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Public policy and human rights

Jan Oster*

The article examines the impact of human rights on the application of public policy clauses in private international law, a topic which is of increasing significance in a "global village" with fragmented human rights standards. It argues that public policy clauses should not be applied restrictively insofar as they serve to protect human rights. Instead, the principle of proportionality and the merely indirect horizontal effect of human rights in private law relationships prevent the use of substantive public policy as a "floodgate" to impose domestic values on foreign cases. Furthermore, the study shows that the human rights-compliant application of public policy clauses is subject to full scrutiny by the European Court of Human Rights, except in cases where domestic courts do not refuse recognition of a foreign judgment based on public policy for judgments originating from another European Convention on Human Rights state. The article contributes to the theoretical and doctrinal analysis of public policy as a private international law concept.

Keywords: public policy; human rights; EU law; private international law; Brussels Ia Regulation; Court of Justice of the European Union; European Court of Human Rights

A. Introduction: aim, scope, and method of this article

In the "global village"[1] the world has become, human rights exert an increasing influence on private law cases transgressing jurisdictional boundaries. Because of its openness and flexibility, particularly the concept of public policy (or, in continental terminology, *ordre public*) has proven to be a gateway to take on board human rights concerns when applying private international law. The same applies to provisions which do not expressly provide a public policy exception, but which allow courts to refuse compliance with private international law rules on human rights grounds.[2] Yet, whilst court decisions have mostly focussed on

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[1]Marshall McLuhan is credited as having coined this term; see A Giddens, *Sociology* (7th ed, Polity, 2013) (revised and updated with Philip W Sutton) 767.

[2]For example, see Art 20 of the Hague Convention on the Civil Aspects of International Child Abduction discussed in K Trimmings & PR Beaumont "Article 20 of the 1980 Hague Abduction Convention" (2014) *Journal of Comparative Law* 66–88.

the effect of the right to a fair trial on *procedural* public policy,[3] the impact of human rights on *substantive* public policy has rarely been subject to distinct scrutiny by European courts so far.[4]

This article examines the conceptions of public policy clauses, develops the distinction between procedural and substantive public policy, and analyses the impact of human rights on these public policy clauses. Particular questions arise regarding the level of judicial scrutiny. First, the standard of scrutiny to be applied by a domestic court when applying foreign law or recognising foreign judgments, and secondly, the scope of judicial review of the European Court of Human Rights (ECtHR) in cases where the (non-)application of public policy clauses is alleged to have violated human rights.

It is the aim of this article to examine the impact of human rights on the application of public policy clauses in private international law. The study aims to contribute to the theoretical and doctrinal analysis of public policy as a private international law concept, the horizontal effect of human rights, and the standard of judicial review concerning human rights violations in private international law. It will establish the following tenets:

1. Insofar as they serve to protect human rights, public policy clauses should not be applied restrictively. The unqualified obligation to protect human rights does not allow for an "attenuated effect" of human rights as public policy.
2. The principle of proportionality and the merely indirect horizontal effect of human rights in private law relationships prevent the use of substantive public policy as a "floodgate" to impose domestic values on foreign cases.
3. The human rights-compliant application of public policy clauses by courts of Member States to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is subject to full scrutiny by

[3]See, eg, Case C-7/98 *Krombach* [2000] ECR I-1395; *Pellegrini v Italy* Judgment of 20 July 2001 App No 30882/96; *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37; *Maronier v Larmer* [2002] EWCA Civ 774; *Al-Bassam v Al-Bassam* [2004] EWCA Civ 857; *Mark v Mark* [2004] EWCA Civ 168; *SA Marie Brizzard et Roger International v William Grant & Sons Ltd (No 2)* 2002 SLT 1365.

[4]G Cuniberti and I Rueda, "Abolition of Exequatur" (2011) 75 *Rabels Zeitschrift* 286, 313; see European Commission, Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174, 4: "As to public policy, the study shows that this ground is frequently invoked but rarely accepted. If it is accepted, this mostly occurs in exceptional cases with the aim of safeguarding the procedural rights of the defendant". Notable exceptions are, for example, *Wagner and JMWL v Luxembourg* Judgment of 28 June 2007 App No 76240/01; *Ammdjadi v Germany* Judgment of 9 March 2010 App No 51625/08; *Oppenheimer v Cattermole* [1976] AC 249; *Kuwait Airways Corporation v Iraqi Airways Company and others* [2002] UKHL 19.

the ECtHR, except in cases where domestic courts do not refuse recognition to judgments originating from another Convention state on grounds of public policy.

B. Conceptions of public policy and the impact of human rights

1. *The conceptions of public policy*

Public policy is not only a vague, but also a ubiquitous concept. Private international law provides exemptions to both the application of the *lex causae* by a domestic court and to the recognition of foreign judgments (*exequatur*), if the application of foreign law or the recognition of the foreign judgment would be incompatible with the public policy of the forum, or contrary to the public policy of the state where recognition is sought, respectively. In short, public policy clauses apply in the frameworks of both the recognition of foreign judgments and the determination of the applicable law. In the European multi-level system both EU law[5] and domestic law[6] provide such private international law rules and, consequently, public policy clauses. Public policy clauses are therefore the ultimate expression of national sovereignty, allowing a state to preserve the fundamental values of its legal system.[7] They open the gates for clashes between the interests of the state and those of individuals.[8]

If states have agreed to a system of mutual recognition and reciprocity – for instance, via an international agreement or, as is the case in the EU, via supranational regulations – they are even under an international obligation to recognise a foreign court's decisions, or to apply foreign law. A decision of a requesting state thus takes legal effect within the enforcing state, subject only to limited grounds of

[5]See Art 45(1)(a) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1 ("Brussels Ia"); Art 22(a) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L338/1 ("Brussels IIa"); Art 24 of Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L7/1.

[6]Under English law, see *Re Macartney* [1921] 1 Ch 522 on the common law; s 9(1) and (2)(f) of the Administration of Justice Act 1920 on judgments obtained in superior courts in other British dominions; s 4(1)(a)(v) of the Foreign Judgments (reciprocal enforcement) Act 1933; *Adams v Cape Industries Plc* [1990] Ch. 433 CA (Civ Div). Under German law, see s 328(4) of the Civil Procedure Code.

[7]A Briggs, *The Conflict of Laws* (3rd ed, Oxford University Press, 2013) 209; HP Meidanis, "Public Policy and *Ordre Public* in the Private International Law of the EU: Traditional Positions and Modern Trends" (2005) *European Law Review* 95, 97.

[8]JJ Fawcett, "The Impact of Article 6(1) of the ECHR on Private International Law" (2007) *International and Comparative Law Quarterly* 1, 32.

refusal. Hence, the enforcing state partly loses its sovereign power over the full control of actions to be taken on its territory.[9] In such systems of mutual recognition and reciprocity, the key question underlying the application of public policy clauses is therefore to what extent states have to mutually trust each other's legal systems, and to what extent they may invoke their own legal principles if they do not trust the home state control.[10]

Being able to refuse recognition of foreign judgments on the basis of public policy (non-recognition based on public policy), such as under Article 45(1)(a) of the Brussels Ia Regulation, serves two functions. First, preventing a breach of the *procedural* public policy of the forum when the procedure in the foreign litigation falls short of the fundamental procedural standards of the enforcing state. Secondly, upholding the forum's public policy when the merits of a foreign court's decision whose recognition is sought fall short of the fundamental substantive standards of the enforcing state (*substantive* public policy). Contrary to the European Commission's initial intention and to several recent pieces of EU legislation,[11] the 2012 recast of the Brussels I Regulation did not abolish the control of substantive public policy.[12] As will be shown in this article, this has to be welcomed: Public policy is a necessary instrument for the respect of human rights and should not be deleted in international instruments on recognition and enforcement of decisions. The "hyper-efficiency"[13] of automatic

[9]See S Peers, *EU Justice and Home Affairs Law* (3rd ed, Oxford University Press, 2011) 663.

[10]See S Peers, *ibid* 685. Compare Recital 16 of the Brussels I Regulation and Opinion 2/13 [2014] Accession to the ECHR, EU:C:2014:2454 [191–192].

[11]See European Commission, Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) of 14.12.2010, COM(2010) 748 final, 6; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, [2004] OJ L143/15; Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, [2006] OJ L399/1; Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, [2007] OJ L199/1; Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L7/1.

