# Chapter 4
# Article 1 ECHR and Private International Law

## Contents



## 4.1 Introduction

In discussions concerning the impact of the European Convention on Human Rights on private international law, the relationship between its Article 1 ECHR, which defines the scope of the ECHR, and private international law does not generally receive a great deal of attention.[1] Occasionally the relationship is

[1] An early—and much shorter—version of this chapter was presented at the Colloquium 'The Impact of the European Convention on Human Rights (ECHR) on Private International Law', organized by the University of Amsterdam on 12 November 2010, as a part of the VICI Project of the Netherlands Organisation for Scientific Research entitled: The Emerging International Constitutional Order: the Implications of Hierarchy in International Law for the Coherence and Legitimacy of International Decision-making. This presentation was subsequently published in the journal *Nederlands Internationaal Privaatrecht (NIPR)*, which devoted a special edition to the subject of human rights and private international law. See Kiestra 2011, pp. 2–7. See also Stürner 2011, pp. 8–12.



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discussed in the literature,[2] but national courts, in particular, appear to pay relatively little attention to the issue of the applicability of the ECHR to private international law cases. This is, however, exactly what is at stake: is the ECHR at all applicable to private international law cases? This is an important preliminary question to the issue of what the impact of the ECHR may be on private international law.

Private international law by its very nature introduces foreign elements to legal orders. Intermittently, private international law will introduce foreign elements originating from third countries, i.e. countries that are not Contracting Parties to the ECHR. In the case of, for example, a foreign applicable law or a foreign judgment from a third country, it is interesting to see what the role of Article 1 ECHR is. One could argue that by virtue of extending the control of the ECHR over the foreign law originating from a third country, a notion of extra-territoriality is introduced in the sense that the ECHR would then apply to a law originating from a country that has never signed this instrument. A similar reasoning applies to foreign judgments emanating from third countries.

In order to examine this issue, a closer examination of the meaning and background of Article 1 ECHR is required (in Sect. 4.2), whereby the notion of 'jurisdiction' contained in this Article will be scrutinized (Sect. 4.2.1). This is important because the term jurisdiction has several distinct meanings in (private) international law and without further clarification the use of this term may lead to confusion. The afore-mentioned notion of extra-territoriality will also receive due attention (Sect. 4.2.2), as well as the case law of the European Court of Human Rights on this subject (Sects. 4.2.3 and 4.2.4). Next, the relationship between Article 1 ECHR and private international law will be further examined (Sect. 4.3). Thereafter some consequences of the findings will be discussed, accompanied by a brief survey of national case law dealing with Article 1 ECHR and private international law (Sect. 4.4), before a brief conclusion is offered (Sect. 4.5).

Before moving on to this discussion I would like to quickly turn to a Dutch case that further illustrates exactly what the issue is here.

In a case before the Dutch Supreme Court (*Hoge Raad*) of 12 December 2008,[3] the mother of a child wanted to judicially establish the paternity of a man of her child. The mother and child both had Surinamese nationality and that is where they also had their habitual residence. The prospective father had Dutch nationality and lived in the Netherlands. The man had acknowledged being the biological father of the child. According to the relevant Dutch choice-of-law rules in force at the time,[4]

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[2] See, e.g., Bucher 2000, pp. 82–86; Docquir 1999, pp. 476–481, 507; Flauss 2002, pp. 69–71; Kinsch 2007, p. 226ff; Thoma 2007, p. 91ff.

[3] *HR* 12 December 2008, *RvdW* 2009, 41; *NIPR* 2009, 1.

[4] Article 6 *Wet conflictenrecht afstamming* [Parentage (Conflict of Laws) Act], 14 March 2002, *Stb.* 2002, 153. This law has since been replaced by Boek 10 *Burgerlijk Wetboek*. See with regard to parentage particularly Title 5, Article 10:92 BW onwards. *Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek* [Determination and Implementation Book 10 of the Dutch Civil Code], 19 May 2011, *Stb.* 2011, 272.

the law of Surinam was applicable in this case. However under Surinamese law it is not possible to judicially establish the paternity of a child. At issue was whether the application of Surinamese law, which would lead to a denial of the mother's request, would violate the Dutch *ordre public* and/or Articles 8 and 14 ECHR and that thus Dutch law would consequently have to be applied to this case. The two lower courts rejected the mother's request. The *Gerechtshof* (the Court of Appeal) held that the child could also be recognized by the man abroad. The mere fact that the applicable foreign law in question does not include the possibility to judicially establish paternity, while Dutch law does, cannot lead to the setting aside of the normally applicable foreign law. Only exceptional circumstances, which would lead to an untenable situation for the child, could suffice for such a solution. There were no such circumstances in this case, according to the appeal court.[5] Before the *Hoge Raad* the appeal by the mother was dismissed, because her complaints could not lead to cassation (appeal).

The most pressing issue in this case for our purposes in this chapter concerns a point raised by the Advocate General Strikwerda in his Conclusion. He asked—in passing, I should add—whether the minor in this case came within the jurisdiction of the Netherlands, as understood in Article 1 ECHR. He immediately made clear that due to the circumstances of the case, this question did not need an answer, but he did briefly point to four cases which could be of guidance.[6] The first is the rather famous *Banković and Others v. Belgium and Others* case,[7] which will be discussed below. The other three cases the Advocate General mentioned are cases which came before the *Hoge Raad*.[8] These cases cover miscellaneous subjects, ranging from a family law case concerning a claim against a mother to surrender her child, to the extradition of an American soldier suspected of murder, to a case similar to the afore-mentioned *Banković* case. The common feature of these cases is that they concern the application of Article 1 ECHR.

The Advocate General ultimately only gave these hints in the Surinam case and did not answer the question he posed. Other interesting issues were also raised in this case, but unfortunately no substantive decision was taken by the *Hoge Raad*.[9] In my opinion, this case neatly illustrates the issue with which this chapter is concerned. What is the role of Article 1 ECHR in private international law cases? What are the limits of the application of the ECHR in this regard? When the applicants who invoke the ECHR come from a non-Contracting Party and either

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[5] See Hof 's-Gravenhage 3 October 2007, *NIPR* 2008, 7. See, particularly no. 8.

[6] Para 13 of the Conclusion supra n. 3.

[7] *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XI.

[8] He mentioned respectively HR 30 March 1990, *NJ* 1991, 249; HR 15 April 1994, *NJ* 1994, 576, *NIPR* 1994, 210; and HR 29 November 2002, *NJ* 2003, 35.

[9] See for a more detailed discussion of this case and two other Dutch cases concerning the judicial establishment of paternity: Kiestra 2010, pp. 27–30. Incidentally, in the other two cases two—lower—courts held under similar circumstances that the normally applicable foreign law had to be set aside. See for a discussion of these cases infra Chap. 6.

the law which is applicable to the case or the foreign judgment at issue also originates from a non-Contracting Party, can the ECHR still be invoked? Are *Banković* and related cases indeed the best model to explain the applicability of Article 1 ECHR in private international law cases? These are the questions that will be discussed in this chapter.

## 4.2 The Meaning of Article 1 ECHR and the Notion of Jurisdiction

Article 1 ECHR states as follows:

> The High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.[10]

Article 1 ECHR does not contain a specific right, but it does transform the ECHR into more than a mere declaration, as it clearly places an obligation on the Contracting Parties to secure the rights guaranteed in the ECHR. Further, it also delineates the scope of the ECHR.[11] The Article noticeably contains a scope requirement enclosed in the clause 'everyone within their jurisdiction'. The meaning of this phrase and the ensuing scope of the ECHR in general have been much discussed. A principal question in the Court's case law in this regard has been whether the ECHR can be said to be applicable extra-territorially, i.e. outside the territories of the Contracting Parties. I will return to this notion of extra-territoriality,[12] but before we further delve into that, it is prudent to first discuss the word 'jurisdiction' which is included in Article 1 ECHR, as this notion is used in several settings and may therefore easily be misunderstood. It will be demonstrated that the term 'jurisdiction' as used in Article 1 ECHR has little to do with how this term is normally used in private international law, while the relationship with how the term is used in public international law is unclear.

### *4.2.1 The Notion of Jurisdiction*

The word jurisdiction has different meanings. It has even—rightfully, it appears—been remarked that the usage of the term jurisdiction is so varied that it is only possible to determine its exact meaning from context.[13] For specialists in the field of private international law, the term usually refers to the competence of a

[10] For good measure, its French counterpart reads: 'Les Hautes Parties contractantes reconnaissent à toute personne relevant de leur juridiction les droits et libertés définis au titre I de la présente Convention.'

[11] See, e.g., White and Ovey 2010, p. 84ff.

[12] See infra Sect. 4.2.4.

[13] Smit 1961, p. 164.

particular judge or, rather, the court(s) of a national State to hear an international case. As was discussed in Chaps. 1 and 2, this notion of jurisdiction is considered to be one of the three main issues of private international law, the other two being the issue of the applicable law and the recognition and enforcement of foreign judgments, respectively.[14]

Jurisdiction in this private international law sense has also been referred to as judicial or adjudicatory jurisdiction (the power of a State's court to hear cases), if put in terms of the jurisdiction of a State in public international law.[15] This type of jurisdiction should then be distinguished from the other two types of jurisdiction which are generally differentiated in (public) international law: legislative (or prescriptive) jurisdiction (the power of a State to legislate), and enforcement jurisdiction (the power of physical intervention by the executive, such as, for example, by seizing property or arresting a person).[16] It should also be understood that jurisdiction in private international law refers to (international) civil jurisdiction (as opposed to, for example, criminal jurisdiction). The afore-mentioned types of jurisdiction in public international law—the jurisdiction to legislate, to adjudicate, and to enforce—naturally do not exclusively deal with private (international) law.

The notion of adjudicatory jurisdiction, and more specifically international civil jurisdiction, will be examined more closely in the next chapter, which deals with jurisdiction in private international law and the impact of the ECHR.[17] However, it appears to be prudent to briefly dwell on the more general notion of jurisdiction in (public) international law here, if only because the Court in Strasbourg has often referred to this concept in its case law concerning the interpretation of the phrase 'everyone within their jurisdiction', albeit without always succeeding in offering much clarity on the subject.

### *4.2.2 The Notion of Jurisdiction in Public International Law*

Jurisdiction in public international law is concerned with the authority of a State to regulate the conduct of all of its subjects and usually refers to the power exercised by a State over people, property, and events.[18] Jurisdiction is thus closely linked with the concept of state sovereignty.[19] It is possible to divide the concept of jurisdiction into three different types of jurisdiction, which are linked with

[14] See for a discussion of the impact of the ECHR on these three issues infra Chaps. 5–8.

