AMEDIP's upcoming webinar: The Inter-American Court of Human Rights' judgment – The case of Córdoba v. Paraguay relating to international child abduction (14 March 2024 at 13:00 Mexico City time) (in Spanish)

The Mexican Academy of Private International and Comparative Law (AMEDIP) is holding a webinar on Thursday 14 March 2024 at 13:00 (Mexico City time – CST), 20:00 (CET time). The topic of the webinar is the Inter-American Court of Human Rights' judgment in Córdoba v. Paraguay, a case relating to international child abduction, and will be presented by a panel of experts in different fields (in Spanish, see poster). This judgment will be discussed from the following perspectives: State responsibility, Private International Law, human rights law and legal argumentation.

The judgment is currently available only in Spanish: I/A Court H.R., Case of Córdoba v. Paraguay. Merits, Reparations and Costs. Judgment of September 5, 2023. Series C No. 505. Press release is available here (in Spanish only).

The details of the webinar are:

https://us02web.zoom.us/j/87214914850?pwd=UStJWnRZc2wvZUplWUx5VkZUSm9FQT09

Meeting ID: 872 1491 4850

Password: AMEDIP

Participation is free of charge.

This event will also be streamed live: https://www.facebook.com/AmedipMX

The Inter-American Court of Human Rights: first judgment on international child abduction

Guest post by Janaína Albuquerque, International Lawyer and Mediator

The Inter-American Court of Human Rights (IACtHR) has just published their first ever judgment on an international child abduction case in *Córdoba v. Paraguay*, which concerns the illicit removal of a child who was habitually resident in Argentina. The applicant and left-behind parent, Mr. Arnaldo Javier Córdoba, claimed that Paraguay violated his human rights by failing to enforce the return order and ensuring the maintenance of contact with his son. At the time of the abduction, the child was about to reach 2 years of age and the taking parent relocated, without the father's consent, to Paraguay.

Both Argentina and Paraguay are Contracting States to the American Convention

on Human Rights (or Pact of San José) and the American Declaration of the Rights and Duties of Man, which are the main instruments assessed by the Inter-American Court and Commission. Paraguay has also accepted the Court's jurisdiction in 1993. Differently from the European Court of Human Rights (ECtHR), applicants cannot present a request directly to the Inter-American Court. The petition must be firstly examined by the Inter-American Commission on Human Rights (IACHR), which will, then, issue recommendations or refer the case to the Court.

Apart from the abovementioned human rights instruments, the Inter-American framework also comprises the 1989 Convention on the International Return of Children. In accordance with Article 34, the referred treaty prevails over the 1980 Hague Convention on the Civil Aspects of International Child Abduction where the States involved are both Members of the Organisation of American States (OAS), unless otherwise stipulated by a bilateral agreement.

Although similar in content, the Inter-American Convention differs substantially from the Hague mechanism, particularly regarding jurisdiction. For instance, Article 6 states that it is the Contracting State in which the child was habitually resident before the removal or retention that has jurisdiction to consider a petition for the child's return, indicating that the Contracting State in whose territory the abducted child is or is thought to be only has jurisdiction if the left-behind parent choses so and in urgent cases. Another core change is found in Article 10, which prescribes that, if a voluntary return does not take place, the judicial or administrative authorities shall forthwith meet with the child and take measures to provide for his or her temporary custody or care. The exceptions to the return are in a different order than the Hague Convention, but remain relatively the same in practice, with minor changes to the wording of the provisions.

In *Córdoba v. Paraguay*, the applicant filed the petition on 30 January 2009. During the time that the merits were being assessed by the Commission, the applicant presented two requests for precautionary measures and only the second one was adopted by the *Resolución nº 29/19* on 10 May 2019. The case was finally referred to the Court 13 years after it was initiated, on 7 January 2022. Public hearings were held on 28 April 2023 and Reunite (United Kingdom), as well as the legal clinics of the Catholic University Andrés Bello (Venezuela) and the University of La Sabana (Colombia) participated in the proceedings as Amicus

Curiae.