[12]Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1. Under Art 45(a) of this Regulation, the recognition of a judgment shall be refused upon the application of any interested party "if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State addressed".

[13]P Kinsch, "Private International Law Topics before the European Court of Human Rights" (2011) *Yearbook of Private International Law* 37, 48; see also P Beaumont and E Johnston, "Abolition of the Exequatur in Brussels I: Is a Public Policy Defence Necessary for the Protection of Human Rights?" (2010) *IPRax* 105, 108, and " Can *Exequatur* be Abolished in Brussels I whilst Retaining a Public Policy Defence?" (2010) *Journal of Private*

enforceability of judgments or orders in the other Member States prevents the enforcing state from taking on board international, but especially domestic, human rights concerns.[14]

In contrast to the use of public policy at the recognition stage, public policy at the applicable law stage, for example Article 21 Rome I Regulation and Article 26 Rome II Regulation,[15] only relates to the forum's substantive public policy, but not to its procedural public policy, because it is the forum courts that conduct the proceedings. Although the forum courts may be under an obligation to apply foreign law, they have to examine whether the application of the foreign law would lead to a result that violates domestic public policy.

2. *Human rights as public policy*

Public policy includes "the fundamental moral convictions or policies" of a society that are "of such paramount importance that [their] non-application to the facts of the case would be intolerable".[16] It encompasses those rules of law that are "regarded as essential in the legal order" of the state concerned.[17] In any democratic society, the respect for human rights ranks among those fundamental principles. Such human rights as a state has to observe are enshrined in domestic constitutional law, in the Charter of Fundamental Rights of the EU

International Law 249; G Cuniberti, "Abolition de l'*exequatur* et présomption de protection des droits fondamentaux" (2014) *Revue critique de droit international privé* 103, para 61.

[14]See, for example, Case C-491/10 PPU *Aguirre Zarraga v Pelz* [2010] ECR I-14247 [49]; *Povse v Austria* Judgment of 18 June 2013 App No 3890/11 on the application of Arts 11 and 42 of the Brussels IIa Regulation which abolishes the public policy defence in certain child abduction cases, discussed in PR Beaumont, K Trimmings, L Walker and J Holliday, "Child Abduction: Recent Jurisprudence of the European Court of Human Rights" (2015) *International and Comparative Law Quarterly* 39–63.

[15]Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L177/8; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40. See also Art 12 of Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L343/10; Art 35 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, [2012] OJ L201/107. Under domestic law, see, for example, s 14(3)(a)(i) UK Private International Law (Miscellaneous Provisions) Act 1995; Art 6 of the German Introductory Act to the Civil Code; Art 6 of the Dutch Civil Code, Book 10; Art 20 of the Belgian Private International Law Code; Art 17 of the Swiss Federal Act on Private International Law; Art 6 of the Austrian Private International Law Act.

[16]O Kahn-Freund, "Reflections on Public Policy in the English Conflict of Laws", *Transactions for the Year 1953* (The Grotius Society) (1954), 39, 40.

[17]Case C-38/98 *Renault* [2000] ECR I-2973 [34].

(EUChFR), if applicable,[18] and in international agreements to which a state is a party, such as the International Covenant on Civil and Political Rights (ICCPR) and the ECHR.[19] Those human rights intrinsically belong to the values public policy clauses aim to protect. This follows, first, from the nature of human rights as objectives a state commits itself to, and secondly, as regards the fundamental rights of the EUChFR in particular, from their status as primary EU law.[20] Thirdly, the fact that human rights constitute an aspect of public policy is even stipulated – in a declaratory manner – in some private international law codifications themselves.

As regards the first point, Article 2 ICCPR provides that each State Party to the Covenant "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights recognised in the Covenant. Similarly, Article 1 ECHR imposes an obligation upon the Convention states to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention". Similar provisions can be found in domestic law. For instance, Section 6(3)(a) of the UK Human Rights Act 1998 bars a public authority, including a court or tribunal, from acting in a way which is incompatible with a Convention right. In the same vein, Article 1(3) of the German Basic Law provides that the fundamental rights of the Basic Law shall bind the legislature, the executive and the judiciary as directly applicable law. None of these provisions makes a distinction according to the legal issue concerned; hence they apply to the interpretation and application of private international law as to any other area of law.[21] To be sure, the area of law or the precise questions a court has to decide on can make a difference as to the way human rights have to be applied. It does make a difference, for example, whether human rights apply in their vertical effect in a state-citizen relationship governed by public law or in their merely indirect horizontal effect in a case between private individuals.[22] Moreover, in relation to child abduction cases, the human right to respect for "family life" is interpreted differently when the court having jurisdiction over the merits is hearing the case from when the court of the requested state has to

[18]Art 51(1) EUChFR provides the rule for the applicability of the Charter.

[19]See *Oppenheimer v Cattermole* [1976] AC 249 at 277–278 (*per* Lord Cross); *Kuwait Airways Corporation v Iraqi Airways Company and others* [2002] UKHL 19 [28] (*per* Lord Nicholls), [114] (*per* Lord Steyn), [139] (*per* Lord Hope); *Al-Bassam v Al-Bassam* [2004] EWCA Civ 857 [45]; *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37; J Fawcett and J Carruthers, *Cheshire, North & Fawcett, Private International Law* (14th ed, Oxford University Press, 2008) 145.

[20]See also S Peers, *supra* n 9, 709. Compare the Opinion of A-G Kokott in Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307 [48]; Opinion of A-G Bot in Case C-66/08 *Kozłowski* [2008] ECR I-6041 [105]; and the Opinion of A-G Bot in Case C-123/08 *Wolzenburg* [2009] ECR I-9621 [116].

[21]See *Nada v Switzerland* Judgment of 12 September 2012 App No 10593/08 [168]; reiterated in *X v Latvia* Judgment of 26 November 2013 App No 27853/09 [92].

[22]See *infra* C.2.

decide whether or not to return the child under the Hague Child Abduction Convention. In the former case, it is the analysis of the child's best interests that would have to be in compliance with the right to respect for "family life", whereas in the latter case it would be the analysis of the exceptions in Articles 12, 13 and 20 of the Hague Convention which had to be in accordance with that right.[23] Nevertheless, the question as to *how* human rights have to be applied has to be distinguished from the fact *that* they apply. Therefore, even when creating or implementing international obligations of reciprocity and mutual recognition, states must not derogate from their obligations under domestic and international human rights law.[24] Instead, apparently diverging commitments are to be harmonised as far as possible, and public policy clauses provide a gateway to take on board human rights concerns in private international law.[25]

Secondly, within the ambit of EU law, the EU's commitment to the protection of human rights enjoys primary law status (Article 6 TEU). Therefore, human rights, such as the fundamental rights enshrined in the Charter, rank higher than the mutual recognition and reciprocity systems established by secondary legislation in the Brussels and the Rome Regulations. This renders problematic the "hyper-efficient" legislation which does not include public policy clauses, because, according to the case-law of the Court of Justice, it does not allow the requested Member State to take on board human rights concerns even in cases of clear violations of the Charter.[26] Instead, ensuring compliance with the applicable human rights is entirely left in the hands of the requesting Member State.

With regard to the internal market, which is also based on a system of mutual recognition, the then-European Court of Justice (ECJ, now Court of Justice of the EU) decided that human rights may even justify an interference with the primary law provisions constituting the internal market: the free movement of goods, services, persons, and capital. The cases of *Omega* and *Schmidberger* may serve as examples.[27]

[23]PR Beaumont, "The Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Hague Convention on International Child Abduction" (2008) 335 *Collected Courses of the Hague Academy of International Law* 9, 102; PR Beaumont, K Trimmings, L Walker and J Holliday, *supra* n 14.

[24]*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* Judgment of 30 June 2005 App No 45036/98 [153]; *Nada v Switzerland supra* n 21 [170]; reiterated in *X v Latvia ibid* [92].

[25]Compare *Al-Saadoon and Mufdhi v United Kingdom* Judgment of 2 March 2010 App No 61498/08 [126]; *Al-Adsani v United Kingdom* Judgment of 21 November 2001 App No 35763/97 [55]; *Nada v Switzerland supra* n 21; *X v Latvia ibid*; German Federal Constitutional Court, Case No 1 BvR 636/68 [1971] "Spaniard decision".

