

# Enforcement as a fundamental right

## Abstract

There is, under the case law of the European Court of Human Rights, a right to the enforcement of judgments obtained abroad. The nature of that right can be substantive and founded on the right to recognition of the underlying situation. It can also be procedural and derive from the fair trial guarantee of Article 6 of the Convention which includes a right to the effectiveness of judgments rendered by 'any court', a concept considered – without, in the author's opinion, a cogent justification in the present jurisprudence of the Court – as including foreign courts. Once there is a right to enforcement, there can be no interferences by national law with that right (and the national authorities can even have a 'positive obligation' to see to its effectiveness), unless the interference or the refusal to take positive measures is justified, in line with the principle of proportionality.

## 1. Introduction

The enforcement of foreign judgments is, *prima facie*, a matter of national law. General international law contains a rule of principle, namely that 'the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.'<sup>1</sup> Foreign judgments can therefore be enforced only to the extent that this is allowed by the State of enforcement, either through its domestic law or through international agreements entered into by that State. In the absence of such permission, there will be no right under general international law to have a judgment enforced.<sup>2</sup> This contribution shall concentrate on the enforcement of foreign judgments in the absence of an enforcement treaty (or a European regulation on the enforcement of judgments among Member States of the European Union), where, as a matter of private international law, it will be up to the enforcing – or non-enforcing – State's own law to lay down the conditions for enforcement. Some legal systems are quite liberal towards the enforcement of foreign judgments. Others are less so; the Nordic countries would appear to be hostile to the enforcement of judgments rendered abroad unless it is provided for by an international agreement.<sup>3</sup> In the Netherlands, the true meaning of Article 431 of the Code of Civil Procedure – which provides that in principle 'neither judgments given by foreign courts nor authentic instruments drawn up outside the Netherlands can be enforced in the Netherlands. The disputes can be considered and determined by the Dutch court anew' – is, despite its venerable age (1838), a matter of ongoing development in case law and doctrinal discussions.<sup>4</sup> While the non-enforcement of a foreign judgment will not violate general international law, it may be a matter of inconvenience to both parties (take, for instance, the refusal to transcribe a foreign divorce judgment),<sup>5</sup> or to one of them (the

winning party in a civil dispute). The question addressed here is in what cases the non-enforcement of a foreign judgment can, beyond creating an inconvenience, be a violation of the parties' fundamental rights. This question has been the subject of a number of cases in the European Court of Human Rights, which this contribution is intended to present. They show that there is indeed, in the case law of the Court, an established right to the enforcement of foreign judgments where certain conditions are met.<sup>6</sup> There is an element of complexity to that case law: the source of the right to enforcement can be substantive (a violation of the right to family life or the right to property) or procedural. When analyzed from a private international law viewpoint, both solutions give rise to different conceptual problems, which up to now have been mastered by the Court with varying degrees of success.

## 2. Recognition (and enforcement) of foreign judgments as a matter of substantive rights

Judgments, whether declaratory or constitutive, are vehicles for substantive rights. To deny recognition to a foreign judgment does not only mean that the judgment will not, as a consequence, be enforced in the forum State. It will also be equivalent to denying recognition to a foreign-created, or foreign-declared, right. To the extent that the right in question is protected by the European Convention on Human Rights, the non-recognition of such a judgment can therefore be problematic.

