}
converging world, and especially in a converging Europe, to let the reach of judicial decisions end at national boundaries is not in the best interest of human rights and of the persons and positions protected by them. So the very fact that the international practice in granting an exequatur to foreign judgments goes far beyond what is required under general international law can be a potent argument in favour of the Court's approach.

However, while the Court follows the tendency of the international practice, it does not strictly follow its particulars. That practice makes the enforcement of foreign judgments, and therefore the very existence of the right to an exequatur \(^{60}\), regularly dependent on certain adjective and substantive criteria posited by the relevant domestic law being met. It therefore approaches the right to the enforcement of a foreign judgment only as a \textit{prima facie} right in this sense that, while a foreign judgment regularly is not considered a non-event as it might be under general international law, it will not be enforced simply by reason of its being there but only once its enforceability, according to substantive domestic criteria, prominent among them the jurisdiction of the foreign court, has been certified domestically, generally in exequatur proceedings. Therefore, always according to that practice, the decision of a foreign court which the \textit{forum} deems not to have jurisdiction opens only the right to an examination of that question, but not a right to an exequatur. The foreign judgment as such opens the right to a procedure but not a substantive right.

Examples are the domestic proceedings in \textit{Hussin} and \textit{McDonald}. In \textit{McDonald}, the foreign judgment had pronounced the applicant's divorce. Not recognising the foreign court's jurisdiction, the \textit{forum} created a “limping marriage”, an unwelcome though not infrequent result under the conflict of laws\(^ {61}\). In \textit{Hussin}, the foreign judgment was the source as well of “possessions” as of an important aspect of the second applicant's private life, i.e., the judicially determined knowledge of her progenitor. Concerning possessions, the ECtHR has held for a long time that judgment claims are “possessions“ within the meaning of Article 1 of Protocol no. 1\(^ {62}\).

\(^{60}\) Cf. the formulation of the very restrictive Article 34 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 OJ 12, 1: “A judgment shall not be recognised ...."

\(^{61}\) Rather surprisingly, in other contexts France treated the (former) spouses as divorced. Cf. ECtHR, \textit{McDonald}, En Fait, para. A.

\(^{62}\) Cf. e.g. ECtHR, \textit{Abramiuc v. Romania}, 37411/02, 24 February 2009, para. 84.
“Possessions” are generally not considered to be territorially restricted but in principle protected in every Convention State. The same applies for the knowledge of one's filiation which is protected under the ECHR as part of private life. However, in the international practice, “possessions”, and the knowledge of one's filiation, if created by the decision of a foreign court deemed by the forum not to have jurisdiction, are simply ignored by the latter; such a decision does not create “vested” rights which the forum would be bound to respect. Rather, it does not create any substantive right against the exequatur State at all.

The Court's jurisprudence deviates from that practice. By recognising without more that the denial of an exequatur interferes with human rights, it considers a foreign court decision as such to open a substantive right to an exequatur. This deviation does not normally influence the result the international practice and the Court respectively arrive at. It concerns only the question of interference and thus the very first step of the examination of a purported human rights violation. As the protection of human rights in general is not absolute, the finding of an interference does not predetermine the final outcome of that examination which may still lead the Court to reject the application, in the end, as (manifestly) ill-founded. Still, the deviation means that the Court's reasoning appears to be profoundly different from that of the international practice. Where the latter might simply ignore the decision of a foreign court the forum deems not to have jurisdiction, the Court sees the denial of an exequatur for such a foreign judgment as an interference with human rights eg the peaceful enjoyment of possessions or the respect for private life.

The Court's reasoning raises certain problems. By recognising a substantive right to an exequatur, and a corresponding positive obligation of the State, the Court enters the human rights examination process and does not, in


64 The domestic courts in Wagner held that, according to their own conflict of law rules, the Peruvian judge had had to apply Luxembourghish law which she had not done. Therefore they denied the exequatur: ECHR, Wagner, para. 34.

65 Cf. eg ECHR, Hussin, En Droit, para. 5.

66 Similarly, in relation to the right to respect for family life, the Court has held that the exequatur courts “could not reasonably disregard the legal status validly created abroad” (ECHR, Wagner, para. 133, my italics).
contrast to the international practice, reject the application as it were *in limine*. Once it has entered that process, to reject the application, within the framework of that examination, as ultimately ill-founded, it must find the denial of the exequatur necessary in a democratic society. This recourse to the principle of proportionality however does not fit well those cases in which the international practice does not accept the rights created by the foreign court as "vested" rights because the *forum* does not recognise that court's jurisdiction and therefore simply denies the right to an exequatur. In those cases, certainly not coincidentally, the Court, in order to allow the exequatur State to ignore those rights even if it (the Court) considered them interfered with by the denial of the exequatur, steps outside the framework of the usual human rights examination to invoke a maxim of rather doubtful pedigree ie that nobody must complain about a situation to the emergence of which she has contributed herself. Thus, the Court, instead of running the usual human rights examination of the State measure, in those cases concludes on the basis of the aforementioned maxim that the respondent State could not be reproached with refusing to enforce the judgment of a foreign court deemed by the *forum* not to have jurisdiction. This maxim the Court applied in both *McDonald* deciding on a principal claim and in *Hussin* deciding on a collateral one. In *McDonald*, where the Court completed the maxim by the clause “by one's own inaction”, it referred to the fact that the applicant had not appealed against the judgment of the Marseille court rejecting his divorce action. In *Hussin*, the maxim presumably referred to the fact that the respondent State did not recognise and enforce the judgment of a foreign court, originally addressed by the applicant, which it deemed not to have jurisdiction. By stepping outside the framework of the human rights examination and instead applying the maxim the Court gives the impression that it takes back with one hand what it had given with the other ie the recognition of an interference with human rights: in the end, it is an interference the victims must not complain about.