[15] See further infra Sect. 4.2.2.

[16] See on the notion of jurisdiction Akehurst 1972–1973, pp. 145–257; Lowenfeld 1996; Mann 1964, pp. 1–162; Mann 1984, pp. 9–116; McLachlan 1993, pp. 125–144.

[17] See infra Sect. 5.2.

[18] Cf. Akehurst 1972–1973, p. 145; Mann 1964, pp. 9–10; Shaw 2008, pp. 645–649.

[19] See, e.g., Mann 1964, p. 20 Cf. Brownlie 2008, pp. 105–106; Cassese 2005, pp. 49–50.

different competences of a State.[20] These three were mentioned above.[21] It has been argued with regard to this subdivision that adjudicatory jurisdiction is 'not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate: a State's right of regulation is exercised by legislative jurisdiction which includes adjudication.'[22] However, this approach underestimates the distinctive features of a court's function in settling a dispute between two private parties and the State's power to draft legislation.[23]

It should be noted that the general principles guiding the assertion of jurisdiction may differ depending on which type of jurisdiction is at hand. However, it can safely be stated that the leading principle of jurisdiction is the territorial principle.[24] This naturally follows from the afore-mentioned link with sovereignty. All types of jurisdiction may be asserted by the State on its own territory. On its own territory the State's courts can unquestionably hear cases, regulate behavior by legislation, and enforce any decisions. The extent to which States are allowed to assert jurisdiction outside their territory, however, differs depending on the type of jurisdiction concerned.

The jurisdiction to enforce, for example, is, in principle, limited to the territory of a State.[25] States are generally not permitted to enforce any decision, regardless of its nature, on the territory of another State, although exceptions may be negotiated between States.[26] With regard to adjudication, one could also say that States are not allowed to settle disputes on the territory of another State. One may recall in this regard that in order for a Scottish court to sit at 'Kamp Zeist' in the Netherlands to hear the cases against the Libyan nationals accused of blowing up an American aircraft in Scottish airspace, an agreement between the Netherlands and the United Kingdom (UK) had to be struck.[27] For prescriptive (or legislative)

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[20] Cf., e.g., Akehurst 1972–1973, p. 145ff; Lowenfeld 1996, particularly pp. 15–136; Shaw 2008, p. 649ff; Wautelet 2004, p. 55.

[21] Supra Sect. 4.2.1.

[22] Mann 1984, p. 67. It should be noted that it has also been questioned if enforcement jurisdiction is a primary competence of a State in this regard. See Higgins 1984, p. 4.

[23] McLachlan 1993, p. 128.

[24] Brownlie 2008, p. 299; Cassese 2005, p. 49; Nollkaemper 2009, pp. 104–105; Lowe and Staker 2010, pp. 314–315.

[25] This was stated by the Permanent Court of International Justice in the *Lotus* case. See PCIJ, 7 September 1927, Series A no. 10, pp. 18–19 (*Lotus*).

[26] As an example, one could cite the fact that troops of NATO Member States stationed in another Member State are principally subject to the authorities in the home State, giving the home State enforcement jurisdiction in the host State as well as prescriptive jurisdiction. Cf. Lowe and Staker 2010, p. 317. See for examples regarding prescriptive jurisdiction the many contributions on this issue in Olmstead 1984.

[27] Verdrag tussen de Regering van het Koninkrijk der Nederlanden en de Regering van het Verenigd Koninkrijk van Groot-Brittannië en Noord-Ierland inzake de rechtszitting van een Schots Hof in Nederland, 18 September 1998 (Trb. 1998, 237; 1999, 1;1999, 208 en 2007-172) [Dutch version]. See also the Agreement concerning a Scottish Trial in the Netherlands, 18 September 1998, UKTS No. 43 (1999).

jurisdiction, though, there is more room for the extra-territorial assertion of jurisdiction compared to the other two types of jurisdiction, as States have applied their laws extra-territorially in several areas of law, particularly economic laws.[28]

The factors on which the assertion of jurisdiction can be based may also diverge depending on the specific area of the law concerned. Let us take legislative jurisdiction as an example, as this type of jurisdiction has the greatest potential to be assumed more generously than the other two types. Some bases of jurisdiction may be used regardless of the subject matter. The afore-mentioned territoriality principle and the nationality principle could be cited here as examples. It is practically undisputed that States have the right to extend the reach of their laws to their nationals, whether they are inhabitants of the State or not.[29] The protective principle—the assumption of jurisdiction over aliens who have undertaken acts abroad against the State exercising jurisdiction—is also used for a wide variety of offenses, although this basis is obviously more limited.[30] The universality principle, however, is much more controversial and mostly limited to criminal matters, more particularly very serious crimes, such as crimes which may be prosecuted by the International Criminal Court.[31]

Finally, it should be noted that the term jurisdiction in public international law is also used to denote the jurisdiction of international tribunals. In this vein, the term is used to describe the scope of the right of an international tribunal to hear cases. This usage of the term is similar to its use in private international law in the sense that jurisdiction then refers to the jurisdiction of a court instead of a State.

In sum, jurisdiction in public international law is concerned with the authority of the State to regulate conduct. This notion of jurisdiction can be differentiated in several specific types of jurisdiction, which are linked to the different competences of the State. These types of jurisdiction have their own characteristics and the limits placed on them by international law may consequently differ depending on the precise type of jurisdiction at hand. It should thus be stressed that the notion of jurisdiction in (public) international law is not unambiguous and may, in fact, refer to several distinguishable facets of jurisdiction.

### *4.2.3 The Notion of Jurisdiction in Article 1 ECHR*

What does the notion of jurisdiction in Article 1 ECHR exactly mean? This has been the focus of quite some debate.[32] The Court has naturally been a major

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[28] See in this regard the contributions in Olmstead 1984. Note that this is mostly the case in relation to civil cases and not necessarily criminal cases.

[29] See, e.g., Lowe and Staker 2010, pp. 323–325.

[30] See, e.g., Brownlie 2008, pp. 304–305.

[31] See, e.g., Nollkaemper 2009, pp. 108–110. But see supra Sect. 1.1 on the possibility of universal civil jurisdiction.

[32] See, e.g., Gondek 2009; Harris et al. 2009, p. 804ff; Lawson 2004, pp. 83–123; Milanović 2008, pp. 411–448; O'Boyle 2004, pp. 125–139; and Orakhelashvili 2003, pp. 529–568.

contributor to this debate, which has mostly been focused on the meaning of the requirement 'within their jurisdiction' and the issue of extra-territoriality, as will be shown below. Before delving into this debate and an examination of some of the Court's case law in this regard, it may be useful to take one step back and first to focus solely on the use of the word 'jurisdiction' in Article 1 ECHR.

It has been demonstrated above that the word 'jurisdiction' has multiple meanings in public international law. It is, for example, not only used to describe a State's authority to regulate conduct, but also to refer to the competence of international tribunals. This is where confusion may arise. One should note that jurisdiction in Article 1 ECHR refers to the jurisdiction of a State, or, more precisely, the jurisdiction of the Contracting Parties.[33] This much follows from the text of Article 1 ECHR, which explicitly states '[t]he High Contracting Parties shall (…)'. It thus does not refer to the jurisdiction of a court. In this sense this notion also differs from jurisdiction in private international law, as that notion refers to the jurisdiction of a court.

The question now, of course, is whether this notion of jurisdiction as found in Article 1 ECHR is the same notion of jurisdiction which exists in public international law. As will be further discussed below in the discussion on the extra-territoriality of the ECHR, the Court has held in *Banković* that this is, in fact, the case.[34] However, the Court's assumption in this regard raises a question. As has been demonstrated above, the notion of jurisdiction in public international law is not unequivocal—it has three different aspects (adjudicatory, prescriptive, and enforcement) and its characteristics may differ depending on the circumstances. The question therefore is which notion of jurisdiction in international law is the Court exactly referring to in *Banković*?[35] This does not become clear, which makes the Court's statement in this case concerning the relationship between the notion of jurisdiction in international law and Article 1 ECHR unhelpful at best.

How should the notion of jurisdiction in Article 1 ECHR, then, be interpreted exactly? This is not easy to establish and probably requires a separate study.[36] For the purpose of this book it is not necessary to answer this question exhaustively. It suffices to recall that the term jurisdiction in Article 1 ECHR does not refer to the jurisdiction of the Court, but to the jurisdiction of the Contracting Parties. It has been suggested that 'jurisdiction' in Article 1 ECHR merely refers to the power, or the authority of the Contracting Parties, which is admittedly not a defined legal term, but this mere factual approach to the term does appear to be the best fit.[37]

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[33] Milanović 2008, p. 415.

[34] *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, para 36, ECHR 2001-XI.

[35] Cf. Milanović 2008, pp. 417–422.

[36] See in this regard Milanović 2011.

[37] Milanović 2008, p. 434ff. See also Loucaides 2006 and Judge Loucaides' critique of *Banković* in his concurring opinion in *Assanidze v. Georgia* [GC], no. 71503/01, ECHR 2004-II and partly dissenting opinion in *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.

It is possible to conclude with the observation that jurisdiction in Article 1 ECHR refers to a threshold: it is first necessary to establish that a Contracting Party has jurisdiction in order for the Court in Strasbourg to examine a complaint under the ECHR.[38] Even though the word 'jurisdiction' in Article 1 ECHR may not refer to the jurisdiction of the Court, the Court's jurisdiction is, of course, related to that Article.

### *4.2.4 Article 1 ECHR and the Extra-Territorial Application of the ECHR*

The scope of the ECHR is contained in the phrase 'within their jurisdiction' in Article 1 ECHR. In order to examine the precise meaning of this phrase for the scope of the ECHR and, subsequently, the meaning of Article 1 ECHR for private international law, it is useful first to discuss briefly the *travaux préparatoires* concerning Article 1 ECHR (Sect. 4.2.4.1). Thereafter, the extra-territorial scope of the ECHR will be further discussed (Sect. 4.2.4.2). It will be shown that with regard to the applicability of the ECHR to events taking place outside the territories of the Contracting Parties, a distinction needs to be made between the actual extra-territorial application of the ECHR (Section "The Extra-Territorial Application of the ECHR") and the extra-territorial effect of the ECHR (Section "The Extra-Territorial Effect of the ECHR").