- 1 S.S. *Lotus (France v. Turkey)*, 1927 PCIJ (Series A) No. 10, p. 18-19.
- 2 R. Michaels, 'Recognition and Enforcement of Foreign Judgments', in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford: Oxford University Press 2012, § 11.
- 3 For Sweden, see M. Bogdan, 'Sweden', in *International Encyclopaedia of Laws: Private International Law*, Alphen aan den Rijn: Kluwer Law International 2012, § 312.
- 4 See the contribution by M. Freudenthal in this issue, arguing for a reform of the statutory provision. The pessimistic view of the meaning of Art. 431 is not universally held: in his 2014 Groningen dissertation, J. van de Velden writes that 'arguably, the real deficiency is not the contents of the law, but its inaccessibility due to the fact that the law on foreign judgment recognition (and enforcement) is uncodified. As a result, the Netherlands continues to be widely misrepresented as hostile to foreign judgments. (...) the law is actually very liberal and advanced; the call, if any, should therefore be for codification of existing principles, not fundamental reform' (*Finality of Litigation: Preclusion and Foreign Judgments in English and Dutch Law, and a Suggested Approach*, Groningen: Ulrik Huber Institute for Private International Law 2014, p. 296).
- 5 The technical question whether transcribing a divorce judgment relates to its enforcement or its mere recognition is answered differently in different jurisdictions, and does not need to be addressed here. Cf. Art. 21(2) of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (OJ 2003, L 338), which considers the updating of civil status records as a matter of mere recognition.
- 6 See generally D. Spielmann, 'La reconnaissance et l'exécution des décisions judiciaires étrangères et les exigences de la Convention européenne des droits de l'homme', *RTDH* 2011, p. 761, and by the same author 'Recognition and Enforcement of Foreign Judicial Decisions – Requirements under the European Convention on Human Rights', *Cyprus Human Rights L. Rev.* 2012, p. 4; T. Schilling, 'The Enforcement of Foreign Judgments in the Jurisprudence of the European Court of Human Rights', *Riv.dir.int.priv.proc.* 2012, p. 545; and most recently L. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press 2014, who devotes a chapter (chap. 7, p. 199 et seq.) to examining the obligation to recognize and enforce foreign judgments.

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It has been shown elsewhere<sup>7</sup> that the protection of the (substantive) right to family life under Article 8 of the Convention is implicated if the relationship created by a foreign judgment corresponds to a social reality that the European Court is not prepared to disregard. There are two preconditions: (1) the parties must have acquired the family status in good faith under the foreign system, and (2) the parties' expectation of stability regarding their status must have been a legitimate expectation. Legitimacy will normally depend upon the intensity of the links with the foreign legal system under which the status was acquired. Merely because the parties' expectations are entitled to protection does not mean that they can never be disturbed. But such reasons for disturbing such expectations must be assessed against the parties' interest in the stability of their status, in light of the principle of proportionality. A similar reasoning can be conducted on the patrimonial incidents of a status judgment (such as the right to maintenance from a parent, or a right to an inheritance), which can be protected under Article 1 of the First Protocol to the Convention, guaranteeing the right to property.

This principle has been applied by several judgments of the Court finding violations of the applicants' substantive rights: in *Wagner and J.M.W.L. v. Luxembourg*,<sup>8</sup> in relation to the denial of an exequatur judgment in Luxembourg to the judicial adoption in Peru, under Peruvian law, of a child by Mrs. Wagner, a single woman and a Luxembourg national, on grounds of incompatibility of the Peruvian judgment with Luxembourg choice of law principles; in *Negrepontis-Giannisis v. Greece*<sup>9</sup> with respect to the failure by the Greek courts, on public policy grounds, to recognize an American adoption judgment under which a monk and bishop of the Greek Orthodox Church had adopted his nephew (the adoption had been denied recognition because under the rules of the Church, which are protected by Greek public policy, monks cannot adopt children, just as they cannot marry);<sup>10</sup> and recently in the cases of *Labassée v. France* and *Mennesson v. France*,<sup>11</sup> where it was held that the refusal of the French courts, again on public policy grounds, to order the transcription of American judgments recording the birth of children conceived legally under Minnesota and California law by gestational surrogacy (of the type using the intended father's sperm and a donor egg) violated the children's right to protection of their identity as children of their biological father, an aspect of the right to private life protected by Article 8 of the Convention.<sup>12</sup>

Conceptually, these judgments are logical and coherent. It is true that – as a critic of the European Court's jurisprudence has pointed out – the European Convention on Human Rights was not intended as a treaty on judgment recognition, which is a matter of national law.<sup>13</sup> Yet it is a fact that a treaty with a general, indeed a substantially constitutional, content will potentially influence all areas of the law. Private law and private international law are no exceptions; as long as the European Court understands correctly the operation of the concepts of private (international) law and does not seek to replace them with the mechanisms of the Convention, there is no objection to it deciding to extend its *control* over the human rights aspects of the operation of private law as well as over the other areas of the domestic law of the Contracting States.