67  ECtHR, *Hussin*, En Droit, para. 5.

68  ECtHR, *McDonald*, En Droit, para. B.

69  ECtHR, *Hussin*, En Droit, para. 5, referring to ECtHR, *Freimanis and Lidums v. Latvia* (dec), 73443/01 and 74860/01, 30 January 2003, En Droit, para. F 2, which however concerned the rather special case of a contribution "by one's own inaction". While maxims similar to the one used by the Court in *Hussin* are well known, especially the maxim *nemo audiatur turpitudinem suam allegans*, the origins of the specific maxim, and its legal status, remain in the dark. Interestingly, the *nemo audiatur* maxim presupposes a turpitude of the claimant whereas the maxim in *Hussin* contents itself with her simple contribution.
It is submitted that the Court's reasoning would gain much clarity by hewing more closely to the international practice. That would avoid the impression that the Court first gives a recognition which it takes back later. While not strictly illogical, the Court's reasoning appears to be at odds with Ockham's razor: there is a more straightforward way of reasoning to achieve the same result ie to deny an interference in the first place. Hewing more closely to the international practice would only require the Court not simply to recognise ab initio an interference with human rights by the denial of an exequatur but to examine whether there was indeed a right against the respondent State with which that State could interfere.

b) The domestic legal basis for the enforcement of foreign judgments

In those cases in which the Court sees in the denial of an exequatur an interference with the right to an exequatur without applying the maxim in Hussin it proceeds with the usual human rights examination. In the case of positive obligations, the requirement of a legal basis for the interference does not apply. There is therefore no need for a domestic legal basis for the denial of an exequatur. That said, it is implicit in the mutually limiting nature of the rights under discussion that the domestic legal requirements for granting an exequatur must be respected in principle but must also themselves be compatible with the ECHR. Thus, the domestic legal basis for the enforcement of foreign judgments may provide further limits for the latter only if the relevant provisions conform themselves to the Convention. In this context, “it has to be borne in mind that the Court's power to review compliance with domestic law is limited”.

The most common such requirement is that the foreign court must have had jurisdiction, a point already touched upon above. As discussed there, the Court deals with the lack of jurisdiction of the foreign court under the aspect that the exequatur State cannot be reproached with refusing to enforce the judgment of a foreign court it deemed not to have jurisdiction. Indeed, on the face of it, Article 6 gives the right to a court but not to any specific

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70 ECtHR, Saccoccia, para. 87. cf. also, concerning the enforcement of a foreign criminal judgment, Grori v. Albania, 25336/04, 7 July 2009, paras. 151-162.

71 ECtHR, Saccoccia, para. 87.

72 Cf. text at supra n. 60 et seq.
court. Therefore, it would appear that rules of jurisdiction in principle are outside the purview of Article 6. This implies that a State which offers a court with jurisdiction to decide a given case generally is not obligated to recognise and enforce the decision of a foreign court whose jurisdiction it denies. Thus, in Hussin, while the Court declared itself not to have jurisdiction to interpret the Brussels Convention, it implicitly accepted the jurisdiction of the respondent State to do so. However, as spelled out in McDonald, the Court considers that Article 6 implies the control of the rules of jurisdiction applicable in the Convention States to ensure that those rules do not interfere with a right protected by the ECHR, in this instance presumably the right to have the foreign court's decision enforced. As the context appears to indicate, the Court does not claim the general power to review rules of jurisdiction which remain outside the purview of Article 6 but does claim the power to declare so-called exorbitant exclusive jurisdictions — the jurisdiction privilege of Article 15 of the French Civil Code used to provide an example — incompatible with the ECHR. If a domestic exclusive jurisdiction is “exorbitant”, its disregard by the foreign court may not be a good reason for denying the domestic exequatur and thereby enforcement of that foreign court's decision. In contrast, if domestic rules of jurisdiction are reasonable and have been disregarded by the foreign court (case of Hussin), or if the rules applied by the foreign court are themselves exorbitant (case of McDonald), than there is a good reason to deny the exequatur. In other words, in those cases the domestic decision not to enforce the foreign judgment passes muster with Article 6. In the same — limited — way the Court examines whether rules of jurisdiction are


74 ECtHR, Hussin, En Droit, para. 3.

75 ECtHR, Hussin, En Droit, para. 5.

76 ECtHR, McDonald, En Droit, para. B.

77 On the development of the domestic interpretation of that provision cf. ECtHR, McDonald, En Fait, para. B.
compatible with the ECHR it must also examine whether other domestic legal requirements are 78.