#### 4.2.4.1 The '*Travaux Préparatoires*' Concerning Article 1 ECHR

The Court has assigned fluctuating value to the '*travaux préparatoires*' in interpreting the ECHR.[39] Moreover, one could remark that the Court has held that the *travaux préparatoires* are not decisive for the interpretation of Article 1 of the ECHR.[40] Nevertheless, a look at the creation of Article 1 ECHR and, particularly, the phrase 'within their jurisdiction', is certainly worthwhile, as it will become clear that the founding fathers of the ECHR have deliberately chosen 'within their jurisdiction' over more stringent alternatives. Accordingly, this legislative history may shed some light on the ensuing debate on the extra-territoriality of the ECHR.

The Council of Europe's Consultative Assembly included a different provision with regard to the scope of the ECHR in Article 1 in its first draft of the Convention:

> In this Convention, the Member States shall undertake to ensure to all persons residing within their territories (…).[41]

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[38] See Milanović 2008, pp. 415–417. Cf. White and Ovey 2010, p. 89.

[39] See, e.g. Harris et al. 2009, pp. 16–17.

[40] *Loizidou v. Turkey* (preliminary objections), 23 March 1995, para 71, Series A-310.

[41] *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, part II, 8 September 1949, p. 276.

One immediately notices the striking difference between this version and the current provision: instead of 'within their jurisdiction', 'residing within their territories' had been proposed by the Consultative Assembly.[42] When this draft was discussed by the Governmental Sub-Committee, however, another proposal was brought forward: 'residing' would be replaced by 'living in', in order to expand the scope of the (future) instrument. This subsequently triggered a new proposal, which should be more familiar to the reader—to replace the words 'residing within' by 'within its jurisdiction'. Interestingly, the proposal to replace 'residing within' was preceded by the following explanatory words:

> Since the aim of the amendment is to widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention, and since the words 'living in' might give rise to a certain ambiguity (…).[43]

Eventually, the Committee of Experts settled on the current 'within their jurisdiction', while explicitly refusing the overly restrictive term 'residing', particularly because it was of the opinion that there were good reasons to extend the guarantees in the ECHR to all persons in the territories of the Contracting Parties, 'even those who could not be considered as residing there in the legal sense of the word.'[44] It is noteworthy that the founding fathers rejected a restrictive phrasing of the scope of the ECHR in Article 1 ECHR, and even pushed for a definition which would be as inclusive as possible. On the other hand, one must concede that at no time during the negotiations did the founding fathers appear to have pondered the notion of the extra-territorial application of the ECHR and it is thus wise not to go too far in trying to decipher the drafters' intentions.

#### 4.2.4.2 The Extra-Territorial Scope of the ECHR

It was thus clearly the drafters' intention not to overtly restrict the meaning of the phrase 'within their jurisdiction'. In a very early case, *Austria v. Italy*,[45] the Court confirmed that the nationality of applicants was not a factor in the interpretation of those words and that nationals of third states as well as stateless persons were included.[46] Shortly thereafter, the issue of whether the requirement of 'everyone

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[42] One may also notice that the term 'persons' was used instead of 'everyone'. The latter term, which ended up in the final version, is at first sight more encompassing.

[43] *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, part II, 5 February 1950, p. 200.

[44] *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, Vol. II, 15 June 1950, pp. 236 and 260. Although Article 1 ECHR was changed after that meeting, the words 'within their jurisdiction' did not. For the text as adopted by the Conference of Senior Officials, see p. 218.

[45] *Austria v. Italy*, no. 788/60, Yearbook of the European Convention on Human Rights 1961.

[46] *Austria v. Italy*, no. 788/60, Yearbook of the European Convention on Human Rights 1961, p. 116.

within their jurisdiction' would limit the applicability of the ECHR to events occurring on the territories of the Contracting Parties came up for the first time.[47] The Court and the Commission have both dealt with cases concerning events actually taking place outside the territories of the Contracting Parties and cases in which events taking place within the territories of the Contracting Parties may have an effect outside the Contracting Parties. Both instances may be associated with the notion of extra-territoriality, but the two categories of cases should be distinguished. In its case law concerning the extra-territorial application of the ECHR, the Court has developed a two-track system. The Court makes a distinction between cases which concern the *extra-territorial effects* of the ECHR and cases in which the actual *extra-territorial application* of the ECHR is at hand.[48]

### The Extra-Territorial Application of the ECHR

Cases concerning the extra-territorial application of the ECHR are those in which the Court has to decide whether the ECHR could also be applied to situations which occurred outside the territories of the Contracting Parties. An example is the well-known *Banković* case, which concerned the question of whether all the NATO Member States, which are also members of the Council of Europe, could be held responsible for the bombing of a building in Belgrade, Serbia, which was not a Contracting Party at the time. Five relatives of people who were killed during that attack and a survivor brought a complaint before the Court in Strasbourg. The Court first had to decide whether the facts of this case could come within the jurisdiction of the respondent States as a result of the extra-territorial act, i.e. the bombing of a radio tower outside the territories of the Contracting Parties. The Court ultimately held that this was not the case.

In deciding whether the facts could fall within the jurisdiction of the respondent States, the Court, seemingly following the suggestion of the seventeen respondent States,[49] took as its angle the ordinary meaning of 'jurisdiction' in public international law. This resulted in the Court's finding that this notion of jurisdiction in Article 1 ECHR is essentially territorial, and that other bases of jurisdiction are exceptional and require special justification.[50] The Court found confirmation hereof in the *travaux préparatoires*[51] and also made a reference to the *Soering*

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[47] The issue came up for the first time before the Commission in *X v. the Federal Republic of Germany* (dec.), no. 1611/62, Yearbook of the European Convention on Human Rights 1965, pp. 159–168 (decision of 25 September 1965).

[48] See, e.g., *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, para 68, ECHR 2001-XI.

[49] *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, para 36, ECHR 2001-XI.

[50] *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, para 61, ECHR 2001-XI.

[51] See supra Sect. 4.2.4.1.

case,[52] in which it, inter alia, had held that Article 1 ECHR 'sets a limit, notably territorial, on the reach of the Convention.'[53]

In *Banković*, the Court made every effort to distinguish the case from its previous case law with regard to Article 1 ECHR, as established in *Loizidou v. Turkey* (Preliminary Objections).[54] Ms Loizidou, a Cypriot national, lodged a complaint against Turkey, as she claimed to be the owner of certain plots of land situated in northern Cyprus which she could no longer peacefully enjoy since the Turkish invasion of northern Cyprus. She alleged that Turkish troops prevented her from returning to her land.

In this case, the Court recalled its own case law in which it had held that although Article 1 ECHR sets limits on the reach of the ECHR, it is not limited to the territories of the Contracting States. Thereafter, the Court held that, under certain circumstances, military action outside the territory of a State can also give rise to the responsibility of a State:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.[55]

In *Loizidou*, the Court emphasised the object and purpose of the ECHR by referring to the Convention as 'a constitutional instrument of European public order (*ordre public*),'[56] in addition to its reliance on the concept of the exercise of 'effective control.'[57] The applicants in *Banković*, unsurprisingly, relied on *Loizidou* in their arguments, but the Court felt that the situation in *Banković* could be clearly distinguished from *Loizidou*, as the latter case fell within the legal space (the *espace jurisdique*) of the ECHR—both Cyprus and Turkey are members of the Council of Europe. Yugoslavia was not part of the legal space of the ECHR at the time. The Court held that '[t]he Convention was not designed to be applied

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[52] *Soering v. the United Kingdom*, 7 July 1989, Series A-161.

[53] *Soering v. the United Kingdom*, 7 July 1989, para 86, Series A-161.

[54] *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310.

[55] *Loizidou v. Turkey* (preliminary objections), paras 62, 23 March 1995, Series A no. 310.

[56] *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310, para 75. The Court here thus refers to the notion of *ordre public*. This is, of course, a reference with a certain connotation for specialists of private international law (see on this notion in private international law supra Sect. 2.5). However, it should be noted that the Court here does not refer to a concept of private international law. See Kinsch 2004, pp. 202–205; Cf. Struycken 2009, pp. 51–52. But see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, para 133, ECHR 2010-. In this case concerning international child abduction the Court referred to the ECHR's special character as an instrument of European public order (*ordre public*) for the protection of individual human beings.

[57] See supra n. 55.

throughout the world, even in respect of the conduct of Contracting States.'[58] In connection with the applicants' invocation of *Loizidou* the Court also observed 'the essentially regional vocation of the Convention system',[59] an oft-cited notion of the Court, which will be revisited below.[60] With this the Court also rejected the applicants' suggestion in *Banković* of a specific application of 'effective control' and their reliance on the *orde public* mission of the ECHR.[61]

The Court not only had to distinguish its decision in *Banković* from its previous case law in *Loizidou*, but it also had to account for its more recent admissibility decision in the case of *Issa and Others v. Turkey*.[62] This case clearly concerned acts outside the legal space of the Contracting Parties, as it involved the alleged killing of Iraqi shepherds in Northern Iraq by Turkish troops, but it had been declared admissible by the Court. Here, the Court gave a rather straightforward and blunt explanation for the difference between *Banković* and this case: in the admissibility decision in *Issa* the respondent States had failed to argue that the Court did not have jurisdiction.[63] This is, of course, a rather odd argument. Was the Court, in such an important case, not prepared to give a ruling on its competence *ex officio*?[64]

The *Banković* decision of the Court has been much criticized.[65] Despite this criticism, it has to be acknowledged that this is an important case regarding the extra-territorial application of the ECHR, as the Court has since often repeated its stance in this case. However, it appears that this decision is not the final word on the extra-territorial application of the ECHR. After its decision in *Banković* the Court found in *Issa and Others v. Turkey*[66] that the concept of jurisdiction was not restricted to the territories of the Contracting Parties and that under exceptional circumstances—notably a situation in which a Contracting Party has 'effective control'—acts occurring outside the territory may entail the exercise of jurisdiction as found in Article 1 ECHR. This case was ultimately decided, though, on the fact that the applicants were unable to demonstrate the alleged facts in this case.[67]

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[58] *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, para 80, ECHR 2001-XI.

[59] Id.

[60] See infra Sect. 4.4.1.

[61] *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, paras 75–80, ECHR 2001-XI.

[62] *Issa and Others v. Turkey* (dec.), no. 31821/96, 30 May 2000.

[63] See also another admissibility decision in a case concerning an extra-territorial act, the apprehension of the applicant in Kenya, in *Öcalan v. Turkey* (dec.), no. 46221/99, 14 December 2000, which the Court distinguished similarly.

[64] Lawson 2004, p. 115.