But it needs to be stated that the conceptual basis of the cases examined thus far is not specific to foreign judgments. It is the non-recognition of the underlying rights that is problematic, independently of the judicial form of their creation. Thus in *Mary Green and Ajad Farhat v. Malta*<sup>14</sup> the same type of reasoning that was used in *Wagner*, *Negrepontis*, *Labassée* and *Mennesson* was applied to the Maltese authorities' refusal to recognize the validity of a polygamous marriage in Libya of a Maltese citizen, Ms. Green.<sup>15</sup> A marriage is not a judgment, but this

does not preclude applying the approach defined by that line of cases to it. Where the recognition and enforcement of foreign judgments is treated as a matter of substantive human rights, these kinds of cases become, in private international law terms, cases on the recognition of situations<sup>16</sup> rather than cases on the recognition of judgments *stricto sensu*.

### 3. Enforcement as a procedural right

To consider the right to enforcement of foreign judgments as a substantive right deriving from the right to recognition of the judgments' content has one disadvantage for applicants to the European Court (or, more generally, for those who seek to rely on the Convention, even before a national court): that line of argument is unavailable where there is *no* substantive right, deriving from the Convention, at stake. A significant example of this is the case of *McDonald v. France*.<sup>17</sup> That case concerned the denial, by the French courts, of recognition to a divorce decree entered by a Florida court. The ground for denial was one drawn from a provision of the French Civil Code: Article 15 of the Code provides for the jurisdiction of the French courts over cases in which persons of French nationality are defendants, and this was traditionally construed, *praeter* or even *contra legem*, to provide for exclusive jurisdiction, preventing recognition to any foreign judgment given against a French national. In fact, that construction of the French statute was

7 See, by the present author, 'Recognition in the Forum of a Status Acquired Abroad – Private International Law and European Human Rights Law', in: K. Boele-Woelki et al. (eds.), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, The Hague: Eleven International Publishing 2010, p. 259, in particular p. 272-273, and more recently 'L'apport de la jurisprudence de la Cour européenne des droits de l'homme', in: P. Lagarde (ed.), *La reconnaissance des situations en droit international privé*, Paris: Pedone 2013, p. 43 et seq.

8 Judgment of 28 June 2007, no. 76240/01.

9 Judgment of 3 May 2011, no. 56759/08.

10 In the European Court's – contrary – view, it is obvious that the rules of the Greek Orthodox Church, dating from medieval times and contradicted by a 1982 law which had allowed monks to marry, can no longer seriously be considered to be of such importance as to justify building a public policy exception on them and applying it to deny recognition to a judgment on which the applicant had relied for many years.

11 Judgments of 26 April 2014, no. 65041/11 and 65192/11, respectively.

12 It was also held, on the other hand, that there had been no violation of the right of the intended parents and the children to family life; this aspect of the refusal to recognize the American judgments was deemed to be within the 'margin of appreciation' of France, which had an important public policy to protect (namely the democratically decided prohibition of surrogate motherhood: *Labassée*, § 63; *Mennesson*, § 84), and the non-recognition of the judgments did not prevent the parties from living together as a *de facto* family, so that in this respect public policy did not interfere disproportionately with the right to family life.

13 L. d'Avout, note to the *Wagner* judgment of the ECtHR, *JDI* 2008, p. 197; for an elaboration by the same author, see 'Droits fondamentaux et coordination des ordres juridiques en droit privé', in: E. Dubout and S. Touzé (eds.), *Les droits fondamentaux: charnières entre ordres et systèmes juridiques*, Paris: Pedone 2010, p. 165 et seq.

14 Decision of 6 July 2010, no. 38797/07.

15 Here it was held that given the importance of monogamy to Maltese society and the necessity to protect the interests of Ms. Green's first husband, a citizen of Malta, the refusal to recognize the validity of her second marriage was justified.

16 On that concept, see Lagarde (ed.) 2013 (*supra* n. 7, a collection of the contributions to a symposium at the T.M.C. Asser Institute in 2013).