[26]See Case C-491/10 *supra* n 14 [48–49]. This has already been criticized by L Walker and P R Beaumont, "Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice" (2011) *Journal of Private International Law* 231, 247–248.

[27]Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659; Case C-36/02 *Omega* [2004] ECR I-9609.

In this context, the Court emphasised that the public policy does not have to be shared by all Member States, and one Member State can choose a system of protection different from that adopted by another state.[28] Article 53 EUChFR confirms that the Charter shall not be interpreted as restricting or adversely affecting human rights as recognised by international law and by the Member States' constitutions. Public policy clauses thus enable Member States to consider human rights obligations going beyond those in the Charter, particularly domestic constitutional rights.[29]

Thirdly, some national as well as European private international law codifications themselves re-emphasise that human rights have to be taken into account as public policy considerations. Article 26 of Council Regulation (EC) No 1346/2000 on insolvency proceedings[30] provides that any Member State "may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, *in particular . . . the constitutional rights and liberties of the individual*" (emphasis added). Similarly, Section 328(4) of the German Civil Procedure Code reads: "Recognition of a judgment handed down by a foreign court shall be ruled out if . . . the recognition of the judgment would lead to a result that is obviously incompatible with essential principles of German law, *and in particular if the recognition is not compatible with fundamental rights*".[31] More specifically, the US SPEECH Act 2010 refuses recognition of foreign defamation judgments that are incompatible with the First Amendment to the Constitution of the United States.[32] Finally, it should be added that express protection of human rights in public policy clauses are not singular to private international law codifications; they are also included in mutual recognition systems in EU criminal law.[33]

[28]Case C-124/97 *Läärä* [1999] ECR I-6067 [36]; Case C-67/98 *Zenatti* [1999] ECR I-7289 [34]; Case C-6/01 *Anomar and others* [2003] ECR I-8621 [80]; Case C-36/02 *ibid* [37–38].

[29]See, *argumentum e contrario*, Case C-399/11 *Melloni* EU:C:2013:107 [61] on the interpretation of Art 4a(1) of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States ([2002] OJ L190/1), which does *not* provide a public policy exception and thus does not allow Member States to refuse to execute a European arrest warrant because of domestically applicable fundamental rights.

[30]Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L160/1.

[31]Translation provided by Samson-Übersetzungen GmbH, Dr. Carmen von Schöning. Emphasis added.

[32]"Securing the Protection of our Enduring and Established Constitutional Heritage Act", 124 STAT. 2380 PUBLIC LAW 111–223 – AUG. 10, 2010, amending title 28, United States Code (Judiciary and Judicial Procedure). See also *Bachchan v India Abroad Publications*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992); *Telnikoff v Matusevitch*, 347 Md. 561, 702 A.2d 230 (Md. 1997), preceding the SPEECH Act.

[33]See Art 1(3) and Preamble 12 of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant; Art 3(4) and Preamble 13 of the Council

C. Standard of judicial scrutiny

1. *Restrictive application of public policy clauses vs full consideration of human rights*

The fact that human rights are part of a state's public policy has to be distinguished from the standard of scrutiny a domestic court has to apply when assessing whether the enforcement of a foreign judgment, or the application of foreign law, would violate human rights. Especially where the receiving state and the country of origin are member states to the same human rights convention, such as the ECHR or the EUChFR, one might argue in favour of a reduced standard of scrutiny, because the receiving state should be able to assume that the judgments and the laws of the country of origin are in compliance with this convention.[34] However, this would confuse the fact that the country of origin is *bound* by human rights with whether this country actually *complies* with these human rights standards. Otherwise, even those countries that have ratified the ICCPR or even the ECHR but nonetheless exhibit a poor human rights record should have to be relied on. Therefore, a more detailed analysis of this question is called for.

It is widely agreed that public policy clauses may be relied on only restrictively and under exceptional circumstances.[35] Courts are prohibited from applying a public policy clause solely on the ground that there is a discrepancy between the applicable foreign law or the decision of the foreign court and the law of the forum.[36] A public policy clause must not be used for a revision of a foreign decision on its merits (prohibition of a *révision au fond*) or as a lever to achieve results that are compatible with domestic law in general. Public policy clauses are therefore subject to a restrictive interpretation in various ways, depending on the connection or proximity of the dispute with the forum, the intensity of the link with the country of the forum, and the degree of relativity of the norms

Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, [2008] OJ L327/27.

[34] *Maronier v Larmer* [2002] EWCA Civ 774 [25] (Lord Phillips); Opinion of A-G Bot in Case C-66/08 *supra* n 20 [98]. Compare A Mills, "The Dimensions of Public Policy in Private International Law" (2008) *Journal of Private International Law* 201, 217.

[35] A Briggs, *The Conflict of Laws* (3rd ed, Oxford University Press, 2013) 151, 209; see Case 145/86 *Hoffmann v Krieg* [1988] ECR 645 [21]; Case C-78/95 *Hendrikman and Feyen v Magenta Druck & Verlag* [1996] ECR I-4943 [23]; Case C-7/98 *supra* n 3 [21]; Case C-341/04 *Eurofood* [2006] ECR I-3813 [62]; Case C-420/07 *Apostolides* [2009] ECR I-3571 [55]; Case C-444/07 *MG Probud Gdynia* [2010] ECR I-417 [34]; Recital 22 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L160/1.

[36] Recitals 37 Rome I Regulation and 32 Rome II Regulation; Case 145/86 *ibid* [21]; Case C-78/95 *ibid* [23]; Case C-38/98 *supra* n 17 [26]; Case C-7/98 *supra* n 3 [36]; G Van Calster, *European Private International Law* (Hart, 2013) 121.

involved.[37] Particularly restrictive interpretation of public policy clauses has been called for with regard to the recognition of foreign judgments (*effet atténué de l'ordre public de la reconnaissance* or, in the terminology of the German Federal Court of Justice, *ordre public international*).[38] In such cases, the matter had already been settled. The parties to the original litigation have obtained a legal position at the foreign court, the validity of which would be diminished by the application of a public policy clause in the *exequatur* procedure.

Furthermore, particularly restrictive application of public policy clauses is apparently required within the ambit of the internal market. In its 1999 Tampere meeting, the European Council hailed the principle of mutual recognition as "the cornerstone of judicial co-operation in both civil and criminal matters within the Union".[39] Mutual recognition in EU private international law is closely related to economic integration and the internal market: Article 81(2) TFEU empowers the Council and the European Parliament to adopt private international law rules "particularly when necessary for the proper functioning of the internal market". The predecessor to this provision, Article 65 EC, even expressed unqualifiedly that measures in the field of judicial cooperation in civil matters having cross-border implications may be adopted "insofar" as they are "necessary for the proper functioning of the internal market". As the Court of Justice observed, the (now) EU rules on conflict of jurisdiction and on the recognition and enforcement of judgments were "without doubt intended to eliminate obstacles to the functioning of the internal market which may derive from disparities between national legislations on the subject".[40] Moreover, the link between the internal market and the judicial cooperation in civil matters has also been emphasised by two Advocates-General.[41] One commentator even speaks of the "free movement of judgments" as the "fifth freedom" of the internal market.[42]

According to the Court of Justice, the public policy caveats in the Brussels I Regulation and in the Rome Regulations have to be interpreted strictly inasmuch as they constitute an obstacle to the attainment of the fundamental objectives of the Regulations, which is to maintain and develop an area of freedom, security and

[37]For a detailed analysis, see A Mills, *supra* n 34, 201; A Mills, The Confluence of Public and Private International Law (Cambridge University Press, 2009) 191, 259; O Kahn-Freund, *supra* n 16, 39.
[38]See German Federal Court of Justice, Case XI ZR 377–397 [1998].
[39]European Council, Presidency Conclusions, Tampere, 15 and 16 October 1999, para 33.
[40]Case C-281/02 *Owusu v Jackson* [2005] ECR I-1383 [34].
[41]See Opinion of A-G Kokott, Case C-420/07 *supra* n 35 [37]; Opinion of A-G Ruiz-Jarabo Colomer, Case C-14/08 *Roda Golf & Beach Resort SL* [2009] ECR I-5439 [71].
[42]JK Škerl, "European Public Policy (with an Emphasis on *Exequatur* Proceedings)" (2011) *Journal of Private International Law* 461, 480. The idea of "free movement of judgments" in the EU goes back to the Jenard Report on the 1968 Brussels Convention, see [1979] OJ C59/7.