[65] See, e.g., Gondek 2009; Lawson 2004; Loucaides 2006, at pp. 391–407; and Orakhelashvili 2003.

[66] *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004.

[67] *Issa and Others v. Turkey*, no. 31821/96, paras 76–82, 16 November 2004.

Since its findings in *Banković*, the Court has found that the arrest of a person in a third country by officials of a Contracting Party means that this person falls within the jurisdiction of that Contracting Party,[68] while applicants who are being held in a prison in a third country which is under the full control of the forces of a Contracting Party also falls within the jurisdiction in the sense of Article 1 ECHR.[69] Even in the exceptional circumstances where a Contracting Party assumes the authority for keeping part of a third country secure, this Contracting Party has jurisdiction under Article 1 ECHR with regard to civilians killed during security operations carried out by the forces of the Contracting Party in that area.[70] In all the afore-mentioned cases, however, the Contracting Party had some sort of physical control over the respective applicants.

More recently, for example, the Court has found that refugees travelling by boat who were picked up on the High Seas by a vessel sailing under the flag of a Contracting Party also came within the jurisdiction of this Contracting Party.[71] These cases are arguably all concerned with different categories of cases of the extra-territorial application of the ECHR and involve some sort of physical control, which may at least partly explain the different outcomes compared to that in *Banković*.[72] What is clear, however, is that even though *Banković* appeared to reduce the extra-territorial application of the ECHR, there are certainly plenty of scenarios remaining in which the ECHR is applicable extra-territorially.

## The Extra-Territorial Effect of the ECHR

In cases concerning the extra-territorial effect of the ECHR, liability may be incurred by Contracting Parties by virtue of their taking action within their own territory (such as a decision to extradite or expel) which may consequently have an effect on non-Contracting Parties. An example of the phenomenon of the extra-territorial effect of the application of the ECHR in the Court's case law can be found in *Soering v. the United Kingdom*,[73] which may still be regarded as a leading case in the field of extradition.[74] Here the Court had to deal with the issue of

[68] *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV.

[69] *Al-Sadoon and Mufdi v. the United Kingdom*, no. 61498/08, ECHR 2010 (extracts). See also *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, ECHR 2011.

[70] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011.

[71] *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, 23 February 2012. See also *Women On Waves and Others v. Portugal*, no. 31276/05, 3 February 2009.

[72] There is rich literature on this subject. See for some recent theories on Article 1 ECHR, e.g., Miller 2009, pp. 1223–1246; Nigro 2010, pp. 11–30.

[73] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161.

[74] See generally on extradition and human rights Van der Wilt 2012, pp. 268–315.

whether it is possible for a Contracting Party to be responsible for an act that (possibly) occurs in another State which is not bound by the ECHR. In this particular case the question was whether the United Kingdom could be held responsible for the extradition of a person suspected of murder to the United States (US). The Court ultimately held that this was so in this case.

In reaching this finding, the Court started out by carefully sketching the Contracting Parties' obligations, noting that Article 1 ECHR

> sets a limit, notably territorial, on the reach of the Convention. (…) Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.[75]

However, the Court subsequently observed that all this cannot absolve the Contracting Parties from responsibility under Article 3 ECHR 'for all and any foreseeable consequences of extradition suffered outside their jurisdiction',[76] and ultimately held that the decision of a Contracting Party to extradite an individual may indeed bring responsibility for the State 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.'[77] While acknowledging that an assessment of the conditions in a State that is not a Contracting Party is inevitable in such cases, the Court did nevertheless emphasize this does not mean that one illicitly meddles with business that only concerns the extradition-requesting State and that there is thus 'no question of adjudicating on or establishing the responsibility of the receiving country (…).'[78]

The Court has taken analogous decisions in the field of expulsion, in which a similar principle applies, as it held in *Cruz Varas v. Sweden*.[79] This has been confirmed in *Daoudi v. France*,[80] a case concerning the expulsion of a suspected terrorist from France. *Drozd and Janousek v. France and Spain* offers another important example of a case concerning international judicial co-operation and the extra-territorial effect of the ECHR.[81]

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[75] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, para 86.

[76] Id.

[77] *Soering v. the United Kingdom*, 7 July 1989, Series A no. 161, para 91.

[78] Id.

[79] *Cruz Varas v. Sweden*, 20 March 1991, paras 69–70, Series A no. 201.

[80] *Daoudi v. France*, no. 19576/08, 3 December 2009.

[81] *Drozd and Janousek v. France and Spain*, 26 June 1992, Series A no. 240. The importance of this case for private international law is, incidentally, very much tied to Judge Matscher's concurring opinion in this case.

## 4.3 The Meaning of Article 1 ECHR for Private International Law

Having discussed Article 1 ECHR and the Court's interpretation thereof, it is now time to turn our attention to the issue with which this chapter is mainly concerned: what is the role of Article 1 ECHR with regard to issues of private international law? A related question is: what does the discussion concerning the possible extra-territorial scope of the ECHR exactly mean for private international law? It will be recalled that private international law is concerned with cross-border cases introducing foreign elements and deals with three main questions in this regard: the issue of jurisdiction, the issue of the applicable law, and, finally, the issue of the recognition and enforcement of foreign judgments. What is the role of Article 1 ECHR with regard to these three issues?

It is submitted here that if a court of one of the Contracting Parties has jurisdiction in the private international law sense to hear a case, then this automatically implies that the subjects in that case come within the jurisdiction of the Contracting Party and that the ECHR is applicable to such cases, even if the persons involved come from a non-Contracting Party and regardless even of whether the relevant facts took place within the jurisdiction of another State.[82] In this regard one could thus say that there is a link between jurisdiction in private international law—adjudicatory jurisdiction—and jurisdiction following from Article 1 ECHR. If a court of a Contracting Party asserts jurisdiction in the private international law sense, then its subsequent decision must be in conformity with the rights guaranteed in the ECHR.[83] It is interesting to note that with regard to the other two issues of private international law—the applicable law and the recognition and enforcement of foreign judgments—foreign elements (either a foreign applicable law or a foreign judgment possibly emanating from third countries) are introduced to the Contracting Parties. This raises the question of the extent to which one could speak of the extra-territoriality of the ECHR in this regard—meaning the extent to which the rights guaranteed in the ECHR may be applied to foreign law and judgments.

Long before the Court, at the beginning of the last decade, delivered a judgment concerning whether the ECHR could be applicable to the recognition of a foreign judgment emanating from a third State in *Pellegrini v. Italy*,[84] specialists in the field of private international law had noticed the possible analogy between the Court's reasoning in *Soering* and the applicability of the ECHR to the recognition of foreign judgments or the application of a foreign law emanating from a third country.[85] Although in the event of the recognition of a foreign judgment violating

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[82] See *Markovic and Others v. Italy* [GC], no. 1398/03, ECHR 2006-XIV. See for a more extensive discussion of the relationship between Article 1 ECHR and jurisdiction in private international law infra Sect. 5.3.

[83] See further infra Chap. 5.

[84] *Pellegrini v. Italy*, no. 30882/96, *ECHR* 2001-VIII.

[85] See, e.g., Mayer 1991, pp. 653–655 and Van Loon 1993, pp. 145–146.

one of the rights guaranteed in the ECHR the violation has already taken place in that foreign country, it is the court of one of the Contracting Parties which would ultimately allow such a violation in the Contracting Party. It is this act of recognizing the foreign judgment which ultimately results in a violation of the ECHR.

The analogy is, of course, not perfect. It has been remarked that *Soering* turned on Article 3 ECHR, which prohibits torture and inhuman or degrading treatment, while private international law cases are generally not concerned with Article 3 ECHR.[86] However, in *Soering* the Court also considered that 'an issue might exceptionally be raised under Article 6 [ECHR] by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.'[87] It has also been suggested that the above-cited passage indicates that the extra-territorial application of Article 6 ECHR is limited to the criminal sphere.[88] However, the Court's findings in *Pellegrini v. Italy* clearly indicate that this is not the case.

The Court's findings in *Pellegrini* with regard to the applicability of the ECHR should thus not have come as too great a surprise.[89] This case concerned the enforcement of a Vatican judgment annulling a marriage in Italy. The applicant alleged that she had not received a fair trial before the courts in the Vatican and that the subsequent enforcement of this judgment in Italy violated her rights under Article 6 ECHR. As the Vatican is not one of the Contracting Parties to the ECHR, for our purposes the most interesting question is whether the Court deemed that the ECHR could be applicable in this case. In its judgment the Court first noted that its task was not to examine whether the proceedings before the Vatican courts were contrary to Article 6 ECHR, as the Vatican is not a Contracting Party, but rather to examine whether the Italian courts duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6 ECHR. The Court added that such a review is required when the enforcement of a judgment emanating from a country that does not apply the ECHR is requested. After examining the reasoning of the Italian courts, the Court held that they had breached their duty to examine whether the proceedings had lived up to the standards of Article 6 ECHR.

It should be noted that the Court did not even mention Article 1 ECHR in *Pellegrini*, although it did treat the Vatican judgment as a judgment emanating from a country that has not signed the ECHR.[90] Apparently the applicability of the ECHR, following from its Article 1 ECHR, to such a situation may be regarded as a foregone conclusion. One could say that such a conclusion is completely in line

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[86] See, e.g., Juratowitch 2007, p. 178.

[87] *Soering v. the United Kingdom*, 7 July 1989, para 113, Series A no. 161. Incidentally, the Court subsequently found that such a risk could not be construed from the facts in *Soering*.

[88] White and Ovey 2010, p. 275.

[89] This case has been much discussed, and one could say that other aspects of the Court's findings in this case were certainly surprising. See for annotations, e.g., Costa 2002, pp. 470–476; Flauss 2002; Pocar 2006, pp. 575–581. This case will be further discussed infra Sect. 8.2.