17 Decision of 29 April 2008, no. 18648/04.

applied for the last time in McDonald's case and abandoned in a later case decided in 2006.<sup>18</sup> In the meantime McDonald, whose Florida divorce from a French woman had been denied exequatur in France, had brought an application against France in the European Court.

McDonald's case was not brought on the basis of a violation of the right to respect for family life (Art. 8 of the Convention). Choosing to found the application on Article 8 would probably not have been possible, since the Court had held in the 1986 case of *Johnston v. Ireland*<sup>19</sup> that a right to divorce was not implied by Article 8 nor by any other provision of the Convention. Therefore McDonald chose as the ground for his application the right to a fair trial (Art. 6), which applies independently from the subject-matter of the underlying proceedings: Article 6 states, in general terms, that '[i]n the determination of his civil rights and obligations (...), everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)' and therefore applies to cases relating to divorce as well as to any other type of civil or commercial matter.

In the *McDonald* case the European Court agreed to extend to a foreign judgment its earlier holding, in *Hornsby v. Greece*,<sup>20</sup> that for proceedings in the same State, effective enforcement of a judgment rendered is an integral part of the 'trial' for the purpose of the fair trial guarantee of Article 6 of the Convention. As the Court had said in *Hornsby*, which concerned the non-enforcement in Greece of a judgment of the Greek Supreme Administrative Court,

'the right of access, that is the right to institute proceedings before courts in civil matters. (...) would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party (...) Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6.'<sup>21</sup>

The extension to foreign judgments of that holding – as it were, the taking literally and the universalization of the reference to 'any court' – was perhaps not unforeseeable,<sup>22</sup> but it does raise conceptual problems, which the Court glosses over by presenting the similarity of foreign and domestic proceedings as self-evident, and by abstaining from any explanation as to the reasons for their assimilation.<sup>23</sup> The problems – not perhaps unsolvable ones, but real ones nonetheless – with the Court's approach are twofold:

First, in the *Hornsby* type of case (characterized by the failure of the authorities of a State to enforce a judgment rendered by the courts of that State), the reasoning of the court is self-sufficient and coherent: a State cannot be said truly to offer 'access' to its courts if it subsequently refuses or neglects to enforce the judgments rendered by those courts; in such a case access to the courts for the purpose of effectively adjudicating disputes does not exist. Therefore the State will in essence violate its very obligation, which lies at the heart of Article 6's fair trial guarantee, to provide procedures for the adjudication of civil disputes. This reasoning cannot be extended – as the European Court does – without further explanation to the refusal, by the courts of a Contracting State, to enforce judgments rendered abroad. Such a refusal may frustrate the effectiveness of the civil justice system of a foreign State, but it does not deny the effectiveness of the civil justice system of the forum State itself – it may well be (indeed, it will generally be the case) that if a State refuses as a matter of legal principle to enforce foreign judgments in a given type of cases, it will also provide for the jurisdiction of its own courts to adjudicate those cases themselves.<sup>24</sup> The missing element in the Court's reasoning is an explanation for identifying (in principle, for there may of

course be exceptional reasons for refusing to recognize and enforce foreign judgments) a judgment given anywhere in the world with a judgment that might have been rendered in the forum itself. Its case law does show that it prefers that cosmopolitan and as such perfectly respectable view to the opposite view based on strict territoriality and the closing of national legal and judiciary systems. But an explanation, in terms of human rights, for this preference would be needed, since the link between the *fair trial* guarantee of Article 6 and the judicial cosmopolitanism underlying the Court's view of the nature of foreign judgments is not self-evident. That explanation is, as of yet, lacking.

Second, the cases do not, or do not yet, show a sufficient appreciation of the two very different reasons for which a State may fail to enforce a foreign judgment. The reason may indeed be similar to the reasons for which the Greek State had failed to comply with the judgments rendered in Greece in the *Hornsby* case (namely an attitude made up of excessive delay and even an outright *de facto* refusal, which obviously was illegal under Greek law, to comply with a judgment of the Supreme Administrative Court), but it may also be due to a reason of principle which is far from illegal under national law: namely that the foreign judgment cannot be enforced because it does not fulfil all the conditions for its *recognition* as these conditions are formulated under national private international law rules.