justice for a proper functioning of the internal market.[43] Recourse to a public policy clause may be envisaged only where the adherence to the principle of mutual recognition would constitute an obvious and manifest infringement of a fundamental principle.[44] As a consequence, the concept of public policy has to be interpreted strictly and cannot be determined unilaterally by each Member State without being subject to control by the EU institutions.[45] Rather, the Member States have to adopt all appropriate measures to guarantee the full scope and effect of EU law so as to ensure its proper implementation.[46]

Yet, even where human rights were concerned, the Luxembourg Court held that "recourse to the public-policy clause must be regarded as being possible *in exceptional cases* where the guarantees laid down in the legislation of the state of origin and in the Convention itself have been insufficient to protect the defendant from a *manifest breach*" of his rights.[47] Public policy "can be envisaged only where recognition or enforcement of the judgment delivered in another [Member] State would be at variance *to an unacceptable degree* with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a *manifest breach* of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order".[48] Accordingly, the concept of public policy presupposes, in addition to the perturbation of the social order which any infringement of the law involves, the existence of a genuine and sufficiently serious threat to a fundamental interest of society.[49]

However, it is submitted that the unqualified obligation to protect human rights does not allow such a restrictive interpretation of public policy where human rights are concerned. Neither the expectations of the litigating parties nor principles of comity, mutual recognition and reciprocity can be regarded as inherent restrictions on human rights with the consequence that they require a restrictive interpretation of public policy clauses. Rather, private international law has to operate within the framework of human rights, and not *vice*

[43]Case C-414/92 *Solo Kleinmotoren* [1994] ECR I-2237 [20], Case C-7/98 *supra* n 3 [21]; Case C-38/98 *supra* n 17 [26]. See Recitals 1 of the Rome Regulations and the Brussels I Regulation 2001.
[44]Case C-7/98 *supra* n 3 [37]; Case C-38/98 *supra* n 17 [30]; Case C-341/04 *supra* n 35 [63]; Case C-420/07 *supra* n 35 [59]; Case C-394/07 *Gambazzi* [2009] ECR I-2563 [27]; A Briggs, *supra* n 7, 151, 209.
[45]See, eg, Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337 [18]; Case 30/77 *Bouchereau* [1977] ECR 1999 [33]; Case C-54/99 *Église de Scientologie* [2000] ECR I-1335 [17].
[46]Case C-265/95 *Commission v France* [1997] ECR I-6959 [56].
[47]Case C-7/98 *supra* n 3 [44] (emphasis added).
[48]Case C-38/98 *supra* n 17 [30] (emphasis added).
[49]Case 30/77 *supra* n 45 [35]; Case C-54/99 *supra* n 45 [17]; Case C-36/02 *supra* n 27 [30]; Joined Cases C-482/01 and C-493/01 *Orfanopoulos* [2004] ECR I-5257 [66].

versa. Consequently, courts should apply full scrutiny regarding a violation of human rights both when applying foreign law and when recognising foreign judgments, in the ambit of both domestic and EU private international law rules. In addition, *any* violation of domestically applicable human rights should justify the application of public policy clauses, and neither only a "manifest" infringement nor only violations of particular human rights, such as *ius cogens* norms.

Three arguments support this tenet: a positivist, a structural, and a normative argument. First, as has already been elaborated, domestic constitutions and international conventions stipulate that human rights are binding on all branches of the state, including the judiciary, and including all areas of law.[50] Human rights codifications do not distinguish between the nature of the legal question to be resolved, but claim prevalence in all circumstances. Consequently, they also require full consideration in the application of private international law regarding the human rights compatibility of both the applicable legislation and the decisions of the courts applying that legislation, in so far as the legislation allows courts to take on board human rights concerns.

Secondly, human rights set objectives for states which go beyond bi- or multilateral exchange of rights and obligations. Human rights are not rules which are either fulfilled or not, but principles which have to be observed and optimised.[51] They have to be given optimal effect when the law is being applied, including private international law. And the main instruments to give effect to human rights in private international law are the public policy clauses. Introducing human rights into private international law via public policy clauses thus requires balancing the legitimate expectations of the parties as well as the principles of comity, mutual recognition and reciprocity against the need to protect human rights. Hence, the claim that human rights have to make way for litigants' expectations or international obligations misconceives their structure as optimisation requirements.

Thirdly, human rights are subjective, individual rights, not state interests. Human rights protection is therefore not at states' disposal. Consequently, the observance of human rights is mandatory, not discretionary. States cannot exempt themselves from human rights protection, not even by joining systems of mutual recognition.[52] The argument that member states of a system of mutual recognition must have trust in each other's legal system would render

[50]See Art 2 ICCPR, Art 1 ECHR, Art 6 HRA 1998, or Art 1(3) German Basic Law.
[51]R Dworkin, *Taking Rights Seriously*, 1977 (republished Duckworth, 1996) 22 *et seq*; R Alexy, *A Theory of Constitutional* Rights (Oxford University Press, 2002) 48 *et seq*.
[52]See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 19 (28 May 1951); EComHR, *Austria/ Pfunders v Italy* Decision of 11 January 1961 App No 788/60, 18; IACtHR, The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75), Advisory Opinion OC-2/82, 24 September 1982 [29].

effective human rights protection illusory.[53] On the contrary, private international law has to be conceptualised as a system of rights protection itself.[54] Private international law should be perceived not only as a tool to operate systems of mutual recognition and reciprocity or to ensure the smooth functioning of the internal market, but also an instrument to safeguard individual rights. Hence, the application of public policy clauses to protect human rights ensures that the system of private international law contributes to the broader European and international endeavour to establish and to protect human rights.[55]

Therefore, under private international law, domestic courts must fully consider domestically applicable human rights when applying foreign law, or when recognising and enforcing a foreign judgment. Section 328(4) of the German Civil Procedure Code, which has already been cited above, can serve as a role model for domestic and European legislators when drafting public policy clauses. The provision stipulates that recognition of a judgment handed down by a foreign court shall be ruled out if the recognition of the judgment would lead to a result that is *obviously* incompatible with essential principles of German law. This corresponds to the doctrine that not any incompatibility with domestic law should open the floodgates of public policy, but only a manifest (or obvious) incompatibility. But the provision further states that recognition of a judgment handed down by a foreign court shall be ruled out "in particular if the recognition is not compatible with fundamental rights". Consequently, the provision places incompatibility with fundamental rights on equal footing with an *obvious* incompatibility with essential principles of German law. By doing so, the provision successfully reconciles the requirement of a generally restrictive application of public policy clauses with the obligation to take full account of human rights.[56]

2. *Indirect horizontal effect and the principle of proportionality as correctives*

As has just been indicated, public policy clauses bear the odium of opening the "floodgates" for the application of domestic law, thus disappointing expectations of the parties involved, disrupting the harmony of mutual recognition and reciprocity in the international community and, within the EU, endangering the smooth functioning of the internal market. Yet it has also been shown that where human rights are concerned, these restrictions should not apply in a way that only violations of *ius cogens* norms or only "manifest" or "obvious" human

[53]See S Peers, *supra* n 9, 109.
[54]See A Mills, *supra* n 34, 187–198, 264–286.
[55]Compare A Mills *ibid*, 286; J K Škerl, *supra* n 42, 490; B Juratowitch, "The European Convention on Human Rights and English Private International Law" (2007) *Journal of Private International Law* 173, 197.
[56]Compare German Federal Constitutional Court, Case No 1 BvR 636/68 [1971] "Spaniard decision" (regarding the choice of law).

rights violations justify the application of public policy clauses. As the obligation to protect human rights is universal, unconditional, indivisible, and cannot be derogated from by virtue of obligations of mutual recognition and reciprocity, a restrictive interpretation of human rights as public policy is not defensible. As a consequence, courts should neither apply foreign law nor recognise a foreign judgment if doing so would constitute or perpetuate a human rights violation. The "manifest infringement" standard for the interpretation of public policy clauses should only apply to public policy considerations that are not based on human rights.