Restitution efforts in Paraguay

As regards the restitution efforts, the left-behind parent seized the Argentinian Central Authority on 25 January 2006, 4 days after the abduction took place. The dossier was received by the Paraguayan counterpart on 8 February 2006. Thereafter, judicial cases were brought both to the Juvenile Courts of Buenos Aires, in Argentina, and of Caacupé, in Paraguay. The return proceedings were carried out in the latter.

The taking parent argued the grave risk exception due to a history of physical and psychological domestic violence. Nevertheless, the Caacupé court ordered the return of the child. The taking parent appealed, claiming, furthermore, that the child suffered from a permanent mental condition. The Court of Appeal and the Supreme Court of Paraguay confirmed the first judgment. A 'restitution hearing' was scheduled to take place on 28 September 2006, but the taking parent did not attend.

Paraguayan authorities conducted searches for the taking parent and the child between the remainder of 2006 and 2009, which were unsuccessful. The child was eventually located by INTERPOL on 22 May 2015, still in Paraguay, at the city of Atyrá. The taking parent was preventively detained and custody was granted to the maternal aunt. The Juvenile court also ordered a protective measure in order to establish a supervised and progressive contact arrangement with the father and the paternal family. The child refused to go near the left-behind parent, and the psychological team of the court concluded that it would be impossible to enforce the return order.

On 7 March 2017, the Public Defender's Office filed a request to establish the child's residence in Paraguay, which was accepted by the Juvenile court under the argument that 11 years had passed since the return order was issued and that other rights had originated in the meantime. Additionally, it was decided that, given the outcomes of the previous attempts, no contact would be established between the left-behind parent and the child. The Paraguayan Central Authority appealed and reverted the decision in regard to visitation, where it was stipulated that the left-behind parent should come to Paraguay to meet with the child. This arrangement was, then, confirmed by the Court of Appeal and, subsequently, by

the Supreme Court.

In 2019, the Ministry of Childhood and Adolescence of Paraguay asked for an evaluation of the situation of the child. It was informed that the child had been receiving monthly psychological treatment; that he was living with his aunt and her husband; and that the mother visited him daily. Contrastingly, between 2015 and 2018, 4 visits had been organised with the father, in which 3 were accompanied by the paternal grandmother. A hearing was finally held on 23 May 2019, where the child expressed to the court that he did not want to be 'molested' by his father nor did he desire to maintain a bond with him.

Merits

On the merits, the IACtHR (hereinafter, 'the Court') noted that it would assess potential violations to Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 11 (Right to Privacy), 17 (Rights of the Family), 19 (Rights of the Child) and 25 (Right to Judicial Protection) of the Pact of San José ('the Pact') in light of the application of the 1989 Inter-American Convention. References were also made to the complementary incidence of the United Nations Convention on the Rights of the Child, the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, as well as the General Comments nº 12 and 14 of the Committee on the Rights of the Child.

Initially, the Court remarked that, at the time of the case's referral by the Commission, the child was about to turn 18 and that both the Inter-American and Hague Conventions were only applicable until the child reached the age of 16. It was noted, with concern, that the child had not been heard during most of the proceedings and that Article 12 of the UNCRC had been disregarded. As the child manifested that he did not feel like a victim and had no interest in pursuing his father's claim, the Court decided to only assess the human rights violations suffered by Mr. Córdoba.

Regarding the violations of judicial guarantees and protection, the Court analysed the right to a reasonable timeframe and the State's obligation to enforce judgments issued by competent authorities, accentuated by the particular condition of urgency required in proceedings involving children. An explicit reference was made to *Maumousseau and Washington v. France* inasmuch as the ECtHR concluded that, in international child abduction cases, the *status quo ante*

must be re-established as quickly as possible to prevent the consolidation of illegal situations.