18 Civ. 1<sup>re</sup> 23 May 2006, *JDI* 2006, 1377, with annotation by Chalas; *Rev.crit. DIP* 2006, 870, with annotation by Gaudemet-Tallon.

19 Judgment of 18 December 1986, *Series A*, no. 112; see also *F. v. Switzerland*, judgment of 18 December 1987, *Series A*, no. 128, § 38.

20 Judgment of 19 March 1997, *Reports* 1997-II, 510.

21 § 40.

22 For earlier hints as to the effect that enforcement of foreign judgments could be seen as a procedural right, see, e.g., E. Guinchard, 'Procès équitable (article 6 CESDH) et droit international privé', in: A. Nuyts and N. Watté (eds.), *International Civil Litigation in Europe and Relations with Third States*, Brussels: Bruylant 2005, p. 199 at p. 214-216; F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la Convention européenne des droits de l'homme*, Brussels: Bruylant 2005, par. 273 et seq.; and for a theoretical justification see A. Bucher, 'La dimension sociale du droit international privé – Cours général', *Recueil des cours* (341) 2010, p. 303 et seq.

23 This observation is valid for the reasoning in *McDonald*, where a mere reference to the *Hornsby* case is deemed to be a sufficient substitute for legal reasoning, as well as for a variation thereon in the later case of *Negrepointis-Giannisis v. Greece* (*supra* n. 9 and *infra*, text at nn. 28 and 29). There the Court states without hesitation (§ 89) that 'it has already been decided' that Art. 6 of the Convention 'applies both to the enforcement of judgments of the national courts (*Hornsby v. Greece* (...)) and to the enforcement of foreign judgments (*Pellegrini v. Italy*, no. 30882/96, ECHR 2001-VIII).' The reference to *Pellegrini* is obviously mistaken, since in that case the Court had not at all defined an obligation to enforce foreign judgments, but rather defined the *limits* to enforcement that can derive from the right to a fair trial: where that right has been violated in the course of the proceedings in the foreign court, Art. 6 will prevent the courts of Contracting States from enforcing the judgment (see generally Kiestra, *supra* n. 6, chap. 8, p. 247 et seq.). *Pellegrini* is therefore not a useful reference at all in the present context. For a radical view, saying that the European Court is downright incorrect in extending the *Hornsby* logic to foreign judgments, see M. López de Tejada, *L'abolition de l'exequatur dans l'espace judiciaire européen*, Paris: LGD 2013, par. 147.

24 It can be observed, in comparative private international law, that legal systems that either do not recognize foreign judgments at all for enforcement purposes or do so under strict conditions only (especially of reciprocity) tend to provide for a *forum arresti* or *forum patrimonii* jurisdiction for their own courts.

Cases where the reasons for non-enforcement are not grounded in the private international law of the requested State but rather can be found in the ineffectiveness of the national procedures or authorities are unproblematic. Here, the reasoning in *Hornsby* may simply be applied by analogy, once it has been decided that foreign judgments should be treated like judgments rendered in the forum. In the European Court's jurisprudence, such cases make up the vast majority of violations of Article 6 of the Convention through the non-enforcement of foreign judgments.<sup>25</sup>

The other type of case is more interesting: the judgment is not being enforced because the judgment cannot be recognized under the forum's private international law rules. It has happened that such cases have also been dealt with in the Court's case law as cases in which the procedural right to the enforcement of foreign judgments was applicable. *McDonald v. France*<sup>26</sup> was such a case; it will be recalled that in *McDonald*, treating the enforcement of the foreign judgment as a procedural matter was probably the only possibility, in the absence of a substantive right to divorce. It should be noted that the condition for the recognition of the Florida divorce that the French courts had found wanting was itself procedural: the French courts had denied the jurisdiction of the Florida courts, on the ground that Article 15 of the Civil Code gave the courts of the wife's French nationality exclusive jurisdiction. Eventually it was held by the European Court, for essentially factual reasons, that France had not violated the Convention by denying recognition to McDonald's Florida divorce.<sup>27</sup>