Another common such requirement is reciprocity. Where reciprocity is required under the law of the forum, its lack appears to be a cogent reason for the domestic court to deny an exequatur 79. This does not only apply, it is submitted, in cases like Saccoccia in which only the judgment debtor enjoys human rights protection but also to cases in which both judgment creditor and debtor are protected by human rights. In contrast, in cases like Wagner in which only the judgment creditor enjoys human rights protection there is a strong human rights case against relying on a lack of reciprocity to deny an exequatur. It is based in first line on the fact that in such a case, there is no protected debtor whose human rights might be interfered with by the granting of an exequatur. There is therefore no triangular relationship. To deny a protected foreign-judgment creditor an exequatur with the only aim of trying to influence another State to grant an exequatur in possible future corresponding cases or “to improve the country's bargaining power“ when trying to convince a foreign State to conclude a relevant treaty 80 would not do justice to the essence of human rights. Indeed, human rights should not be limited for abstract reasons of State. That human rights case arguably falls within the Court's limited power of review 81.

c) The Proportionality of the Interference, or its Necessity in a Democratic Society

The last point to be addressed within the framework of the usual human rights examination is the question of the proportionality of the interference. In practical terms that means that the respondent State has the possibility to invoke restrictions which are necessary in a democratic society 82. Indeed, in Negrepontis-Giannisis, the respondent State argued that Article 6 (1) does

78 Cf. ECtHR, Saccoccia, para. 77.

79 Cf. ECtHR, Saccoccia, para. 82.

80 Cf. Michaels (supra n. 6), para. 10.

81 Doubts about the compatibility with the ECHR of the application of the principle of reciprocity are apparent in ECtHR, Apostolidi v. Turkey, 45628/99, 27 March 2007, para. 71, confirmed in ECtHR, Agridis v. Turkey, 21668/02, 23 February 2010, para. 40.

82 Cf. ECtHR, Negrepontis-Giannisis, para. 76.
not oblige the State to recognise foreign judgments unconditionally. The Court appears to accept that the enforcement State makes the enforcement of a foreign judgment dependent on certain conditions being met, among them the respect of the enforcement State's international ordre public. The Court thereby provides for an important limitation to the right to an exequatur it assumes. However, it controls the proportionality of the interference. This control has two sides. The Court subjects the domestic criteria for the denial of an exequatur to specific human rights requirements. Also, those criteria must not be used arbitrarily or disproportionately. This approach restricts the discretion the exequatur State may enjoy under its domestic law. It also applies rather to principal than to collateral claims.

Within the paradigm of collateral claims, an effect similar to the control of proportionality is to disable an arbitrary or disproportionate use of domestic criteria is achieved by the Court by relying less on the question of the exequatur denied than directly on the substantive right the foreign judgment had recognised or created. Two of the cases related above have been dealt with by the Court in this way. Both Wagner and Negrepontis-Giannisis concerned the respect for the respective applicants' family life. As the Court has held, '[t]he presence or absence of “family life” is foremost a factual question depending on close personal relations.' In Wagner, a family life between the first and second applicants had developed after the Peruvian judgment and clearly was an observable fact which the domestic court could not reasonably refuse to recognise. Once family life had in fact

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83 ECtHR, Negrepontis-Giannisis, para. 86.
84 ECtHR, McDonald, En Droit, para. B.
85 ECtHR, Negrepontis-Giannisis, para. 90.
86 In Hussin, it does not appear that the foreign-judgment debtor's paternity to the second applicant, which had been determined by the foreign court, amounted to, or was the source of, any family life between those two persons.
87 ECtHR, Moretti and Benedetti v. Italy, 16318/07, 24 April 2010, para. 44, with references.
88 ECtHR, Wagner, para. 133.
89 ECtHR, Wagner, para. 135.
been established, the right to see its respect secured existed, quite independent of how that fact had come about, against every Convention State. The Peruvian decision allowing the adoption in question therefore played no further role in the human rights argumentation although the Court also held that the exequatur courts “could not reasonably disregard the legal status validly created abroad”.90 Indeed, the ECtHR appears to see such a decision primarily as the source of a situation which is amenable to fall within the purview of protection of the ECHR. To put it differently: it was less the foreign sovereign act — the Peruvian judgment pronouncing a full adoption — as such whose enforcement was protected by the ECtHR against the Luxembourgish denial of an exequatur but rather the family life between the applicants the development of which that act had merely facilitated and which the denial of an exequatur would render much more difficult. The relevant factual situation in Negrepontis-Giannisis was somewhat similar. Here, the Court protected a family life of the applicant which it assumed on the unrebutted presumption that the US act of adoption had had effects. In both cases Article 8 provided for a collateral right to the effective recognition of the situation created by the foreign judgment which may require, depending on the circumstances of the case, the grant of an exequatur by the enforcement State.

d) Interim Conclusion

The Court recognises a foreign-judgment creditor's right to an exequatur in every Convention State. To defeat an application based on the denial of an exequatur, the respondent State must show either that the applicant contributed herself to the situation she complains of, or that granting an exequatur had no legal basis in domestic law, or that the denial was necessary in a democratic society. The first requirement, it is submitted, should be replaced by a requirement that the respondent State show that the applicant has no human rights claim against that State with which the latter could interfere, thereby binding the human right to an exequatur closer to the international practice ie to widespread domestic State practice and to treaties. To proceed in that way would have an additional advantage. It practically would guarantee that the preoccupations of States, which have found expression in those very instruments, are adequately accommodated in the Court's jurisprudence. By the same token, it would allow to respect the triangularity of the relationship considered. This requires in particular

90 ECtHR, Wagner, para. 133. Of course, insofar as the denial of the exequatur was concerned, there was, from the Luxembourgish point of view, no difference to Hussin, as the Luxembourgish forum denied the Peruvian court's jurisdiction.
that the foreign-judgment debtor be granted a countervailing Article 6 right that foreign judgments be not enforced if they do not meet certain conditions. It is to this right we will now turn.