[90] Whether that in itself is completely justifiable can be the subject of debate. Italy and the Holy See clearly have a special relationship. See Kinsch 2004, p. 220.

with the Court's case law concerning extradition and expulsion, with which the recognition of a foreign judgment emanating from a third country may be said to correspond. There is also no reason to assume that the Court would reach a markedly different conclusion with regard to the application of a foreign law originating from a third country. The Court has confirmed as much in its decision in *Ammjadi v. Germany*,[91] in which it also did not comment on the applicability of the ECHR, despite the fact that the applicable law in this case originated from Iran, which, of course, is not a Contracting Party.[92]

One could remark that the application of a foreign law of a third country violating the ECHR by a court of a Contracting Party is not entirely similar to the recognition of a foreign judgment violating the ECHR. One could argue that when the court of a Contracting Party applies a foreign law violating the ECHR, this results in a direct violation of the ECHR, while the recognition of a foreign judgment by that same court results in a more indirect violation. After all, in the latter instance the actual violation would have already taken place in the country of origin of the judgment. However, one could wonder what the practical relevance of such a distinction is in the event that the foreign law or foreign judgment originates from a non-Contracting Party. In both these scenarios the violation of the ECHR by way of either applying the foreign law or recognizing or enforcing the foreign judgment is attributable to the Contracting Party in which the pertinent proceedings took place.[93]

The Court's judgment in *Pellegrini*, combined with its case law concerning extradition and expulsion, thus seem to indicate that the ECHR is generally applicable to cases concerning private international law issues, even if the foreign law or judgment introduced in the Contracting Parties has its origin in countries that are not signatories to the ECHR.[94] Consequently there appears to be little room for the invocation of the Court's case law concerning the extra-territorial application of the ECHR up to this point.

That is not to say that the applicability of the ECHR in these cases concerning issues of private international law is clear-cut from here on. There is, for example, much debate on what the Court's standard of control should be in such cases

[91] *Ammdjadi v. Germany* (dec.), no. 51625/08, 9 March 2010.

[92] See for a more detailed discussion of the case infra Chap. 6.

[93] Incidentally, the distinction may be of use in the event that the applicable law or foreign judgment emanates from another Contracting Party. In such an instance one could namely argue that when the judge of Contracting Party A applies the law of Contracting Party B, which subsequently results in a violation of the ECHR, State A is responsible for the violation of the ECHR. This would arguably not be the case when recognizing a foreign judgment emanating from another Contracting Party. See *X. v. Belgium and the Netherlands*, decision of 10 July 1975, *DR* 6, p. 77 and *Lindberg v. Sweden* (dec.), no. 48198/99, 15 January 2004. See for a more detailed discussion of this issue infra Sects. 6.2.1 and 8.3.

[94] Cf. Juratowitch 2007, p. 183; Kinsch 2004, pp. 203–205; Kinsch 2007, pp. 233–237.

concerning foreign elements.[95] In *Pellegrini* the Court made no mention of an attenuated standard with regard to the foreign proceedings, while in *Soering* and *Drozd and Janousek* the Court held that the Contracting Parties could only withhold their co-operation in the case of 'a flagrant denial of justice'. However, the standard of control in private international law cases is a separate issue, which will be discussed in subsequent chapters.[96]

The position of the Court concerning the applicability of the ECHR to private international law issues thus appears to be quite clear. However there is one more type of scenario that has yet to be fully discussed. One may recall that I started this discussion with a Dutch case concerning a request to judicially establish paternity—a request to which Surinamese law was applicable—over a child habitually residing in Surinam. This case may be considered as exemplary for cases in which their facts have little connection to the Contracting Party, except, of course, for the Contracting Party being the forum.

It should be noted that this is not the only conceivable case in which one could speak of there being little connection to a Contracting Party. One could, for example, envisage a case in which a couple living outside Europe might have immovable property in one of the Contracting Parties. The subject of the proceedings being immovable property would, in most countries, suffice for having jurisdiction to adjudicate such a case, but other than the property being in that country, there is little connection to the Contracting Party.[97] However it is not unimaginable that, for example, a succession according to Iranian law could result in an unequal share in the property between a brother and sister, which may violate the ECHR if this instrument is applicable to such a case.[98] The ultimate case would be one in which two parties have no link whatsoever with any of the Contracting Parties, other than having drafted a valid choice of forum clause selecting one of the Contracting Parties as the forum for their dispute, with the choice-of-law clause selecting a law of a non-Contracting Party. This admittedly far-fetched, but not entirely inconceivable, case would surely stretch the applicability of the ECHR to its limit.

The question, of course, is how to deal with such issues? Are these situations in which the Court's case law concerning the extra-territorial application of the

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[95] See, e.g., Flauss 2002, pp. 73–75; Juratowitch 2007, p. 180ff; Kinsch 2007, p. 247ff. See also Judge Matscher's concurring opinion in *Drozd and Janousek* supra n. 81.

[96] See particularly Chaps. 6 and 8.

[97] It should be noted, though, that this head of jurisdiction has traditionally been regarded as an important (and exclusive) ground for jurisdiction in private international law. See, e.g., Article 22 of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, *OJ* 2001, L12/1. (Brussels I-Regulation) Cf. the Jenard Report. One could thus say that, while there may appear to be a limited connection between the parties involved and the forum, this may an important connection from the point of view of the forum State.

[98] Cf. the statement of facts of 27 May 2010 in *Hüseyinzade v. Turkey*, no. 4763/07 (lodged on 12 January 2007).

ECHR may be of any guidance, as was alluded to earlier? If so, this would severely limit the extra-territorial effect of the ECHR. It would, in fact, preclude the application of the ECHR in such cases. However, even though the link with the Contracting Party might be negligible at best, there appears, logically speaking, to be very little reason not to apply the ECHR to such cases. The reasoning which the Court used in its case law concerning extradition and expulsion (on the extra-territorial effects of the ECHR), and which was also followed in *Pellegrini* and *Ammdjadi*, holds up even in situations which have little connection to the Contracting Party. Even in those cases, it is still the judge of a court in a Contracting Party who would ultimately breach the ECHR by either applying a foreign law or recognizing a foreign judgment violating the ECHR.

This raises the following question: what are the outer limits of Article 1 ECHR in this regard? In what kind of situation would the ECHR no longer be applicable? The Court may have given us an indication in a recent case dealing with the aftermath of the undoubtedly well-known publication of twelve cartoons in the Danish newspaper *Politiken*,[99] which caused an international controversy. In this case, *Ben El Mahi and Others v. Denmark*,[100] the applicants were a Moroccan national living in Morocco and two Moroccan organizations. Their complaint concerned their contention that under Articles 9 ECHR (the right to freedom of thought, conscience, and religion) and 14 ECHR they had been discriminated against as Muslims by Denmark. Furthermore, by invoking Article 10 (the right to freedom of expression), they argued that Denmark had permitted the publication of the cartoons.

The Court first considered whether the applicants came within Denmark's jurisdiction, given that the first applicant lived in Morocco and the other two were based there. After summing up all of its case law by mostly referring to its various findings in the above-mentioned *Banković* case, the Court found that this was not so, as there 'is no jurisdictional link between any of the applicants and the relevant Member State, namely Denmark, or that they can come within the jurisdiction of Denmark on account of any extra-territorial act'.

What is not entirely clear from this case, however, is what the link is exactly between the applicants and Denmark. The Court noted that there 'is no jurisdictional link', and, if that is the case, then the conclusion that the applicants do not come within Denmark's jurisdiction is not exactly surprising. If the Court had held differently, then people and organizations from all over the world could quite randomly invoke the ECHR. However, in describing the circumstances of the case, the Court mentioned several Muslim organizations in Denmark reporting the newspaper to the police. It also mentioned several—otherwise unnamed—Muslim organizations instigating civil proceedings for defamation in Denmark. I would argue that if the applicants had been some of the organizations instigating proceedings in Denmark, then they would come within the jurisdiction of Denmark.

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[99] Cf. Kinsch 2007, p. 230.

[100] *Ben El Mahi v. Denmark* (dec.), no. 5853/06, *ECHR* 2006-XV.

Does that not directly follow from the Court's reasoning with regard to Article 1 ECHR in *Soering* and *Pellegrini*?[101] It is not clear, however, from the relevant facts as they have been summed up by the Court in its decision, whether this was in fact the case.

In concluding this section concerning the meaning of Article 1 ECHR for private international law, I should reiterate that, in my opinion, the involvement of an individual in (international civil) proceedings in the territory of one of the Contracting Parties places that individual, in principle, under the jurisdiction of that State within the meaning of Article 1 ECHR. This is the case when an individual brings a case before a court of one of the Contracting Parties and that court makes a decision as to whether it has jurisdiction in the private international law sense. It should thus be clear that the mere bringing of proceedings in a case before a court of one of the Contracting Parties is, in principle, sufficient to come within the jurisdiction of a Contracting Party.[102]

## 4.4 The Consequences of the Applicability of Article 1 ECHR to Private International Law

In this part I will discuss the consequences of the above findings with regard to Article 1 ECHR and private international law. If one follows the Court's reasoning in *Soering* and *Pellegrini*, it will thus become clear that there is virtually no escaping the applicability of the ECHR to private international law cases. If a court of one of the Contracting Parties is competent to hear a private international law dispute, then that court will have to consider the possible impact of the ECHR on that case, regardless of the foreign elements. What does this mean? The discussion will commence with a review of some of the consequences of the findings above. Thereafter, the related discussion on the imperialism of the ECHR will be examined (Sect. 4.4.1). This will be followed by a discussion of the dangers of the

[101] See also the discussion of *Markovic and Others v. Italy* [GC], no. 1398/03, ECHR 2006-XIV infra Sect. 5.3.

[102] It should be noted, though, with regard to bringing (civil) proceedings in a Contracting Party, that the courts of the relevant Contracting Party may justifiably refuse to assume jurisdiction in the private international law sense. Even though Article 6 ECHR also contains the right of access to a court, there may be restrictions to this right of access. This issue will be discussed in the next chapter. See infra Chap. 5. It is also important to underscore that lodging proceedings in a Contracting Party with regard to an issue which is not at all attributable to the Contracting Party will result in the case being inadmissible. See, e.g., *Galić v. the Netherlands* (dec.) no. 22617/07, 9 June 2009 and *Blagojević v. the Netherlands* (dec.), no. 49032/07, 9 June 2009. These cases concerned applicants convicted by the ICTY, an international tribunal hosted by the Netherlands. The Court found that the sole fact that the ICTY is hosted in the Netherlands was not enough to attribute the matters complained about to the Netherlands, whereby it stressed that the case involved an international tribunal established by the Security Council of the United Nations and found that the applications were incompatible *ratione personae.*

proliferation of the rights guaranteed in the ECHR (Sect. 4.4.2). Finally, a few cases of the national courts of the Contracting Parties relating to the issues discussed in this chapter will be examined (Sect. 4.4.3).

First of all, one should concede that all this does give the ECHR an extra-territorial notion to a certain extent. This appears to be unavoidable. The ECHR will have an extra-territorial effect in the area of private international law in the sense that foreign laws and judgments originating from third States will—to a certain extent—be scrutinized as to their compliance with the ECHR, despite the State of origin of the law or judgment not being a Contracting Party to the ECHR. One could say that in this regard the ECHR is a sort of mandatory rule for private international law in the sense that the ECHR always applies to private international law cases.[103] If the judge of a Contracting Party has jurisdiction to hear an international (private law) case, the ECHR will be applicable to that international case to a certain extent.