Then there is the case of *Negrepontis-Giannisis v. Greece*,<sup>28</sup> where what was at stake was the decision of Greek courts not to recognize an American adoption judgment. The refusal was grounded on substantive public policy (the prohibition of an adoption by a Greek Orthodox monk). Insofar as the right of the adoptee to obtain the recognition of the adoption was itself grounded on substantive human rights, there was no major difficulty inherent in the Court's proportionality balancing exercise. But in the *Negrepontis-Giannisis* case, it was also decided to treat the decision to disregard the American judgment as a violation of the adoptee's procedural rights under Article 6, and the Court held that the same kind of proportionality balancing exercise was called for in this respect: it therefore proceeded to balance the adoptee's procedural right to the enforcement of the judgment against Greek substantive public policy and, since the grounds of public policy given by the Greek courts did not appear convincing to the Court, it considered Article 6 to have been violated.<sup>29</sup> The balancing exercise conducted in *Negrepontis-Giannisis* was not unconvincing; after all, a similar reasoning is sometimes conducted by the courts in private international law cases when considering whether to apply public policy at all to rights acquired under a foreign judgment. Nonetheless this aspect shows that where it is possible, the substantive approach to the human right to the enforcement of foreign judgments has advantages over a purely procedural approach: the balancing of interests inherent in an exercise of proportionality will tend to be simpler, and more transparent, if the policy aims of the applicable substantive law are to be weighed against a right that is itself substantive in nature.

#### 4. Conclusion

The European Court's case law appears by now to be settled: there can be, among the rights guaranteed by the European Convention on Human Rights, a right to the enforcement of foreign judgments. The nature of that right can be substantive and founded on the right to recognition of the underlying situation, provided that the parties' reasonable expectations

enabled them to rely on it and, of course, that the underlying situation is protected by one of the provisions of the Convention. It can also be procedural and derive from the right to the effectiveness of judgments rendered by 'any court', read as including foreign courts. Once there is a right to enforcement, there can be no interferences by national law with that right (and the national authorities can even have a 'positive obligation' to see to its effectiveness), unless the interference or the refusal to take positive measures are justified, in line with the principle of proportionality.

It would seem, therefore, that an attitude of refusing, as a matter of principle, to enforce foreign judgments at all (unless their enforcement is covered by a treaty) bears with it a serious risk of a violation of the European Convention on Human Rights.<sup>30</sup>

25 See *Dinu v. Romania and France*, judgment of 4 November 2008, no. 6152/02; *Huc v. Romania and Germany*, judgment of 1 December 2009, no. 7269/05; *Vrbica v. Croatia*, judgment of 1 April 2010, no. 32540/05; *Romańczyk v. France*, judgment of 18 November 2010, no. 7618/05; *Agache v. Romania*, judgment of 4 October 2011, no. 35032/09; *Matrakas v. Poland and Greece*, judgment of 7 November 2013, no. 47268/06; *Panetta v. Italy*, judgment of 15 July 2014, no. 38624/07; cf. *Solokhov v. Armenia and Moldova*, no. 40358/05, § 66 (where Armenia was supposed to apply the Minsk Convention and to enforce a Moldavian judgment, but where its courts had failed to do so without explanation).

26 See above, text at nn. 17-19.

27 McDonald had initially applied for a divorce in France, at a moment when he himself was resident with his wife in France; the divorce proceedings instigated by him in Marseilles were rejected by the *tribunal de grande instance* in accordance with French law. Instead of appealing the Marseilles ruling, he brought fresh proceedings in Florida, which was not the spouses' common domicile, nor the wife's residence, but had become the plaintiff's own temporary place of residence. Under the Florida law of jurisdiction, this apparently was sufficient. The French Supreme Court, when affirming the refusal of recognition of the Florida divorce, had emphasized that the Florida rule was hardly less exorbitant than the rule of Art. 15 of the Civil Code, so that denying recognition to the McDonald divorce was 'neither a violation of the right to a fair trial nor an inadmissible discrimination' (Cass. civ. 1<sup>re</sup> 30 March 2004, *Rev.crit. DIP* 2005, 86, with annotation by Sinopoli). The decision of the European Court is similar, but it puts the stress on McDonald's procedural behaviour rather than on a comparison of the abnormalities of French and of American law. It starts by stating that 'in principle no one can complain of a situation which he himself has contributed to bring about'. It then reasons as follows: 'The Court notes that before bringing an action before the American courts for a judgment which he then asked the French courts to enforce, the applicant should have appealed the judgment of the *tribunal de grande instance* of Marseilles (...) which he himself had chosen for his initial divorce application. Therefore the French authorities cannot be blamed for the refusal to enforce a judgment which appeared to them to have been applied for in an attempt to impair, by virtue of the applicant's refusal to take the necessary action, the applicable procedural rules' (author's translation).