II. The Protection of the Human Rights of the Debtor

The protection of the human rights of the debtor is covered by the first prong of the Court's jurisprudence. The States' first and paramount preoccupation in this area is that foreign proceedings might be seen as deficient. This preoccupation, while not preventing most States from recognising and enforcing foreign judgments in principle, has led them to develop, in their domestic law, special requirements for the enforcement of such judgments which are checked in special (exequatur) proceedings, and to conclude relevant treaties. This preoccupation can be translated into a human rights concern: no foreign judgment should be enforced against a protected debtor, nor should it otherwise interfere with her human rights, unless the underlying proceedings have been fair.

The Court's jurisprudence clearly recognises the value of exequatur or similar proceedings for the protection of human rights of the judgment debtor. In those cases “where the courts of a State party to the [ECHR] are required to enforce a judicial decision of the courts of a country that is not a party” the Court even considers such a procedure as required by the ECHR, especially Article 6. Here, the exequatur functions as a gatekeeper at the border of the Convention's legal space to identify and keep off foreign judgments which are themselves not compatible with, or have been rendered in proceedings not compatible with, applicable human rights standards. For this purpose, the traditional domestic criteria for denying an exequatur, especially infringement of the domestic international ordre public, are subjected to the Court's human rights control and, insofar as necessary, modified or supplemented by criteria derived from the ECHR.

1. The Cases

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91 ECtHR, Maumousseau, para. 96.

92 On which cf. Michaels (supra n. 6), paras. 25 et seq.

93 ECtHR, Negrepontis-Giannisis, para. 90: the concept of ordre public must not be construed arbitrarily or disproportionately.
In the first case, *Pellegrini*[^94^], the applicant had married in a religious (catholic) ceremony which was also valid in law. 25 years later, the husband sought to have the marriage annulled by the ecclesiastical courts on the ground of consanguinity. In second and last instance, the Roman Rota annulled the applicant's marriage. The case before the Court concerned the Italian decision (*delibazione*) to enforce that annulment. The human rights dispute was over the question whether the proceedings before the ecclesiastical courts were such as to permit the Italian courts to grant an exequatur without infringing the applicant's right to a fair trial. As “the applicant had not had the possibility of examining the evidence produced by her ex-husband”[^95^] before the ecclesiastical courts, and as she had not been informed “that she could seek the assistance of a lawyer before she attended for questioning”[^96^], the Court saw an interference with, and a violation of, her right to a fair trial by the Italian exequatur courts because those courts, in proceedings that were in themselves unimpeachable, declared enforceable the decision of a court not bound by the ECHR without respecting their duty to satisfy themselves that the relevant proceedings fulfilled the guarantees of Article 6[^97^].

This approach of *Pellegrini* was confirmed in *Maumousseau*. That case concerned a request to return a child to her father. The parents were a French woman and an American man who used to live as a family in the US. The mother and the common child went on a holiday to the mother's parents in France. When the mother decided not to return to the US and to keep the child, the father instigated proceedings there to have the child returned and to be awarded sole custody. The US court awarded such custody, and the US Central Authority requested the return of the child under the 1980 Hague Convention on the Civil Aspects of Child

[^94^]: The House of Lords, *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, took *Pellegrini* as applying only to the facts of that case i.e. an enforcement according to the concordat between the Holy See and Italy. Contra: *Fawcett* (*supra* n. 71) at 35; Gilles Cuniberti, 'The Recognition of Foreign Judgments Lacking Reason in Europe: Access to Justice, Foreign Court Avoidance, and Efficiency', (2008) 57 ICLQ, 30 et seq. In the meantime, ECtHR, *Maumousseau*, has applied the principles of *Pellegrini* to the relationship between France and the US.

[^95^]: ECtHR, *Pellegrini*, para. 44.

[^96^]: ECtHR, *Pellegrini*, para. 46.

[^97^]: ECtHR, *Pellegrini*, para. 47.
Abduction\textsuperscript{98}. That request was finally granted by a decision of the French Cour de cassation in proceedings against the applicants i.e. the mother and her child. Before the Court, the applicants did not raise a complaint of the Pellegrini type\textsuperscript{99}. Under Article 6 the Court had “no evidence that the impugned foreign [US] decisions ... were given following proceedings that did not afford the essential guarantees of Article 6 ...”\textsuperscript{100}. Therefore, the French decision to grant an exequatur did not infringe Article 6.

The third case, 
Saccoccia,
concerned an Austrian exequatur for a US forfeiture order. In the context of criminal proceedings for large-scale money laundering conducted against the applicant in the US, the Austrian courts were requested by the US court to seize assets which had been found in safes in Vienna rented by the applicant. After the final verdict against him, the US court issued a final forfeiture order covering also the contents of the said safes. The US Central Authority requested the enforcement of that order. The Austrian court ordered the forfeiture to the benefit of Austria. Before the Court, the applicant complained that the proceedings before the US courts had not complied with the requirements of a fair trial. The Court concluded that they had done so and rejected the application.

2. Discussion

The triangular nature of the Article 6 relationships discussed in the present contribution requires that the creditor's Article 6 right to an exequatur be offset by an opposite right of the debtor not to have enforced a foreign judgment against her save if certain conditions are met. The basic argument would be that Article 6 requires that an exequatur be only denied for reasons compatible with the ECHR, and be always denied if its grant is incompatible with the ECHR. Some of the debtor's rights are principal rights while others are best described as limits to the creditor's rights. As such, the latter have been discussed in the context of those rights\textsuperscript{101}. Principal rights are undoubtedly the rights to fairness of the domestic and foreign proceedings.

a) The Exequatur Proceedings

\textsuperscript{98} of 25 Oct 1980, 1343 UNTS 89.