It is, however, also important to underscore what all of this does not mean. The fact that the ECHR may be applicable to private international law disputes does not necessarily mean that there would be no possibility to account for the special nature of private international law cases, which is often a critique by specialists of private international law.[104] Even though the ECHR is applicable to a private international law case because such a case comes within the jurisdiction of a Contracting Party, there may still be room for maneuvering in this regard. The discussion concerning the possible attenuation of the requirements following from Article 6 ECHR with regard to the recognition of foreign judgments emanating from third States was briefly mentioned above, although the *Pellegrini* judgment appears to leave little room for such an interpretation.[105] However, with regard to family law situations and the possible impact of Article 8 ECHR, one could think of the so-called 'margin of appreciation' with which the impact of the ECHR on private international law may be softened.[106] These specific topics will be further discussed in the subsequent chapters, but it is nevertheless important to stress here that the mere fact that the ECHR is applicable in private international law disputes in the Contracting Parties does not mean that concerns specific to private international law can no longer be dealt with.[107] These should, in my opinion, merely be dealt with within the system of the ECHR.

This brings us to what is perhaps the greatest consequence of the impact of Article 1 ECHR on private international law, and that is its impact on the (relativity of the) public policy exception. Traditionally, fundamental rights in private

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[103] See Mayer 1991; Cf. Gannagé 2001; Kiestra 2010, p. 30. See also infra Sect. 6.3.3.3.

[104] See, e.g., Kinsch 2004, pp. 214–218.

[105] See for a more detailed discussion of *Pellegrini* infra Sect. 8.2.

[106] See, e.g., Coester-Waltjen 1998, pp. 9–32; Engel 1989, p. 36ff; Van Loon 1993, pp. 146–147; Mayer 1991, pp. 660–661; Rutten 1998, p. 802ff. See with regard to the notion of the 'margin of appreciation' supra Sect. 3.5.2.

[107] See for examples of cases in which the rights guaranteed in the ECHR are softened in issues of private international law also further infra Sect. 4.4.3, and particularly Sect. 4.4.3.3.

international law cases have been protected by way of the intervention of so-called public order or public policy clauses (*ordre public*). The choice-of-law rules of the forum determine the law which is applicable to a case, but if the result of the application of that law would be manifestly incompatible with the fundamental principles of the forum, the public policy exception will be invoked in order to set aside that result.[108] An important characteristic of the public policy exception is its relative character. This naturally stems from the goals of private international law, which include respect for other legal cultures. This relative character is manifested by the fact that it is generally observed that the operation of the public policy exception is related to the proximity between the relevant case and the forum.

If a case has little or no connection to the forum, the public policy exception cannot be invoked—except for certain extreme cases in which the applicable law is so fundamentally against the values of the forum that the application of that law would never be permitted in the forum. If a case has more connections or links with the forum, the threshold for the application of the public policy exception is lower.[109] The public policy exception can be used as an instrument to prevent violations of the ECHR, as the ECHR undoubtedly belongs to the fundamental principles of the Contracting Parties.[110]

However, what happens if there is little connection between the issue and the forum? Normally the public policy exception would not then be invoked. However, not invoking the public policy exception because of the fact that there is little or no connection to the forum appears not to be permitted in light of Article 1 ECHR if one of the rights guaranteed in the ECHR is violated by either the application of a foreign law or the recognition or enforcement of a foreign judgment. As was stated above, this does not necessarily mean that all flexibility, which the use of the public policy exception would offer, is lost, but merely that such flexibility should be sought within the system of the ECHR. It may well be the case that there is room within the ECHR to reject the application of this instrument in full force, but a blanket rejection based on the links of a case with the forum and, consequently, the invocation of the public policy exception is asking for trouble, in my opinion.

### *4.4.1 Article 1 ECHR and the Debate on the 'Imperialism' of the ECHR*

Related to the discussion concerning the relationship between Article 1 ECHR and private international law is a debate on the perceived dangers of what has been

[108] See for an extended discussion of the public policy exception, e.g., Lagarde 1994, Chap. 11. See also supra Sect. 2.5.

[109] See further supra Sect. 2.5.

[110] Cf. Stürner 2011, pp. 9–10. See also, e.g., Mills 2008, p. 214.

dubbed the 'imperialism'[111] of the rights guaranteed in the ECHR with regard to private international law and its possible solutions. This debate on the perils of the hegemony of the ECHR has particularly found acceptance in France.[112] The basic idea behind the alleged 'imperialism' of the ECHR is that the human rights contained therein are essentially an expression of the European-western legal culture, which would be incompatible with foreign legal norms of third countries.[113] Such criticism towards human rights, and the rights guaranteed in the ECHR in particular, is, incidentally, neither new nor limited to the area of private international law.[114]

In this particular debate on the relativism of human rights it is, however, important to carefully distinguish two different approaches of the proponents of such relativism concerning private international law: on the one hand, there are those that deny the universal nature of human rights altogether and that thus consequently support their restriction in private international law; on the other hand, there are those that denounce the inflation of the rights guaranteed in the ECHR by the Court in Strasbourg.[115] It should thus be noted that the first group denies the universality of human rights altogether, while the second group merely denounces the proliferation of human rights in the ECHR, which are not universally accepted. Such an increase is usually attributed to the interpretation of certain provisions in the ECHR by the Court, which has, for example, certainly not been reticent in its interpretation of Article 8 ECHR. The criticism of the second group is thus directed against rights which could never have been foreseen by the drafters of the ECHR and which are the result of the interpretation of the Court in Strasbourg.[116]

Critics of the proliferation of rights within the ECHR, who turn against the invocation of rights guaranteed in the ECHR which are not universally accepted, may feel strengthened in their arguments by a comment of the Court in the aforementioned *Banković* case. The Court explicitly stated that the ECHR has an 'essentially regional vocation'.[117] However, one should not forget the context in which this statement was made. This case concerned the issue of the possible application of the ECHR outside the Contracting Parties' territories. Such a statement cannot easily be read as a comment by the Court on the applicability of the ECHR in cases clearly falling within the jurisdiction of the Contracting Parties, even if such cases concern elements from third countries.

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[111] Lequette 2004, p. 113.

[112] See Gannagé 2008, p. 265ff and the (French) authors cited there.

[113] See, e.g., Fulchiron 2010, p. 627.

[114] There is much debate on the universality and relativity of human rights. See, e.g., the debate between Donnely and Goodhart: Donnely 2007, pp. 281–306; Goodhart 2008, pp. 183–193; Donnely 2008, pp. 194–204.

[115] Gannagé 2008, pp. 269–270.

[116] Lequette 2004, p. 114.

[117] *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, para 80, ECHR 2001-XI.

### 4.4.2 The Dangers of the Proliferation of Rights Guaranteed in the ECHR for Private International Law

The danger of an increasing number of situations in which the ECHR may be invoked in the area of private international law is that this will often lead to the non-invocation or the setting aside of legal norms of third countries. This will in effect be harmful to some of the objectives of private international law, such as the international harmony of decisions and the international mobility of people, which will be hindered if a status created in one country is not recognized in another.[118] If, for example, a divorce judgment between two spouses is not recognized in one of the Contracting Parties, because of the invocation of the ECHR, this will have the result that these spouses will be considered divorced in the country of origin of the divorce, while they are still legally married in the Contracting Party concerned. The result of this would thus be a limping legal situation.[119]

The main solution, which has been offered by the critics of the proliferation of the rights guaranteed in the ECHR in private international law, is the use of the public policy exception to deal with the rights guaranteed in the ECHR. This would offer the judge some flexibility when faced with the invocation of a certain right guaranteed in the ECHR. However, as was discussed above, it is at best questionable whether the use of the public policy exception in such a manner is permitted in light of Article 1 ECHR.[120] Gaudemet-Tallon has proposed a solution which consists of determining the scope of the application of the ECHR depending on the nature of the protected right.[121] She appears to call for, in essence, the introduction of a hierarchy with regard to the rights guaranteed in the ECHR, as she proposes to make a distinction between rights in the ECHR which have a universal vocation and rights which do not have such a vocation.[122]

The problem, discussed above, that stems from the possibly growing number of interventions in the area of private international law by the ECHR, is real. If legal solutions originating from third countries will be swept aside due to the invocation of the ECHR more and more often, this could indeed possibly lead to problems related to a lack of an international harmony of solutions. As indicated earlier, this international harmony of solutions helps avoid so-called limping international legal relationships. Moreover, the international mobility of persons could also be jeopardized.

However, in light of the obligations undertaken by the Contracting Parties, as set out in Article 1 ECHR, the use of the public policy exception is in all likelihood not the solution to this problem, as this runs the risk of running afoul of the prime

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[118] See, e.g., Gannagé 2008, pp. 270–271. See with regard to the notion of the 'international harmony of decisions' supra Chap. 2.

[119] Cf. Fulchiron 2010, p. 627.

[120] See supra Sect. 4.4.

[121] Gaudemet-Tallon 2004, pp. 219–220.

[122] Gaudemet-Tallon 2004, pp. 219–220.

obligation to secure the rights for everyone within their jurisdiction. The solution offered by Gaudement-Tallon may also run into trouble with regard to Article 1 ECHR, but, moreover, attempting to determine which rights guaranteed in the ECHR truly have a universal vocation would appear to be very difficult. It is nearly impossible to determine the exact composition of such universally accepted rights. It should be noted that Gaudement-Tallon admits this herself.[123] As was indicated above, there may be other solutions to the issues discussed here. In my opinion there is room for such considerations within the rights guaranteed in the ECHR that are involved in cases of private international law. However, this will be further discussed in subsequent chapters.[124]

### 4.4.3 *Jurisprudence of the National Courts of the Contracting Parties*

This section will provide an overview of examples of how the foregoing issues have been handled by the courts of the Contracting Parties. Some of the cases mentioned below will be discussed again in subsequent chapters. These cases are solely being discussed in this chapter in relation to the issue with which it is mainly concerned: is the ECHR applicable at all to private international cases involving foreign norms emanating from third countries, and what is the role of Article 1 ECHR in this regard? The issues in the cases discussed below are of course not necessarily limited to this topic. However, for reasons of clarity, the discussion below will mostly be confined to this issue of the applicability of the ECHR to private international law following from its Article 1 ECHR. It should, incidentally, be noted that there is very little case law concerning private international law cases in which Article 1 ECHR and the applicability of the ECHR is explicitly discussed.