28 *Supra* n. 9.

29 § 91.

30 The same may well be true, in the present author's opinion, of a requirement of reciprocity as a condition for the enforcement of a judgment from a given foreign State (a requirement along the lines of, for instance, Art. 328, par. I, no. 5 of the German Code of Civil Procedure): a requirement of reciprocity situates the enforcement of judgments on an interstate level, disregarding individual rights to enforcement. In the past, a requirement of reciprocity was disapproved (in a context other than the enforcement of foreign judgments) in *Koua Poirrez v. France*, judgment of 30 September 2003, no. 40892/09, § 40; but see *Granos Organicos Nacionales S.A. v. Germany*, judgment of 22 March 2012, no. 19508/07, § 57, in the field of security for costs in civil proceedings.

This does not mean that only the other extreme – namely automatic enforcement, on the ‘European Enforcement Order’<sup>31</sup> model as it exists in the European Union – can be deemed to comply with fundamental rights. The European Court of Human Rights has seen no problem with a State requiring an exequatur order to be given by its own courts before a foreign judgment can be enforced,<sup>32</sup> and an earlier decision of the European Commission of Human Rights had considered, in general terms, that no provision of the Convention ‘guarantees, as such, a right that decisions by a foreign judicial authority obtain immediate legal effect in a given domestic jurisdiction without any form of judicial recognition in the latter legal order’.<sup>33</sup> In addition, the requirement that the judgment must fulfil the conditions for its recognition in the forum State is not invalidated by the Convention: the Convention is not a full code of private international law and should therefore be read as allowing States to require compliance with reasonable conditions in line with international standards that can be observed in comparative private international law. In the application of those conditions, the national authorities will have a ‘margin of appreciation’, subject to ‘European supervision’<sup>34</sup> – as cases such as *Negrepontis-Giannisis*, *Labassée* or *Menesson* demonstrate.<sup>35</sup>

The form in which a State’s legal system proceeds to the ‘judicial recognition’ of foreign judgments should not be a matter with which the Convention would be concerned: it could be an exequatur proceeding, a registration of the foreign judgment, or an *actio iudicati* – provided that the procedure complies with the general requirement of adjudication within a ‘reasonable time’ which is part of the fair trial guarantees of Article 6 of the Convention.

The Court’s jurisprudence on the enforcement of foreign judgments as a matter of human rights has its strong as well as its weak points. Its strength lies in applying the Court’s proportionality test to such justifications as may exist, under the private international law of the forum, for not recognizing and, hence, not enforcing foreign judgments, especially where these justifications conflict with a substantive right such as the right to protection of family life. Its weakness is, strangely enough, situated not so much in aspects that would be better dealt with under private law or private international law, but rather – at least for the time being – in a conceptual deficiency in the justification for treating the ‘procedural right’ to the enforcement of foreign judgments as falling under the right to a fair trial at all.

31 Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims (*OJ* 2004, L 143), and other European regulations inspired by the same kind of hyper-efficient enforcement mechanism. These Regulations correspond to a very specific, politically-driven, project at the European Union level and cannot be universalized by reference to the ECHR.

32 *Engin Bozkurt v. Turkey*, decision of 17 April 2012, no. 40404/06.

33 *Alkin v. The Netherlands*, decision of 1 July 1998, no. 34986/97.

34 ‘The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its “necessity”’ (*Handyside v. United Kingdom*, judgment of 7 December 1976, *Series A*, no. 24, § 49, the *locus classicus*).

35 See above, text and nn. 9 to 12.