\textsuperscript{99} ECtHR, 
Maumousseau,
para. 97.

\textsuperscript{100} ECtHR, 
Maumousseau,
para. 98.

\textsuperscript{101} Cf. text at supra n. 69 et seq.
In order to enforce a foreign judgment evidently the domestic exequatur proceedings must have been fair\textsuperscript{102} although this requirement does not ask for a specific treatment in this contribution. Suffice it to say that the Court recognises that exequatur proceedings are specific: “in exequatur proceedings the domestic courts are not called upon to decide anew on the merits of the foreign court’s decision. All they have to do is to examine whether the conditions of granting exequatur have been met”\textsuperscript{103}. That is to say, they only have to examine two points: whether the requirements for granting exequatur as posited by domestic law have been met, and whether the foreign proceedings “had been in conformity with Article 6 ...”\textsuperscript{104}.

The cases related above show that a right to exequatur proceedings may also flow, as a collateral right, from substantive human rights provisions. In \textit{Maumousseau}, the Court expressly decided that there was an interference with the right to respect for family life in the decision to order the mother to return her daughter to the father\textsuperscript{105}. In \textit{Pellegrini}, the grant of the exequatur evidently was an interference with the right to respect for family life\textsuperscript{106} and/or the right to marry protected respectively in Articles 8 and 12 although this was not argued before the Court nor discussed by it. In \textit{Saccoccia}, the exequatur granted for the American forfeiture order clearly constituted an interference with the applicant’s right to peaceful enjoyment of possessions. Indeed, in all those cases in which there actually is a private foreign-judgment debtor\textsuperscript{107} against whom to enforce a foreign judgment, an exequatur cannot but interfere with one or the other of her substantive rights. To protect those rights, a collateral right to exequatur proceedings may flow directly from the relevant substantive provisions of the ECHR.

\textsuperscript{102} ECtHR, \textit{Saccoccia}, paras. 70 et seq.

\textsuperscript{103} ECtHR, \textit{Saccoccia}, para. 63.

\textsuperscript{104} ECtHR, \textit{Saccoccia}, para. 64.

\textsuperscript{105} ECtHR, \textit{Maumousseau}, paras. 58-59.

\textsuperscript{106} ECtHR, \textit{Emonet et al. v. Switzerland}, 39051/03, 13 December 2007, para. 70, “has no doubt that the severing of the mother-daughter relationship ... constituted an interference with the applicants’ enjoyment of the right to respect for their family life”. For the severing of the husband-wife relationship, the same most apply.

\textsuperscript{107} There is no such debtor in a case like \textit{Wagner}. Of course, the grant of an exequatur in such a case could never reach the Court.
Insofar as those provisions carry their own procedural requirements, as many of them do\textsuperscript{108}, those requirements are also relevant under Article 6\textsuperscript{109}.

b) The Fairness of the Foreign Proceedings

Also the foreign proceedings must have been fair\textsuperscript{110}. That question has notably two aspects i.e. the nature of the effect of Article 6 on foreign proceedings and the yardstick to be applied.

aa) The indirect effect of Article 6

In those cases in which the rendering court is not within the legal space of the ECHR, there arises the problem of the applicability of Article 6 to the foreign proceedings. As the Court has recognised long ago\textsuperscript{111}, direct applicability obviously is impossible as the foreign State cannot be subjected to the ECHR. But an indirect effect of Article 6 remains possible\textsuperscript{112}. Indirect effect means that a Convention State, being bound by the ECHR, may permit the enforcement of a foreign judgment only if that judgment was the result of a fair trial within the meaning of Article 6. Such an indirect effect of Article 6 is required under the ECHR\textsuperscript{113}. It follows that a State that would proceed to directly enforce a judgment from outside the legal space of the ECHR without a prior screening in exequatur proceedings would run the risk of violating the Convention by interfering with the judgment debtor’s human rights without the justification which a fair trial generally provides\textsuperscript{114}. Whether also the procedural requirements carried by

\textsuperscript{108} On Article 1 of protocol no. 1 cf. in the present context ECtHR, Saccoccia, para. 89, on Article 8 ECtHR, Dolhamre v. Sweden, 67/04, 8 June 2010, paras. 80, 116, referring to ECtHR, Maumousseau, paras. 77-81.

\textsuperscript{109} cf. in this sense ECtHR, Eskinani and Chelouche v. Turkey, 14600/05 (dec.), 6 December 2005, The Law, para. B 2 in fine.

\textsuperscript{110} ECtHR, Maumousseau, para. 98.

\textsuperscript{111} ECtHR, Drozd and Janousak, para. 110.

\textsuperscript{112} Judge Matscher, concurrent opinion, ECtHR, Drozd and Janousak; and cf. eg Fawcett (supra n. 73) at 4 et seq. and 43.

\textsuperscript{113} Cf. ECtHR, Drozd and Janousak, para. 110.