Three different aspects of the discussion on the role of Article 1 ECHR in issues of private international law will be further illustrated in this section. First, I will demonstrate that the Court's case law concerning the extra-territorial effect of the ECHR has been used explicitly by the House of Lords in private international law issues (Sect. 4.4.3.1). Thereafter, I will discuss some case law in which the pitfalls of using the public policy exception will be further shown (Sect. 4.4.3.2). The inevitable result of the findings in this chapter regarding Article 1 ECHR and issues of private international law—the extensive reach of the rights guaranteed in the ECHR in issues of private international law—is the final aspect of the discussion which will be examined here (Sect. 4.4.3.3).

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[123] Gaudemet-Tallon 2004, p. 219.

[124] See particularly infra Sects. 6.3.2–6.3.3.

#### 4.4.3.1 Private International Law Cases and the Extra-Territorial Effect of the ECHR

In England the—then—House of Lords (UKHL) was presented with a private international law case regarding an issue of possible international child abduction in which the applicability of the ECHR arose. In *Re J (a child)*,[125] the UKHL held with regard to the father's request for the return of the child to Saudi Arabia that the United Kingdom could be in breach of rights guaranteed in the ECHR 'where there is a real risk of particularly flagrant breaches.' In so finding, a reference was made to the *Ullah* case.[126] The UKHL in *Re J (a child)* thus acknowledged the applicability of the ECHR to this particular case, even though the possible violation of the ECHR could occur in Saudi Arabia, a non-Contracting Party.[127] It is interesting to note that in this issue of private international law, the UKHL, with a reference to *Ullah*, relied on the Court's case law concerning the extra-territorial effect of the ECHR. Then again, even though this case dealt with an issue of private international law, the case also resembled very closely the sort of removal cases with which the Court's case law regarding the extra-territorial effect is concerned,[128] as the possible breach of one of the rights guaranteed in the ECHR upon the child's return to a non-Contracting Party was at issue.

The *Ullah* case[129] did not concern an issue of private international law, but this case is generally regarded as providing a precedent for private international law cases.[130] In *Ullah* the UKHL had to decide whether Article 9 ECHR could be engaged in the case of the removal of an individual from the United Kingdom, which would allegedly lead to treatment of that individual violating the rights guaranteed in Article 9. The UKHL, per Lord Bingham, held with regard to the interpretation of Article 1 ECHR that a distinction should be made between 'domestic' and 'foreign' cases.[131] 'Domestic' cases are those in which a State has acted within its own territory in such a manner that it has infringed upon one of the rights guaranteed in the ECHR; 'foreign' cases are those in which the removal of a person from a State's territory will (possibly) lead to an infringement of the ECHR in that other territory.[132] *Soering* provided a precedent for the category of foreign cases, according to Lord Bingham.[133]

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[125] *Re J (a child)* [2005] UKHL 40.

[126] *Re J (a child)* [2005] UKHL 40, no. 42. See with regard to *Ullah* infra n. 129.

[127] Incidentally, it was ultimately found that on the facts there was no such risk.

[128] See supra Sect. 'The Extra-Territorial Effect of the ECHR'.

[129] *R (Ullah) v. Special Adjudicator* [2004] UKHL 26.

[130] See, e.g., Fawcett 2007, p. 3ff; Juratowitch 2007, p. 179ff.

[131] See *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, nos. 7 and 9.

[132] Id. With regard to this categorization Lord Bingham immediately admitted that the distinction was imperfect, as even in so-called 'foreign cases' the State naturally exercises authority over a person by virtue of the decision to remove him or her from the territory.

[133] One should note that this analysis ultimately provided only a partial answer. See *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, no. 10.

This distinction between domestic and foreign cases is, incidentally, not entirely clear, because, as acknowledged by Lord Bingham, it is precisely this exercise of authority in so-called 'foreign' cases—namely the decision to extradite or expel—which leads to responsibility for a breach of the ECHR. In this sense the act which leads to responsibility takes place within the territory of the Contracting Party; this is only different in cases which concern a genuine extra-territorial act, where the act by definition takes place outside the territory of the Contracting Party.[134]

#### 4.4.3.2 Article 1 ECHR and the Use of the Public Policy Exception

It is interesting to return once more to the Dutch case discussed in the beginning of this chapter with regard to the use of the public policy exception.[135] This case concerned a mother and child habitually resident in Surinam attempting to establish the paternity of a man living in the Netherlands. Surinamese law was the applicable law and the appeal court held that the normally applicable law could not be set aside save for exceptional circumstances. This decision could not be challenged in cassation (appeal), according to the *Hoge Raad*. The Advocate General in his conclusion also found that cassation was not possible, but he also posed the question of whether the applicants would have fallen within the jurisdiction of the Netherlands *ex* Article 1 ECHR had this case proceeded.

Interestingly enough, it should be noted that a few lower courts in the Netherlands had little hesitation in concluding that the ECHR was applicable in two cases in which the facts were remarkably similar to those of the case discussed previously.[136] Both cases concerned the request of a Moroccan mother to establish the paternity of a man residing in the Netherlands. In the first case the mother resided in Morocco, while in the second the mother was illegally residing in the Netherlands. In both cases the court—on the basis of the public policy exception—set aside the normally applicable Moroccan law, under which it was not possible to judicially establish paternity, and applied Dutch law instead. I should point out that in both these cases Article 1 ECHR was not discussed; both courts immediately raised Article 8 ECHR, presumably assuming that the ECHR was applicable to the case—which, in my opinion, is indeed the case.

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[134] Cf. Juratowitch 2007, pp. 185–187.

[135] See supra Sect. 4.1.

[136] See Rb. 's-Gravenhage 3 November 2008, *NIPR* 2010, 23 and Hof 's-Hertogenbosch 27 November 2008, *NIPR* 2009, 95. These two cases, as well as the afore-mentioned case of the *HR*, were discussed in Kiestra 2010, pp. 27–30. See for a more recent example also Rb. Haarlem 11 December 2012, *NIPR* 2013, 24. In this case, which was decided on the basis of the 'new' article 10:97BW, the normally applicable Nigerian law was set aside on the basis of Article 8 ECHR, because the concept of the judicial establishment of paternity for children born out of wedlock does not exist under Nigerian law. In this case the mother, the child, and the presumed father all resided in the Netherlands. See for more on this case infra Sect. 6.3.3.2.

Such cases concerning the establishment of paternity have not been limited to the Netherlands.[137] The French *Cour de Cassation* has also dealt with an action for paternity of an Algerian child residing in Algeria against a Frenchman residing in France.[138] The normally applicable Algerian law prohibited such an action. The issue before the *Cour* was whether the principle of equality of filiations, which the court of appeal had expressly invoked in its decision, could be invoked by way of a reference to the public policy exception. The French *Cour* held that as the child had neither French nationality nor resided in France, the public policy exception could not be invoked. The outcome of this case has received a fair amount of praise in France, particularly in light of the debate concerning the imperialism of the ECHR discussed above.[139] However, it remains difficult to see how a court could find that the ECHR would not apply to these cases given the obligations following from Article 1 ECHR, which would make the *Cour de Cassation's* denial by way of finding that the public policy exception may not be invoked a questionable decision.[140]

In a more recent case, however, the *Cour de Cassation* appears to have reversed this course.[141] This case also concerned an action for paternity, which had to be decided on the basis of the law of the Ivory Coast. Here, though, it was merely found that the impossibility to do so would violate French public policy, while—contrary to the case discussed above—no mention was made of a further requirement of a connection between the child and France.[142] From the viewpoint of Article 1 ECHR, such a development is encouraging.

#### 4.4.3.3 The Extensive Reach of the ECHR in Issues of Private International Law

There are two more cases which are interesting to discuss here, because they demonstrate the possibly extensive reach of the rights guaranteed in the ECHR in international civil proceedings, which is ultimately the result of Article 1 ECHR.

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[137] It has also been suggested in the Swiss literature that Article 8 ECHR could be invoked by a child to establish a relationship with both parents in private international law cases, even though this issue appears not yet to have come up in the domestic case law. See Bucher 2011, pp. 588–589. See further infra Chap. 6.

[138] Cass. 1re civ., 10 May 2006.

[139] See for an overview, e.g., Gannagé 2008, pp. 266–267.

[140] One could, of course, argue that in this case the decision not to set aside the normally applicable Algerian law and consequently not to establish paternity could fall within the margin of appreciation which France has with regard to Article 8 ECHR. Regardless of how one may feel about this argument, though, the problem with the use of the public policy exception here in this manner is that its use precludes any discussion of the ECHR, and this is problematic from the point of view of Article 1 ECHR. See with regard to this case also infra Sect. 6.3.3.

[141] Cass. 1re civ., 26 October 2011, *JDI* 2012, p. 176 (note Guillaumé).

[142] See on this case Sindres 2012, pp. 887–901.

The first is an English case, *Douglas & Others v. Hello Ltd. & Others*.[143] In this case obligations following from Article 8 ECHR were deemed to be applicable, even though some of the relevant facts had taken place far from the English courts.

This rather complex case concerned the wedding reception of Mr Douglas and Ms Zeta-Jones (the Douglases), two very well-known movie actors. In November 2000 they were married in the Plaza Hotel in New York in the United States. There was a considerable amount of media interest in this event, particularly from the publishers of *OK!* and *Hello* magazines. Both publishers approached the couple to obtain the exclusive right to publish pictures of the wedding. The Douglases granted the right to publish to one publisher in order to protect their privacy, and reached an agreement with *OK!* magazine. However, *Hello* magazine later succeeded in acquiring unauthorized pictures of the wedding and published these more or less at the same time as the authorized ones in *OK!*.