As the judicial proceedings for the return were concluded within 8 months, the Court did not find that there had been a violation of Article 8.1 of the Pact. However, Article 25.2.c prescribed that the State's responsibility did not end when a judgment had been reached and that public authorities may not obstruct the meaning nor the scope of judicial decisions or unduly delay their enforcement (*Mejía Idrovo v. Ecuador* and *Federación Nacional de Trabajadores Marítimos y Portuarios v. Perú*). References to *Maire v. Portugal* and *Ignaccolo-Zenive v. Romania* from the ECtHR were also made to reinforce that such delays brought irreparable consequences to parent-child relationships. It had not been reasonable that the State of Paraguay, for 9 years, was not able to locate a child that regularly attended school and received care from the public health services. After the child was found, custody was immediately granted to the maternal aunt and contact with the father was hindered throughout the subsequent proceedings. Furthermore, the precautionary measures awarded by the Commission to instate a detailed visitation plan had not been enforced as a result of the COVID-19 pandemic, which contributed to the permanent deterioration of paternal bonds. Hence, the lack of diligence and morosity of the Paraguayan authorities resulted in a violation of Article 25.2.c of the Pact of San José.

In relation to the personal integrity, private and family life, and family protection, the Court focused on the assessment of Articles 11.2 and 17.1. It was firstly stated that arbitrary or abusive interferences to family life from third parties or the State are strictly forbidden, and that the latter must take positive and negative actions to protect all persons from this kind of conduct, especially if they affect families (*Ramírez Escobar y otros v. Guatemala* and *Tabares Toro y otros v. Colombia*). Secondly, it was asserted that the separation of children from their families should be exceptional and, preferably, temporary (*Opinión Consultiva OC-17/02*, *Opinión Consultiva OC-21/14*, *Fornerón e hija v. Argentina* and *López y otros v. Argentina*), emphasizing that the child must remain in their family nucleus as parental contact constitutes a fundamental element of family life (*Dial et al. v. Trinidad y Tobago* and *Personas dominicanas y haitianas expulsadas v. República Dominicana*). The Court clarified that effective family protection measures favour the development and strengthening of the family nucleus and that, in contexts of parental separation, the State must guarantee family reunification to prevent

unduly estrangement (*K. and T. v. Finland*, *Jansen v. Norway* and *Strand Lobben and Others v. Norway*).

The Court concluded that the lack of diligence and exceptional promptness required by the circumstances resulted in a rupture of paternal bonds. Moreover, the reconnection efforts were excessively delayed without providing significant advances or conditions to enable the improvement of the family relationship on the paternal side. Therefore, Paraguay had not only breached Articles 11.2 and 17, but also Article 5 for putting the applicant in a permanent state of anguish that resulted in a violation of his personal integrity.

Lastly, the Court stated that States are encouraged to adopt all necessary provisions in their legal systems to ensure the adequate implementation of international treaties and improve their operation. Even though it was observed that Paraguay had enacted internal regulations, they had not yet entered into force when the facts of the case unravelled. Consequently, Articles 1.1 and 2 of the Pact of San José had also been violated.

Reparations

One of the keys aspects of the Inter-American Court's judgments is that they thoroughly establish resolution points that must be individually satisfied. The State will send periodic reports to the Court specifying what measures have been taken to fulfil the decision, for as long as it takes, until the case is considered to be fully resolved.

In *Córdoba v. Paraguay*, the Court determined:

1. The payment of psychological and/or psychiatric treatment to Mr Córdoba;
2. The publication of the summary of the judgment in the officialgazette and in a media outlet with wide national circulation;
3. The adaptation of the domestic framework through the adoption of legislation that incorporates the standards set out in the judgment;
4. The establishment of a database to cross-reference information on internationally abducted children, which comprises all public systems that record data on people, such as social security, education, health and reception centres;
5. The creation of a communication network to process entries of

internationally abducted children whose whereabouts are unknown and send search alerts for institutions involved in their care;

6. The accreditation of a training aimed at public servants of the judicial system and officials of the Ministry of Childhood and Adolescence on the issues appertaining to internationally abducted children and the need to safeguard their right to family life. The State must also indicate to which officials such training was addressed, the number of persons who effectively participated, and whether it was instituted as a permanent programme; and
7. The payment of the amounts set out in the judgement in terms of material and moral damages, costs and expenses, and reinstatement of the costs to the Court's victims' legal aid fund.