\textsuperscript{114} This risk, while much reduced, exists also in purely domestic proceedings. While the debtor is generally required to defend herself in the main proceedings, if she is unable to
many substantive provisions of the ECHR can be used as required standards for the foreign proceedings is not yet clear from the Court's jurisprudence.\(^{115}\)

There is another aspect of indirectness in the Court's jurisprudence. In *Pellegrini*, the ECtHR describes its task as examining “whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6.”\(^{116}\) The Court does not itself consider the proceedings underlying the foreign judgment but only examines whether the domestic court duly satisfied itself that those proceedings had fulfilled whatever Article 6 requires in respect of them.\(^{117}\)

bb) The yardstick to be used

The yardstick to be used in the indirect application of Article 6 is not particularly clear.\(^{118}\) As the Court recognises itself, its *dicta* quoted above are somewhat inconsistent. In *Drozd and Janousek*, dealing with the matter of a foreign criminal judgment to be enforced within the ECHR's legal space, the Court expressly held that the Convention States are not required to impose the Convention's standards on third States but that they are obliged to refuse their international cooperation in the administration of justice if it emerges that the foreign decision is the result of a flagrant denial of justice.\(^{120}\) In the words of Judge Matscher's concurring opinion, “Article do so due to a hidden mental incapacity, she will have a valid human rights defense in the enforcement proceedings. Cf. ECtHR, *Zehentner v. Austria*, 20082/02, 17 July 2009.

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\(^{115}\) ECtHR, *Saccoccia*, paras. 89 et seq., applies the procedural requirements of Article 1 of protocol no. 1 only to the Austrian exequatur proceedings but not to the American forfeiture proceedings.


\(^{117}\) In contrast, in ECtHR, *Drozd and Janousek*, para. 110, the Court appears itself to have considered the foreign proceedings.

\(^{118}\) The question has been raised by *Fawcett* (*supra* n. 73), at 5.

\(^{119}\) In ECtHR, *Saccoccia* (dec.), The Law, para. 2.2, the Court sees no need to decide in the abstract between the yardsticks “absence of a flagrant denial of justice” and “full guarantee of Article 6” because the applicable domestic law required that the foreign decision respect the principles of Article 6 — to my mind yet another yardstick.

\(^{120}\) ECtHR, *Drozd and Janousek*, para. 110.
6 has in its indirect applicability only a reduced effect”. Later judgments of the Court appear to oscillate, without apparent reason, between the full application of Article 6\textsuperscript{121} and making do with the mere absence of a flagrant denial of justice, preconceived in Drozd and Janousek\textsuperscript{122}, passing by requiring the respect of “the essential guarantees of Article 6”.\textsuperscript{123} This jurisprudence raises two questions: whether those apparently different yardsticks really are what they appear to be or simply represent a distinction without a difference, and, if indeed they are different, what yardstick to apply generally or in the individual case.

The first question is whether there is a meaningful difference between those yardsticks as the Court itself assumes\textsuperscript{124}. This assumption is corroborated if one considers the individual foreign proceedings, as far as they are known, which the Court characterised by the one or the other term. Such proceedings are known respectively from the Court's judgment in Pellegrini\textsuperscript{125} and from the dissenting opinion in Maumousseau. In Pellegrini, the Court held two points against the decision of the Roman Rota: that “the applicant had not had the possibility of examining the evidence produced by her ex-husband”\textsuperscript{125} and that she had not “been put in a position enabling her to secure the assistance of a lawyer”\textsuperscript{126}. While these two points, as the Court's judgment shows, are incompatible with the full application of Article 6, I should hesitate to call them a flagrant denial of justice, especially as the evidence at issue appears to have consisted in just one objective and undisputed fact ie the former spouses' consanguinity\textsuperscript{127}. In Maumousseau, the Court simply held that it had no evidence that the relevant US decisions

\textsuperscript{121} ECtHR, Pellegrini, para. 40, required that “the relevant proceedings fulfilled the guarantees of Article 6”. ECtHR, Saccoccia (judgment), para. 64.

\textsuperscript{122} ECtHR, Saccoccia, decision of 5 July 2007, The Law, para. 2.

\textsuperscript{123} ECtHR, Maumousseau, para. 98, my italics.

\textsuperscript{124} Cf. n. 117 supra.

\textsuperscript{125} ECtHR, Pellegrini, para. 44.

\textsuperscript{126} ECtHR, Pellegrini, para. 46.

\textsuperscript{127} ECtHR, Pellegrini, para. 45. However, ibid., para. 15, the question of a special dispensation from the prohibition of consanguinity is mentioned.
“were given following proceedings that did not afford the essential guarantees of Article 6”. However, what is described in the dissenting opinion as “cruel and draconian” reactions of the US court, as its revanchist attitude and its arrogant over-reaction at the very least gives the impression that there was “a legitimate reason to fear that [the US judge] lacked impartiality”. It therefore appears that the essential guarantees of Article 6 — in evident contrast to its full guarantees and somewhat surprisingly — do not include the impartiality of the bench. Together those judgments tend to indicate that the yardsticks applied from time to time by the Court are indeed different ie that the requirements of a full application of Article 6 are higher than those of its “essential guarantees” while the requirements of a mere absence of a flagrant denial of justice are presumably even less demanding. Still, the exact contents of the two versions of reduced effects of Article 6 remain largely unclear.

The second question is which of those yardsticks to apply in a given case or generally. Unfortunately, the Court's jurisprudence does not give the slightest hint as to when to apply one yardstick rather than another. In particular, there is no indication that the substantive human right involved in a given case might be decisive: in both Pellegrini (full application of Article 6) and Maumousseau (application of its “essential guarantees”) the substantive human right involved was Article 8. The following considerations therefore deal only with the question whether the full or a reduced applicability of Article 6 is preferable either for principled reasons (a) or as the best fit to the Court's relevant jurisprudence (b).