However, this should not give cause for the concern that human rights public policy opens the "floodgates" for the imposition of national concepts on foreign law or foreign judgments. There is no need to reduce the impact of human rights on private international law by recourse to extrinsic concepts, such as *effet atténué*. Rather, the impact of human rights on private international law is already limited by factors which are inherent in human rights doctrine: the principle of proportionality and the mere indirect horizontal effect of human rights in private law relationships. The principle of proportionality, or more precisely, the proportionality *sensu stricto* analysis, requires that a court, when applying foreign law, has to duly take the applicable human rights that are binding on this court into consideration. Similarly, in *exequatur* proceedings, a court of the enforcing country has to review whether the outcome of the foreign judgment is compatible with the human rights applicable in the country where enforcement is sought. And in this context, it has to be considered that human rights principally do not have a direct effect between individuals; they are not actionable *per se* between private parties. Human rights are not rules stipulating conditions for actionable claims, such as the right to damages or injunctions.[57] Yet they influence the interpretation and application of pre-existing law in a trial between private individuals because the courts as adjudicators are obliged to protect individuals from fellow citizens within the private law order.[58] Accordingly, the balancing

[57]There is one exception to this principle, and this applies if a human rights catalogue itself provides that certain rights apply between private individuals. This is the case, for example, with regard to Art 14 of the American Convention of Human Rights, which provides a right to reply to "[a]nyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication". This provisions is, therefore, a human right directly applicable between private individuals.

[58]See, eg, A Drzemczewski, "The European Human Rights Convention and Relations between Private Parties" (1979) *Netherlands International Law Review* 168; S Alkema, "The Third-Party Applicability or '*Drittwirkung*' in the European Convention on Human Rights" in F Matscher and H Petzold (eds), *Protecting Human Rights: The European Dimension in Honour of GJ Wiarda* (Heymanns,1988) 35; A Clapham, *Human Rights in the Private Sphere* (Oxford University Press, 1993); A Barak, "Constitutional Human Rights and Private Law" in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart, 2001) 13; S Kay, "The European Convention on Human Rights and the Control of Private Law" (2005) *European Human Rights Law Review* 466, 475 *et seq*; H Fenwick and G Phillipson, *Media*

of conflicting rights has to take place within the application of private law rules, and not independently thereof. Where human rights interests are in conflict, domestic courts have to apply private law, but taking into account applicable human rights, in a balancing exercise. If courts do not balance the conflicting rights properly, they violate a party's human rights. International examples for this balancing exercise are provided in the notorious *von Hannover* decisions,[59] *Mosley v United Kingdom*,[60] *Eweida and others v United Kingdom*[61] and many more decisions from the Strasbourg Court,[62] as well as in *Fontevecchia and D'Amico v Argentina*[63] from the Inter-American Court of Human Rights.

By contrast, when considering procedural public policy, courts have to examine alleged violations of human rights not in their indirect horizontal effect, but in their direct vertical effect. Procedural public policy clauses apply to procedural mistakes made by the foreign court in the adjudicative procedure, and not with regard to the decision of the private law dispute on the merits. As a result, when scrutinising procedural public policy, courts have to balance the gravity of the violation of the procedural right with the legitimate expectations of the party seeking enforcement.

D. Review by the Strasbourg Court

Since public policy also involves human rights concerns, the wrongful application or non-application of public policy clauses by a court of a Convention state may itself constitute a human rights violation, either because the court refuses to invoke public policy although the foreign judgment or the application of foreign law violates human rights, or because the court applies a public policy clause although the foreign judgment – or, more generally, the status acquired abroad[64] – or the

Freedom under the Human Rights Act (Oxford University Press, 2006) 128; M Nowak, *CCPR* (2nd ed, NP Engel, 2005) Introduction, para 4.

[59] *von Hannover v Germany (No 1)* Judgment of 24 June 2004 App No 59320/00, *von Hannover v Germany (No 2)* Judgment of 7 February 2012 App Nos 40660/08 and 60641/08 and *von Hannover v Germany (No 3)* Judgment of 19 September 2013 App No 8772/10 [62].

[60] *Mosley v United Kingdom* Judgment of 11 May 2011 App No 48009/08 [129].

[61] *Eweida and others v United Kingdom* Judgment of 15 January 2013 App Nos 48420/10, 59842/10, 51671/10 and 36516/10 [89–95] and [107–110].

[62] See, eg, *Lingens v Austria* Judgment of 8 July 1986 App No 9815/82; *Bladet Tromsø and Stensaas v Norway* 20 May 1999 App No 21980/93; *Bergens Tidende and others v Norway* Judgment of 2 May 2000 App No 26132/95; *Jerusalem v Austria* Judgment of 27 February 2001 App No 26958/95; *Egeland and Hanseid v Norway* Judgment of 16 April 2009 App No 34438/04; *MGN Ltd v United Kingdom* Judgment of 18 January 2011 App No 39401/04; *Novaya Gazeta and Borodyanskiy v Russia* Judgment of 28 March 2013 App No 14087/08.

[63] *Fontevecchia and D'Amico v Argentina* [2011] Case 12.524.

[64] See P Kinsch, "Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law" in K Boele-Woelki *et al* (eds),

outcome of the application of the foreign law is human rights-compatible. For example, if a court recognises a foreign defamation judgment or applies foreign defamation laws, it might be in violation of the defendant's freedom of expression by refusing to consider public policy. In turn, if a court refuses to recognise a foreign defamation judgment or to apply foreign defamation law because of freedom of expression as public policy, it might violate the claimant's right to respect for private life.[65] In addition, the refusal to recognise and enforce a judgment constitutes, according to the Strasbourg Court, an interference with Article 6 ECHR.[66]

When analysing the scope of the ECtHR's judicial review, two questions have to be distinguished. First, as the EU itself is not a Contracting Party to the ECHR, it is questionable whether the Strasbourg Court may review the (non-)application of public policy clauses codified in EU legislation by courts of EU Member States. It will be argued in the next section that the restrictive *Bosphorus* doctrine should not be applied. Secondly, it will be shown that the Strasbourg Court's scrutiny is only reduced where the refusal to apply public policy clauses against judgments originating from other Convention states is concerned. In all the other cases, the ECtHR should apply strict scrutiny.

1. *(Non-)application of public policy clauses in EU legislation*

Following Articles 1 and 34 ECHR, the alleged violation of human rights through the application of public policy clauses – or the refusal thereof – by a domestic court of a Convention state can be the subject of an application to the ECtHR. This is unproblematic where the (non-)application of domestic public policy clauses is concerned.[67] Such domestic public policy clauses remain applicable if recognition of a judgment obtained in a non-EU Member State is sought, or if

Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr (Eleven International Publishing, 2010) 259, 266; P Kinsch, "Private International Law Topics before the European Court of Human Rights" (2011) *Yearbook of Private International Law* 37, 42–45.

[65]Compare *Wagner, supra* n 4, finding a violation of Art 8 ECHR because the receiving state refused to recognise a judicial decision concerning full adoption of a child by a single woman, and *Leschiutta and Fraccaro v Belgium* Judgment of 17 July 2008 App Nos 58081/00, 58411/00 finding a violation of Art 8 ECHR because the receiving state did not immediately enforce a foreign judgment on handing over custody of a child.

[66]*Hornsby v Greece* Judgment of 19 March 1997 App No 18357/91 (regarding the lack of enforcement of a domestic judgment); *McDonald v France* Judgment of 29 April 2008 App No 18648/04 (non-recognition of a divorce decree obtained abroad); *Negrepontis-Giannisis v Greece* Judgment of 3 May 2011 App No 56759/08 (non-recognition of a foreign adoption judgment); for comment on enforcement as a *procedural* right see P Kinsch, "Private International Law Topics before the European Court of Human Rights" (2011) *Yearbook of Private International Law* 37, 44, n 21.

[67]Compare *Bosphorus supra* n 24 [157].