The Douglases and the publishers of *OK!* filed a law-suit against the publishers of *Hello* and were awarded damages. All parties appealed against this decision. One of the issues (on appeal) was whether the Douglases could rely on their right to privacy following from Article 8 ECHR, as the wedding had taken place in the city of New York, which is, of course, outside the territories of the Contracting Parties.[144] The court ultimately decided that despite the wedding having taken place in New York, English law was the law applicable to the case and that the right to privacy, which is based on common law rights, after a discussion of the relevant principles found in the Strasbourg case law, was indeed applicable.[145] This case could thus be cited as an example of the possibly extensive reach of the rights guaranteed in the ECHR. It should be noted that although in the appeal before the House of Lords the Douglases still prevailed with regard to the breach of confidence, the importance of their right to privacy was significantly downplayed in the UKHL's decision.[146]

A final case, which is worth discussing because it raises a question regarding the possibly extensive reach of the ECHR in issues of private international law due to the extra-territorial effect of the Convention, is a Dutch case.[147] This case concerned a change of an arrangement regarding parental access between two divorced parents. After the divorce, the mother married another man and she moved to the United States with her new husband, taking the children with her. The former husband moved back to Denmark. The father had sought, before a Dutch appeal court, to change the arrangement they had originally agreed to after their divorce. The appeal court had changed the agreement. The mother

[143] [2005] EMLR 609, [2005] 4 All ER 128, [2005] 2 FCR 487, [2005] EMLR 28, [2005] 3 WLR 881, [2005] HRLR 27, [2005] EWCA Civ 595, [2006] QB 125.

[144] At no. 95ff.

[145] Cf. Janis et al. 2008, pp. 401–402. See with regard to this case also, e.g., Mak 2008, pp. 125–131.

[146] [2007] UKHL 2. See particularly Lord Hoffmann at no. 117ff.

[147] HR 19 October 2007, *NIPR* 2007, 267.

successfully argued before the *Hoge Raad* that the appeal court had set a more generous arrangement than the father had requested and the judgment was therefore quashed by the *Hoge Raad*.[148] What is of interest in relation to the scope of the ECHR is an argument raised by the mother. She argued that the new arrangement would violate her right to family life under Article 8 ECHR with her new husband in the US. This argument was not discussed by the *Hoge Raad*, which granted the mother's request for the reason mentioned above. However, the Advocate General did examine this claim and found that the mother could not rely on Article 8 ECHR, as she, her new husband, and the children resided in the US and were thus not within the jurisdiction of the Netherlands, as is required by Article 1 ECHR.

This case represents, in my opinion, the ultimate test regarding the scope of the ECHR. While the proceedings took place in a Contracting Party (the Netherlands), the applicant, who invoked a right guaranteed in the ECHR, no longer resided in a Contracting Party, as the family had moved to the United States. I should first emphasize that I will only discuss this case in relation to the issue concerning Article 1 ECHR. I will not venture further into the mother's claim concerning her rights under Article 8 ECHR, except to say that regardless of the international dimension of this case it seems, in principle, unlikely that a change to the arrangement for parental access would result in a violation of Article 8 ECHR.[149]

It should be clear that the connection between the forum and the case at hand is negligible. Above, I have stated that if proceedings take place in the Netherlands, these proceedings concerning issues of private international law fall within the jurisdiction of the Netherlands within the meaning of Article 1 ECHR and that thus any decision of a Dutch court should, in principle, also be in line with the guarantees of the ECHR. Should this still be the situation in a case such as this? This case really tests this finding. There are plenty of reasons to argue that the ECHR should not be applied to this case. What right to protection under the ECHR could a person residing in the United States possibly have? However, the reasoning discussed in this chapter regarding the role of Article 1 ECHR in connection with issues of private international law still holds up. If a Dutch court has jurisdiction in the private international law sense, this court should take a decision in accordance with the guarantees of the ECHR. If the decision of a Dutch court were to violate one of the rights guaranteed in the ECHR, even if this violation would actually

[148] One may wonder why a Dutch court still had jurisdiction, when the parties had since moved, respectively, to the United States and Denmark. The court based its jurisdiction on Article 8(1) of Council Regulation (EC) No. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, *OJ* 2003, L 338/1 (Brussels II*bis*-Regulation), as the proceedings were initiated when the children still had their habitual residence in the Netherlands.

[149] It is unlikely that the Court would interfere in such a case on the basis of Article 8 ECHR. While a change of the arrangement on parental access may entail an interference with Article 8 ECHR, it follows from the Court's case law that a violation will only be found if no adequate steps are taken to enable access to a child. See, e.g., *Nuutinen v. Finland*, no. 32842/96, ECHR 2000-VIII.

take place in the United States, then the Netherlands could, in principle, still be responsible for this violation.[150]

While in this case the Netherlands may be held responsible if its courts were to take a decision violating one of the rights guaranteed in the ECHR, the Netherlands could presumably not be held responsible if its decision was not applied correctly, or not enforced at all, in the United States, as the Netherlands of course does not have the jurisdiction to enforce its decision in a third country. This latter situation should be distinguished from the one discussed directly above. If, for example, the Dutch courts were to decide on a visitation rights scheme which was subsequently not enforced in the United States by the authorities, this would not mean that the Netherlands would be responsible for a possible violation of Article 8 of the ECHR in this regard.[151]

#### 4.4.3.4 Article 1 ECHR in National Case Law: Concluding Remarks

The scope of the ECHR, which can be found in Article 1 ECHR, is almost never explicitly discussed in private international law cases in the national legal orders of the Contracting Parties. In the cases discussed above, Article 1 ECHR was only explicitly referred to in a case concerning international child abduction, in which the requested return raised an issue, and in cases where the connection between the case at hand and the forum is limited. The international child abduction case, in which the requested return raised a possible issue under the ECHR, offered a direct parallel with the Court's case law concerning the extra-territorial effect of the ECHR where the decision to extradite or expel raised possible issues, and it is thus not surprising that Article 1 ECHR would be discussed in such cases. In cases

[150] One should, incidentally, note that it is unlikely at best that the United States would actually enforce a decision by the Dutch courts that would violate one of the rights guaranteed in the ECHR. Such a decision would presumably also violate the public policy of the United States.

[151] Cf. *Qama v. Albania and Italy*, no. 4604/09, 8 January 2013. In this case the applicant, an Albanian national, is the father of a son, also an Albanian national. The applicant's son went to Italy with his mother. The applicant followed at a later point. In 2002 the applicant was expelled from Italy, while the mother and son remained in Italy. Later that year the mother passed away. The applicant's sister in law was awarded custody over the child in Italy. The applicant's parental authority was suspended in these proceedings by the Italian judge. The child acquires a regular status in Italy. He does not want to have contact with his father. Later the father initiates proceedings in Albania. In this case an Albanian judge found that the father has visitation rights and awards these to the father. However, this right cannot be enforced by the Albanian authorities, as the child formally resides in Italy. Before the Court in Strasbourg the applicant alleges that both Albania and Italy have violated his rights under Article 8 ECHR. With regard to Italy the Court found that the applicant had failed to exhaust his local remedies. With regard to the complaint against Albania the Court held that it could not be held against Albania that it had failed to enforce the Albanian judgments regarding visitation rights. Article 8 ECHR does not entail an obligation for a Contracting Party to establish visiting rights between a parent and a child in the event that the child has moved out of the country and out of the jurisdiction of the Contracting Party, according to the Court. See with regard to this case further EHRC 2013/79 (note Kiestra).

which have so little connection to the forum that doubts arise as to whether the ECHR is applicable at all, it is also not surprising that Article 1 ECHR would be discussed—although, in my opinion, the ECHR is still applicable to these cases.

However, in cases concerning either the recognition of a foreign judgment or the application of a foreign law possibly originating from a third country, Article 1 ECHR is almost never discussed in jurisprudence at the national level. Nevertheless, this should not be interpreted as meaning that there is no role for Article 1 ECHR in such cases. In most cases concerning issues of private international law and third countries, and consequently norms originating from these third countries, courts will refer to the rights guaranteed in the ECHR in their assessment of either a foreign judgment or a foreign law—if circumstances so warrant. One could say in this regard that national courts merely skip the issue of the applicability of the ECHR to private international law cases, which is not that remarkable, as I have explained that it is virtually impossible to escape the applicability of the ECHR to private international law cases. Moreover, most issues of private international law clearly fall within the jurisdiction of the Contracting Parties. In that sense, one could argue that it is simply efficient to skip the issue of the applicability of the ECHR in private international law cases and that no harm is done.

However, the danger inherent to relegating the role of Article 1 ECHR to a mere afterthought has, hopefully, also become clear in this section. In many of the Contracting Parties, including England, the Netherlands, and Switzerland, the public policy exception is normally used in private international law cases in order to deal with the possible impact of the rights guaranteed in the ECHR in such cases.[152] However, if the use of this instrument were to lead to the application of the normally applicable law, which subsequently violates one of the rights guaranteed in the ECHR, one may wonder whether the Contracting Party in question has lived up to the obligations undertaken in Article 1 ECHR. A similar reason applies to the recognition and enforcement of a foreign judgment. The French case discussed above demonstrates that such a scenario is not inconceivable. However, as the national case law that will be discussed in subsequent chapters will clearly demonstrate, this has not stopped courts from using the public policy exception in private international law cases.

## 4.5 Conclusion

This chapter has considered the relationship between Article 1 ECHR and private international law. Article 1 ECHR defines the scope of this instrument with the phrase ‘within their jurisdiction’. In order to examine the meaning of this phrase, the notion of ‘jurisdiction’ has been analyzed, and several of its aspects have been illuminated. It was found that the notion of jurisdiction in (public) international

[152] See with regard to the public policy exception supra Sect. 2.5. See also the national case law discussed in the subsequent chapters. See, e.g., Sect. 6.3.3.

law is generally concerned with the authority of a State to regulate conduct, but this notion has several distinguishable aspects, and its meaning is thus not always clear. While the Court, in its case law concerning the notion of jurisdiction in Article 1 ECHR, has held that the interpretation thereof should be based on the ordinary meaning of jurisdiction in international law, it should be clear that questions regarding this notion remain, as the meaning of jurisdiction in public international law is simply not unambiguous.

Thereafter the role of Article 1 ECHR with regard to private international law has been discussed. It has been found that when a court of one of the Contracting Parties either applies a foreign law or recognizes a foreign judgment originating from a third State, the ECHR is applicable to such cases. Even though such a third State has never signed the ECHR, it would ultimately be the court of one of the Contracting Parties whose application of a foreign law or recognition of a foreign judgment violating one of the rights guaranteed in the ECHR would breach the ECHR. This may be derived from the Court's case law concerning the extra-territorial effects of the ECHR, and has been confirmed by the little case law that specifically deals with issues of private international law. Even in circumstances in which there is only a negligible connection with the Contracting Party, the situation does not change appreciably. Such situations still come within the jurisdiction of the Contracting Party and the ECHR is thus applicable to such cases.

This does not mean that there cannot be any consideration of specific private international law issues, but only that such concerns should, in my opinion, be dealt with within the system of the ECHR. Therefore, one could question whether the public policy exception resulting in the non-application of the ECHR, because of the relative character of the exception, is permissible in light of Article 1 ECHR.

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