(a) The Court's judgment in Drozd and Janousek is still the most expansive explanation by the (plenary) Court of the yardstick applicable to the indirect effect of Article 6. However, its reasoning is not fully convincing. Contrary to what the Court implies, there never was a question of “imposing the Convention's standards on third States”. The only question was as to the conditions of the recognition and enforcement of a foreign judgment. The undisputed fact that the Convention's standards must not be imposed on third States offers no clue as to the standards the foreign proceedings must

128 ECtHR, Maumousseau, para. 98.

129 To adopt the Court's language in ECtHR, Kyprianou v. Cyprus, 73791/01, Rep. 2005-XIII, para. 118.

130 Cf. ECtHR, Drozd and Janousek, para. 110.
meet so that the resulting judgment may be recognised and enforced within the legal space of the ECHR. In particular, it does not follow from that fact that the appropriate yardstick is, as the Court has held in Drozd and Janousek, the mere absence of a flagrant denial of justice.

More persuasive is Judge Matscher's concurring opinion which tries to give a principled answer to the matter. Judge Matscher based his opinion on a parallel he drew with State exequatur requirements. He recalled that “the theory of the 'reduced effect' of ordre public with reference to the recognition of foreign judgments ... is well known to international law”. The drawing of that parallel appears to be in bearing with the method of interpreting the Convention taking into account *inter alia* the consensus emerging from the practice of Convention States\(^{131}\). Still, two caveats are necessary. The first one is terminological in kind. It concerns the risk of confusing Judge Matscher's “reduced effect“ (*effet atténué* in the French original) with the theory of “*l'effet atténué de l'ordre public*“ as developed by the French *Cour de Cassation*\(^{132}\). That theory provides for a reduced effect of the *ordre public* in cases where there is only a reduced proximity of the facts of the case to the French legal system. In other words and without going into details, *l'effet atténué de l'ordre public* does not apply to all foreign decisions — of course not, as the *ordre public* itself regards only foreign decisions. The reduced effect within the meaning of that theory therefore cannot be a valid parallel to a rule meant to apply to the enforcement of all decisions from outside the Convention's legal space.

The other caveat goes to the substance of the argument. It concerns the difference between domestic requirements for a fair trial on the one hand and Article 6 on the other. Generally, domestic requirements are more specific than Article 6 which in its generality allows, and indeed is meant to allow, for quite different procedures to be applied as long as its guarantees are respected. Therefore, to content oneself with a “reduced effect“ of domestic requirements is not the same as to content oneself with a reduced effect of Article 6. The reduced effect of domestic requirements might, and should, still require the respect of the full guarantees of Article 6. The parallel drawn by Judge Matscher therefore is misleading. That any domestic international *ordre public* may have only reduced effect is no reason to ascribe a reduced indirect effect to Article 6.

\(^{131}\) Cf. text at supra n. 56.

\(^{132}\) Cass. civ., 1re, 17 avril 1953, Rivière.
That the Court's, and Judge Matscher's, reasons for advocating a reduced indirect effect of Article 6 are not fully convincing of course does not suffice to refute such a reduction. But it can be refuted, it is submitted, by referring to the very nature of the ECHR which the Court has identified as "a constitutional instrument of European public order". As such, in principle it is to be applied fully. Concerning Article 6, the necessary balance between the interests of the parties to the proceedings as it was intended by the authors of the Convention has found expression in that provision itself. Whatever may apply in any individual case, there is no general reason to change that balance in favour of the foreign-judgment creditor, as the theory of the reduced indirect effect of Article 6 does. In particular, while international cooperation in the administration of justice — the growing importance of which the Court has recognised long ago — may be in principle in the interest of the persons concerned, this can be no reason to privilege one of those persons ie the foreign-judgment creditor over the other ie the foreign-judgment debtor. Rather, there is a strong and principled case which appears not to have been refuted for the full application of the Article 6 guarantees also in instances of the indirect applicability of the latter.

(b) Notwithstanding, the Court's jurisprudence has repeatedly, though by no means consistently, indicated that Article 6 in its indirect applicability has only reduced effect. As countervailing aspect permitting such a reduction the Court has especially accepted the interest of international cooperation in the administration of justice. The recognition and enforcement of foreign judgments are a prime example of that international cooperation, be they based on a treaty or a principle of prudence and politeness.

If one accepts that line of the Court's jurisprudence, as the present contribution does not, it remains to identify the conditions under which the interest of international cooperation allows to restrict Article 6. There are two strands to the relevant jurisprudence. According to Bosphorus, the interest of international cooperation takes precedence over Convention rights generally, presumably including Article 6, only if there is, under international law, a legal obligation of the Convention State to interfere with

133 ECtHR, Loizidou v. Turkey (preliminary objections), 15318/89, 23 March 1995, A 310, para. 75.

such a right\textsuperscript{135} (and only as long as “the protection of Convention rights is not manifestly deficient”\textsuperscript{136}). To apply that requirement to the present discussion would imply that the yardstick of the indirect effect of Article 6 would depend on whether the foreign judgment was enforced on the basis of a treaty — reduced effect of Article 6 — or on the basis of purely domestic law inspired by comity or reciprocity — full effect. As the respective interests of the parties to the proceedings are exactly the same in both constellations, this is not a convincing result under human rights aspects.