EU legislation on the choice of law does not cover or expressly excludes a certain matter from the scope of its application, as is the case with, for example, Article 1 (2) Rome II Regulation. It is questionable, however, if and to what extent the Strasbourg Court may review the (non-)application of public policy clauses enshrined in EU private international law by EU Member States' courts. An accession of the EU to the ECHR would have significantly reduced the practical importance of this question, since acts of the EU and of the Member States would then have been equally subject to the ECtHR's scrutiny. But with its *Opinion 2/13*, the CJEU has rendered accession difficult, if not impossible.[68]

In *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, the Strasbourg Court held that state action taken in compliance with legal obligations flowing from the state's membership in an international organisation "is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides".[69] If such "equivalent protection" – a term which the Court further defines in its judgment – is provided by the organisation, "the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation".[70] As the Court considers the protection of fundamental rights by EU law "in principle equivalent" to that of the Convention system, there is a presumption that Member States do not depart from the requirements of the ECHR when they implement legal obligations flowing from their membership of the European Union.[71] This presumption can be rebutted, however, if the protection of Convention rights in a particular case was "manifestly deficient".[72] This is the case, for example, if the domestic court refuses to request a preliminary ruling from the CJEU on an alleged violation of a party's fundamental rights.[73]

The decisive question is, therefore, whether the (non-)application of public policy clauses codified in EU private international law is "flowing" from the Member States' legal obligations under EU private international law or whether such acts fall outside their strict legal obligations. The Strasbourg Court emphasised that in the latter case Convention States remain fully responsible under the Convention, and the ECHR's role as a "constitutional instrument of European public order" in the field of human rights would outweigh the interest of

[68] Opinion 2/13 *supra* n 10.
[69] *Bosphorus supra* n 24 [155]; reiterated in, for example, *Michaud v France* Judgment of 6 December 2012 App No 12323/11 [103].
[70] *Bosphorus supra* n 24 [156].
[71] See *Bosphorus ibid* [165]; *Povse supra* n 14 [77].
[72] *Bosphorus supra* n 24 [156].
[73] *Michaud supra* n 69 [115].

international cooperation.[74] This is particularly the case if the Member States exercise discretion when applying EU law.

This question has not been answered yet with regard to public policy clauses under EU private international law. The post-*Bosphorus* cases decided by the Strasbourg Court, namely *Povse v Austria* and *Avotiņš v Latvia*, related to EU private international law rules which, according to the Strasbourg Court, did *not* leave the Member States any discretion as to their application.[75] *Povse v Austria* concerned Articles 42 and 11(8) of the Brussels IIa Regulation, in which *exequatur* has been abolished. The applicant in *Avotiņš v Latvia* complained about the refusal of the enforcing Latvian authorities to invoke Article 34(2) of the Brussels I Regulation, to which Article 45(2) of the Brussels Ia Regulation now corresponds. Accordingly, a judgment given in default of appearance shall not be recognised "if the defendant was not served with the document which instituted the proceedings . . . in sufficient time and in such a way as to enable him to arrange for his defence, unless [he] failed to commence proceedings to challenge the judgment when it was possible for him to do so". The majority of the Court's Fourth Section briefly indicated that the Latvian court was "under a duty to ensure the recognition" of the foreign (Cypriot) judgment in Latvia.[76] The majority thus denied any discretion on the domestic court's behalf, which would have brought the case outside the scope of the *Bosphorus* doctrine, and eventually found no violation of Article 6 ECHR. Three out of seven judges dissented, highlighting – among other aspects – that because of its Article 34(2) the Brussels I Regulation "does not provide for blind automaticity as concerns the execution of judgments".[77] In fact, Article 34(2) requires the interpretation and application of ambiguous terms, such as the service of the defendant with a document "in sufficient time" and the defendant's failure to commence proceedings "when it was possible for him to do".[78] This suggests that the Latvian court might indeed have had certain discretion when recognising the Cypriot judgment. The decision has been referred to the Grand Chamber and is still pending.

Yet those decisions have to be distinguished from possible cases involving public policy. It is argued here that EU public policy clauses do leave discretion to the Member States and hence their (non-)application do not fall under the

[74] *Bosphorus supra* n 24 [156–157]; *M.S.S. v Belgium and Greece* Judgment of 21 January 2011 App No 30696/09 [338]; *Michaud supra* n 69 [103] and [113].
[75] *Povse supra* n 14 [79]; *Avotiņš v Latvia* Judgment of 25 February 2014 App No 17502/07 [47–49].
[76] *Avotiņš ibid* [49].
[77] *Avotiņš supra* n 75, Joint Dissenting Opinion of Judges Ziemele, Bianku and De Gaetano [4]. The decision also met with criticism in the academic literature; see, eg, G Cuniberti, *supra* n 13, para 59; M Requejo Isidro, „Exequaturverfahren und EMRK: Die EuGVVO vor dem EGMR" (2015) *IPRax* 69.
[78] On the interpretation of those terms, see Case C-283/05 *ASML Netherlands BV v Semiconductor Industry Services GmbH (SEMIS)* [2006] ECR I-12041; Case C-420/07 *supra* n 35 [72–80].

Bosphorus doctrine.[79] This argument finds support in the decision *M.S. S. v. Belgium and Greece*. In this case, Belgium had discretion to decide whether or not to make use of the "sovereignty clause" in Article 3(2) of the then-Dublin II Regulation. In derogation from Article 3(1) of that Regulation, Article 3(2) would have given the Belgian officials the authority to examine an asylum application themselves rather than transferring the applicant back to Greece. Therefore, the order of the Belgian authorities in compliance with Article 3(1) directing the applicant to apply for asylum in Greece, where he met with appalling conditions of detention and reception of asylum-seekers, was subject to the Court's full scrutiny. The Court held: "In such a case, the State concerned becomes the member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility . . . [T]he Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection [as established in *Bosphorus*] does not apply in this case".[80] It is to be expected that the Court would apply the same reasoning to the (non-)application of public policy clauses in EU private international law. From a human rights perspective, such a development could only be welcomed.

At the same time, the Court of Justice of the EU may also review the compliance of such acts with the Charter, as Member States applying public policy clauses under EU private international law are to be regarded as "implementing Union law" within the meaning of Article 51(1) EUChFR. At first glance, this appears to be paradoxical, since Member States applying public policy clauses are not "implementing" EU law, but rather derogate from mutual recognition and reciprocity obligations established by EU law. However, it follows from the Explanations relating to the Charter of Fundamental Rights as well as from the case-law of the Court of Justice that it is sufficient for the application of the Charter if the Member States "act in the scope" of EU law.[81] Hence, the fact that Member States may have discretion to apply public policy clauses does not affect the applicability of the Charter.[82] Consequently, the (non-)application by the Member States of public policy clauses codified in EU private international

[79]See also G Cuniberti, *supra* n 13, 103 paras 54 and 58.
[80]*M.S.S. supra* n 74 [339–340]; reiterated in *Tarakhel v Switzerland* Judgment of 4 November 2014 App No 29217/12 [89–90].
[81]Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/17 (on the interpretative force of the Explanations, see Art 52(7) EUChFR); ECJ, Case C-260/89 *ERT* [1991] ECR I-2925 [42]; Case C-309/96 *Annibaldi* [1997] ECR I-7493 [13]; Case C-617/10 *Åkerberg Fransson* EU:C:2013:105 [19].
[82]Joined Cases C-411/10 and C-493/10 *N.S. and others* [2011] ECR I-13905 [68]; compare Case 260/89 *ERT* [1991] ECR I-2925 [43]: public policy exceptions under EU primary law.

law may lead to a judicial review by both the Strasbourg Court and the Luxembourg Court.[83]

2. *Standard of scrutiny of the ECtHR's review*

The question remains which standard of scrutiny the Strasbourg Court should apply to claims of human rights violations by the (non-)application of public policy clauses. The Court's decisions concerning alleged human rights violations in international systems of comity, reciprocity and mutual recognition have revealed a reduced standard of scrutiny. The origins of the Strasbourg Court's case-law in this regard can be traced back to the 1989 decision *Soering v United Kingdom*, in which the Court established that extradition of a German national to the United States to face charges of capital murder violated Article 3 ECHR, as the applicant would be exposed to the so-called "death row phenomenon".[84] However, the Court also established in this decision that in cases in which the extraditing Convention state had to consider whether the applicant's right to a fair trial would be observed in the requesting non-Convention state, the Strasbourg Court reduces its own scope of judicial review to a "flagrant denial of justice" standard. According to the Court, Article 1 ECHR does not require a Convention state not to surrender an individual unless satisfied that the conditions awaiting him in the country of destination are fully compliant with the Convention, as this would indirectly place the requesting non-Convention state under the obligations of the Convention.[85]

In *Drozd and Janousek v France and Spain* and in *Iribarne Pérez v France*, the Strasbourg Court applied the reduced "flagrant denial of justice" standard of scrutiny to the enforcement of foreign criminal convictions in Convention states.[86] Both cases concerned the enforcement of criminal sentences in France and Spain that had been passed in the criminal courts of Andorra, which had not yet become a member of the Council of Europe. Although the sentences had been adopted by questionable procedures,[87] the Court did not find a violation of the Convention in either case. Then, in *Prince Hans-Adam II of Liechtenstein v Germany*, the Court applied a

[83]Compare *M.S.S. supra* n 74, on the one hand, and *N.S. and others*, *ibid*, on the other, regarding the Common European Asylum System.
[84]*Soering v United Kingdom* Judgment of 7 July 1989 App No 14038/88. This phenomenon consists in a combination of circumstances to which someone sentenced to death would be exposed (para 81). The human rights violation would not have consisted of the application of the death penalty itself, as the death penalty had not yet been abolished by the Convention.
[85]See *Soering ibid* [113]; see also *Mamatkulov and Askarov v Turkey* Judgment of 4 February 2005 App Nos 46827/99 and 46951/99 [88] and the Joint Partly Dissenting Opinion of Judges Bratza, Bonell and Hedigan [14].
[86]*Drozd and Janousek v France and Spain* Judgment of 26 June 1992 App No 12747/87 [110]; *Iribarne Pérez v France* Judgment of 24 October 1995 App No 16462/90 [31].
[87]Compare S Peers, *supra* n 9, 677.

similarly restrictive standard of scrutiny regarding the review of administrative court proceedings.[88] In 1946, the former Czechoslovakia confiscated an old painting of the applicant's late father based on the "Beneš Decrees". Five years later, the Bratislava Administrative Court dismissed the appeal lodged by the applicant's father. In 1991, the applicant sought the return of the painting which was on loan to a German municipality. Citing *Drozd*, the Strasbourg Court observed, however, "that the German courts were not required to assess whether the standard of the Bratislava Administrative Court proceedings . . . was adequate, in particular if seen against the procedural safeguards of the Convention."[89]

Yet it has for a long time been uncertain whether the reduced standard of review had to be applied to the enforcement of *civil* law judgments, too. The decision *Pellegrini v Italy*, adopted eight days after *Prince Hans-Adam II of Liechtenstein v Germany*, seemed to indicate the contrary.[90] In this case concerning the annulment of a marriage under Canon Law, the applicant had been summoned to appear before an ecclesiastical court, which was outside the ambit of the ECHR. The applicant had not been informed about her right to seek legal assistance, she did not have access to the court files or to witness statements, and she did not receive a full copy of the decision. The Strasbourg Court decided that the enforcement of this judgment in Italy violated Article 6(1) of the Convention. However, the Court did not refer to the concept of "flagrant denial", which seemed to indicate that this restricted standard of scrutiny does not apply to civil law cases. Yet, in *Government of the United States of America v Barnette*, the House of Lords distinguished *Pellegrini* from *Drozd and Janousek* on the basis that *Pellegrini* turned on a special legal relationship between the Italian civil courts and the ecclesiastical court that was governed by the terms of a Concordat.[91] Alternatively, one could also argue that the Strasbourg Court actually regarded the violation of the applicant's Article 6 ECHR rights as a "flagrant denial of justice", without expressly mentioning it.

The ECtHR did not clarify this point in its 2004 decision *Lindberg v Sweden*, where the Court did "not deem it necessary for the purposes of its examination . . . to determine the general issue concerning what standard should apply where the enforcing state as well as the state whose court gave the contested decision is a Contracting Party to the Convention".[92] Furthermore, the judges declined any comment on what standard of scrutiny should apply where the subject-matter is

[88] *Prince Hans-Adam II of Liechtenstein v Germany* Judgment of 12 July 2001 App No 42527/98.
[89] *Ibid* [64].
[90] *Pellegrini supra* n 3 [46].
[91] *Government of the United States of America supra* n 3 [21] (*per* Lord Carswell). According to Art 8(2) of this Concordat, Italian courts have to verify that in the proceedings before the ecclesiastical courts the right to sue and defend in court has been assured to the parties in a way not dissimilar from what is required by the fundamental principles of the Italian legal system.
[92] *Lindberg v Sweden* Judgment of 15 January 2004 App No 48198/99, 11.

one of substantive rather than procedural public policy. In this case, the applicant, a seal hunting inspector, had been ordered to pay compensation for the publication of allegations to the effect that certain seal hunters had violated Norwegian seal hunting regulations. Mr Lindberg's application to the former European Commission of Human Rights against the *Norwegian* court's judgment alleging violations of Articles 6, 10 and 13 of the Convention had been declared inadmissible as having been lodged out of time.[93] Therefore, the applicant lodged an application against the decision of the *Swedish* authorities not to refuse the enforcement of the defamation judgment in Sweden, where he lived. The ECtHR held that the Swedish courts reviewed the substance of the applicant's complaint against the requested enforcement of the Norwegian judgment "to a sufficient degree", and that the application disclosed "no appearance of violation of Article 10 of the Convention".[94] Most notably, in the related case of *Bladet Tromsø and Stensaas v Norway*, the Strasbourg Court decided that a defamation judgment against a newspaper that published statements from the applicant's report violated the newspaper's right under Article 10 ECHR.[95] The diverging judgments are partly due to the fact that the Court held the newspaper to be entitled to rely on an official report. However, the rejection of the second *Lindberg* application is obviously also due to the Strasbourg Court's reduced scope of judicial review. Given the *Bladet Tromsø* decision, Mr Lindberg's application against the Norwegian decision, had it been lodged on time, would have had a higher chance of success.

Yet the Strasbourg Court finally confirmed the "flagrant denial of justice" standard of scrutiny regarding the enforcement of civil law judgments in the child custody-related case *Eskinazi and Chelouche v Turkey*, where it held that the Convention "does not require the Contracting Parties to impose its standards on third States or territories".[96] To require Contracting Parties (in this case, Turkey) to review under the Convention all aspects of proceedings of non-contracting parties (in this case, Israel) "would thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned, and would risk turning international instruments into a dead letter, to the detriment of the persons they protect".[97]

To summarise, the Strasbourg Court does not see itself entitled to review foreign criminal, administrative or civil proceedings concerning *any* denial of justice, but reduces its standard of scrutiny to a "flagrant" denial.[98] This means

[93]EComHR, *Lindberg v Norway* Decision of 26 February 1997 App No 26604/95. In *Lindberg v Sweden*, the application number is mistakenly referred to as 26604/94.
[94]*Lindberg, supra* n 92.
[95]*Bladet Tromsø and Stensaas*, *supra* n 62.
[96]*Eskinazi and Chelouche v Turkey* Decision of 6 December 2005 App No 14600/05, p. 26 of the English translation.
[97]*Ibid* (references omitted).
[98]See *Soering supra* n 84 [113]; *Einhorn v France* Decision of 16 October 2001 App No 71555/01 [32]; *Mamatkulov and Askarov v Turkey* Judgment of 4 February 2005 App

that the domestic authorities must have found "substantial grounds for believing" that the foreign trial took place in conditions that contravened the right to a fair trial, without going into the details of a broad debate on the specific features of the foreign judicial system.[99] It is therefore not sufficient that there is information available that may give cause for doubting that the applicants would receive a fair trial under the foreign judicial system; rather, there has to be sufficient evidence available to show that any possible irregularities in the trial were liable to constitute a "flagrant" denial of justice.[100] This requires an unfairness going beyond mere irregularities or lack of safeguards in trial procedures, namely a breach of the principles of fair trial guaranteed which is so fundamental that it destroys the very essence of the right to a fair trial.[101]

However, the Strasbourg Court's reduced standard of scrutiny in *exequatur* cases cannot be welcomed. As has been shown, the "flagrant denial of justice" standard of scrutiny, which is in itself a rather amorphous concept,[102] has been developed in a removal case, where the extraditing state had to consider whether the applicant's right to a fair trial would be observed *in the requesting state*.[103] However, cases of enforcement of foreign judgments are structurally different, and the same applies to the application of foreign law by a Convention state court. With the enforcement of a foreign judgment in a Convention state or the application of foreign law by a court of a Convention state in violation of human rights, the Convention state itself would directly commit the human rights violation within the ambit of the Convention. This is exactly contrary to the obligation referred to in Article 1 ECHR, according to which the Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in the Convention. It is therefore not acceptable that the Convention state is subject to a reduced standard of review by the ECtHR, only because the original judgment originated from another country, or because the court had applied foreign law.