The other strand is represented by \textit{Drozd and Janousek} which does not contain such a restriction\textsuperscript{137}. Of course, the facts underlying that decision are quite different from those in \textit{Bosphorus}. In \textit{Bosphorus}, the international cooperation took the form of the State’s membership in the EU. In \textit{Drozd and Janousek}, the international cooperation was restricted to the enforcement of a foreign sentence. In \textit{Bosphorus}, the Court underlined the principle of \textit{pacta sunt servanda} and the fact that the “need to secure the proper functioning of international organisations” is a consequence of the growing importance of international cooperation\textsuperscript{138}. In \textit{Drozd and Janousek}, it related that the “current trend towards strengthening international cooperation in the administration of justice ... is in principle in the interest of the persons concerned”\textsuperscript{139}. It therefore appears that the two foundations for considering international cooperation as a reason to restrict Convention rights are not mutually exclusive but can coexist: in the case of a Convention State’s membership in an international organisation, the restriction of a Convention right is justified only if that restriction is mandated by the international organisation (and if the international organisation is considered to protect human rights)\textsuperscript{140}. In the case of international cooperation in the administration of justice, there is no such requirement. Here, according to the Court’s jurisprudence, a reduced indirect

\begin{itemize}
\item \textsuperscript{135} ECtHR, \textit{Bosphorus}, paras. 145 et seq.
\item \textsuperscript{136} ECtHR, \textit{Bosphorus}, para. 156.
\item \textsuperscript{137} ECtHR, \textit{Drozd and Janousek}, para. 110.
\item \textsuperscript{138} ECtHR, \textit{Bosphorus}, para. 150.
\item \textsuperscript{139} ECtHR, \textit{Drozd and Janousek}, para. 110.
\item \textsuperscript{140} ECtHR, \textit{Bosphorus}, para. 155.
\end{itemize}
effect of Article 6 can be justified by the simple fact that international cooperation in this field is in principle in the interest of the persons concerned.

The latter obviously applies to the recognition and enforcement of foreign civil judgments; as stated above, parties are interested in transnational legal certainty and in avoiding repeated litigation and conflicting decisions. Therefore, according to the Court's jurisprudence, the indirect effect of Article 6 in exequatur cases should be a reduced effect independent of the State's reasons — obligation or discretion — for granting the exequatur. Indeed, while in all the cases decided by the Court and here discussed the enforcement State did have an international law obligation to enforce the foreign judgment based on a bilateral or multilateral treaty, or on customary law, the Court duly noted that fact in the “as to the facts” section of its judgments but did not rely on it in the “as to the law” section in choosing the applicable yardstick.

c) Interim Conclusion

In conclusion on this part of the discussion, there is no doubt that the enforcement State may grant an exequatur only if the domestic exequatur proceedings and the foreign judgment proceedings have been fair. There is also little doubt that under the ECHR, if the foreign proceedings happened outside the legal space of the Convention, the ECHR right to a fair trial has an indirect effect in this sense that the domestic court may grant an exequatur only if those proceedings had been fair. On the question however of the yardstick to be applied to gauge that fairness the conclusion cannot be but equivocal. The better case, it is submitted, is for the full effect of the Article 6 guarantees also in instances of its indirect applicability. However, if one follows that line of the Court's jurisprudence that provides only for a reduced effect of Article 6 in cases of its indirect applicability, that reduced effect should be applied irrespective of whether the foreign judgment is to be enforced on the basis of a treaty or of comity or reciprocity.

141  Michaels (supra n. 6), para. 1.

142  ECtHR, Pellegrini, para. 31; ECtHR, Saccoccia, para. 54.

143  ECtHR, Maumousseau, para. 43.

144  ECtHR, Drozd and Janousek, para. 56.
Conclusion

In the triangular relationship between foreign-judgment creditor, foreign-judgment debtor and enforcement State, the State must secure the Article 6 rights and the substantive human rights of both parties. In the supervising jurisprudence of the Court, the need to balance those opposite rights results in a rather well-structured if still embryonic system. The picture emerging from the Court's jurisprudence is one of rule and exception. The rule is that foreign judgments merit enforcement under Article 6 on the same footing as domestic judgments. But at the same time, the Court accepts and recognises the exequatur mechanism which it transforms to suit specific human rights purposes. On the one hand, it uses exequatur proceedings to extend its fair trial control indirectly to third State proceedings in this sense that judgments resulting from such proceedings may be enforced in a Convention State only if the foreign proceedings have been fair, with the yardstick of fairness being derived from Article 6. On the other hand, the Court limits the discretion enforcement States enjoy under general international law in this sense that the denial of an exequatur must be based on valid reasons; it must not be arbitrary or disproportionate. Those reasons include serious defects of the foreign judgment proceedings and, under the supervision of the Court, lack of jurisdiction of the foreign court and the non-fulfilment of other domestic legal requirements for granting an exequatur.

Overall, it appears, the Court has taken the ancient and largely discretionary instrument of the exequatur and successfully transformed it into an instrument that answers as far as practical to the requirements of human rights and especially to the strictures of the rule of law. In doing so, the Court, without expressly admitting it, appears largely to follow the lead of State practice and relevant treaties rather than that of general international law. With its relevant jurisprudence, it appears that the Court acts less as a human rights court than as a European Constitutional Court. As such, like the legislatures in all well-ordered societies, it appears to try to achieve by its jurisprudence what must be the ultimate aim in all triangular relationships: *suum cuique tribuere*. 