Therefore, it is submitted that the following principles regarding the ECtHR's standard of scrutiny concerning the (non-)application of public policy clauses should apply. The Strasbourg Court should apply a reduced standard of scrutiny regarding the non-application of enforcement public policy clauses against judgments originating from another Convention state (first principle). However, in all the other cases, the ECtHR should apply strict scrutiny: the application of

Nos 46827/99 and 46951/99 [88]; *Maumousseau and Washington v France* Judgment of 6 December 2007 App No 39388/05 [99]. See also Case C-341/04 *supra* n 35 [67].

[99] *Einhorn ibid* [34]; *Eskinazi supra* n 96, p. 27 of the English translation.

[100] *Mamatkulov supra* n 98 [91].

[101] See Joint Partly Dissenting Opinion of Judges Bratza, Bonell and Hedigan to *Mamatkulov supra* n 98 [14].

[102] See B Juratowitch, *supra* n 55, 180.

[103] See *Soering supra* n 84 [113]; *Bader v Sweden* Judgment of 8 November 2005 App No 13284/04 [47]; *Mamatkulov supra* n 98 [88].

enforcement public policy clauses against judgments originating from another Convention state (second principle), both the application and non-application of enforcement public policy clauses against judgments originating from a third country (third principle), and both the application and non-application of choice of law public policy clauses (fourth principle).

Concerning the first principle, that is, the reduced standard of scrutiny with regard to the refusal to apply public policy clauses against the recognition of judgments originating from another Convention state, *Lindberg v Sweden* reveals the conundrum that occurs when the judgment to be enforced had been decided in another Convention state (in this case, in Norway). The applicant had failed to raise a complaint against the Norwegian court's judgment in Strasbourg within the time limit. The decision of the Swedish court not to refuse the enforcement of the defamation judgment in Sweden thus seemed to have provided the applicant with a second chance to appeal to Strasbourg Court. However, the mere coincidence that the applicant lived in Sweden, and not in Norway, should not open a back door for the applicant to *de facto* have his inadmissible application against the Norwegian judgment reviewed. It is not the function of public policy clauses to circumvent the admissibility rules of the Strasbourg Court's procedure. The proper venue of redress for the defendant would have been judicial review of an alleged human rights violation in the original proceedings, here against the Norwegian judgments.[104] However, a complaint in Strasbourg against the non-application of public policy in the enforcing country would have given the applicant the undue possibility of being able to reopen matters that were already settled. A full scrutiny of the non-application of an enforcement-preventing public policy clause by the Strasbourg Court would run the risk of "upsetting the coherence of the division of roles between national review bodies and the European Court, making up the system of collective enforcement under the Convention".[105] As a consequence, in cases where both the enforcing state and the state whose court gave the contested decision are parties to the Convention, the Strasbourg Court should reduce its standard of scrutiny to flagrant violations of human rights.

However, this reduced standard of scrutiny should not apply to all other cases of (non-) application of public policy clauses (second to fourth principle). Here, the Strasbourg Court should fully consider human rights in their vertical effect where breaches of Article 6 ECHR are concerned (procedural public policy), and in their indirect horizontal effect where breaches of human rights by the application of private law are concerned (substantive public policy). The argument that redress to the Strasbourg Court should be sought against an original judgment does not apply in such cases. Rather, it would be the court of the Convention state that

[104]See, by comparison, the child abduction case of *Povse supra* n 14 [86]: "it is open to the applicants to rely on their Convention rights before the [requesting] Italian courts", instead of the enforcing Austrian courts.
[105]*Lindberg supra* n 92, 10.

would be the first one in violation of Convention rights: by refusing recognition of a judgment from another Convention state, by recognising and enforcing (or not recognising) a third-country judgment, or by applying (or not applying) foreign law, in violation of the ECHR. In these situations, the applicant has never had the opportunity to seek redress in Strasbourg: not in the constellation of the second principle, because the applicant had been successful in the original litigation; not in the constellation of the third principle, because the country of the court of origin is not a Convention state; and not in the constellation of the fourth principle, because it is the court of the Convention state that conducts the proceedings and issues the judgment.

Yet one additional thought has to be given to the constellation of the fourth principle. One might argue that the ECHR is applied beyond its territorial scope if a court of a Convention state refuses to apply the law of a non-Convention state because the outcome of such an application is allegedly incompatible with the ECHR. However, as has been elaborated earlier, when applying its private international law and deciding a case based on foreign law, the forum judge is still bound by the Convention because of Article 1 ECHR. Consequently, even if the applicable law is that of a non-Convention state, the consideration of the Convention rights via the public policy clause is not an extra-territorial application of the ECHR, but an application of a domestically applicable public policy clause in the light of the ECHR.[106] Moreover, the Strasbourg Court's task is not to review the relevant legislation – neither the foreign law nor the domestic private international law requiring the application of the foreign law – in the abstract; rather, it must "as far as possible confine itself" to the issues raised by the concrete case before it.[107] And the applicant's rights would *in concreto* be breached by the domestic court, albeit under application of foreign law.[108]

[106]See M Stürner, "Extraterritorial application of the ECHR via private international law? A comment from a German perspective" (2011) *Nederlands Internationaal Privaatrecht* 8, 11. On the unlawfulness of an extra-territorial application of the Convention, see *Banković and others v Belgium and others* Decision of 12 December 2001 App No 52207/99; *Ben El Mahi and others v Denmark* Decision of 11 December 2006 App No 5853/06. Only in "exceptional circumstances" may acts of Convention States performed outside their territory amount to exercise by them of their jurisdiction within the meaning of Art 1 ECHR, see *Issa and others v Turkey* Judgment of 16 November 2004 App No 31821/96 [68].

[107]Compare, among many other authorities, *The Holy Monasteries v Greece* Judgment of 9 December 1994 App No 13092/87, 13984/88 [55]. An example for a decision on an alleged human rights violation committed through the application of foreign law is EComHR, *X. v Belgium and the Netherlands* Decision of 10 July 1975 App No 6482/74.

[108]See P Kinsch, "The Impact of Human Rights on the Application of Foreign Law and the Recognition of Foreign Judgments – A Survey of the Cases Decided by the European Human Rights Institutions", T Einhorn and K Siehr (eds), *Intercontinental Cooperation Through Private International Law – Essays in Memory of Peter E Nygh* (TMC Asser Press, 2004) 197, 214.

E. Conclusion

Globalisation has led, and will arguably further lead, to an increase of human rights-related litigation with a cross-border dimension. As a consequence, human rights will also further influence the interpretation of private international law. The global and even regional fragmentation of human rights standards will necessarily turn the courts' attention to public policy clauses, which permit human rights concerns to be taken into consideration. In doing so, courts should not apply public policy clauses restrictively, as the expectations of the parties as well as principles of comity, mutual recognition and reciprocity do not justify reduced standards of human rights protection. However, when applying public policy clauses in the light of human rights, courts have to consider the principle of proportionality, and, with regard to substantive public policy, also the doctrine of indirect horizontal effect.

When reviewing the human rights compatibility of the (non-)application of public policy clauses by courts of Convention states, the ECtHR's intensity of judicial scrutiny should distinguish the refusal to apply public policy clauses against judgments originating from a Convention state from all the other cases of (non-)application of public policy clauses. While in the first case it has to be ensured that the Convention's admissibility rules are not circumvented (the *Lindberg* scenario), the argument that redress to the Strasbourg Court should be sought against an original judgment does not apply in the other cases.

In the long run, the significance of private international law in human rights-sensitive cases in general, and the application of public policy clauses in particular, may only be limited by global harmonisation of substantive human rights protection. Thus, the application of public policy clauses to protect human rights does not diminish international coherence in private international law, but rather incentivises the pursuit of global harmonisation of human rights standards. A prudent use of public policy clauses to protect human rights may thus prepare the ground for a common human rights *ordre public*.