Final observations

International child abduction has been a long-awaited addition to the Inter-American portfolio in its intersection between international human rights law and international family law. The fact that *Córdoba* is the first decision to reach the Court does not mean that human rights violations seldom happen within American States in such cases, but it undoubtedly reveals that the pathway to reach an international judgment is long. Because the Commission must refer the cases to the Court, it will take time before extensive case-law is developed on the topic. Nonetheless, the decision represents an advance in many aspects, especially for establishing a set of standards amongst Caribbean and Latin American countries, which are the ones who majorly ratified the Pact of San José and accepted the Court's jurisdiction.

It must also be noted that, despite there being allegations by the taking parent against the left-behind parent of domestic violence, little was mentioned in regard to the evaluation of grave risk of harm to the physical and psychological well-being of the child by the Paraguayan authorities and if this interfered in any way with the applicant's rights. Many references were made to the Guide of Good Practice of the 1980 Hague Conventions and the ECtHR case-law, yet this assessment seems to have been ignored by the IACtHR. As remarked in *X. v. Latvia*, *"the [ECtHR] reiterates that while Article 11 of the [1980] Hague Convention does indeed provide that the judicial authorities must act*

expeditiously, this does not exonerate them from the duty to undertake an effective examination of allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case". Additionally, the HCCH Guide to Good Practice on Article 13 (1) (b) states in paragraph 37 that "(…) *past incidents of domestic or family violence may, depending on the particular circumstances, be probative on the issue of whether such a grave risk exists*". The exceptions displayed on Article 13 (1) (b) and (2) of the 1980 Hague Convention are both reflected on Article 11 of the 1989 Inter-American Convention, which arguably means that more attention could have been granted to the analysis of potential situations of danger and the vehement refusal of the child to maintain any sort of contact with the father.

Even though the Court decided to respect the child's wishes and refrained from examining the human rights violations that affected him, it must not be disregarded that the *Córdoba* judgment lacks a best interests assessment and that it might take some time before another international child abduction case gets a Commission referral. Apart from the grave risk analysis, it would have been enlightening to better understand how the Court perceived a potential violation of the child's right to be heard, including an assessment of *how*the child was heard, as well as the other children related rights safeguarded by the Inter-American normative instruments, including the protection of private and family life, that were afflicted.

Book Review: The UN Guiding Principles on Business & Human Rights

This book review was written by Begüm Kilimcioglu, PhD researcher, Research Groups Law & Development and Personal Rights & Property Rights, University of Antwerp

Barnali Choudbury, *The UN Guiding Principles on Business & Human Rights- A Commentary*, Edward Elgar Publishing, 2023

The endorsement of the United Nations Guiding Principles (UNGPs) in 2011 represents a milestone for business and human rights as the principles successfully achieved to put the duties of different actors involved in (possible) human rights abuses on the international agenda. The UNGPs provide a non-binding yet authoritative framework for a three-pillared scheme to identify and contextualize the responsibilities with regard to business and human rights: the State's responsibility to protect, businesses' responsibility to respect, and facilitating access to remedy. However, although the impact of the principles can be described as ground-breaking, they have also been criticized for their vague and generic language which provides for a leeway for certain actors to circumvent their responsibilities (see Andreas Rasche & Sandra Waddock, Surya Deva, Florian Wettstein).Therefore, it is important to determine and clarify the content of the principles to increase their efficiency and effectiveness. In this light, this commentary on the UNGPs which examines all the principles one-by-one through the inputs of various prominent scholars, academics, experts and practitioners is indeed a reference guide to when working on corporate social responsibility.

The UNGPs and private international law are inherently linked. UNGPs aim to address issues regarding human rights abuses and environmental degradation which are ultimately transnational. Therefore, every time we talk about the extraterritorial obligations of the States, or the private remedies attached to cross-border human rights violations, we have to talk within the framework of private international law. For instance, in a case where a multinational company headquartered in the Global North causes damage through its subsidiaries or suppliers located in the Global North, the contractual clauses regarding their respective obligations or the private remedies in their contracts brings the questions of which law is applicable or how to enforce such mechanisms. Furthermore, in cases where the violations are brought before a court, it is inevitable that the court will have to decide on which law to be applied to the conflict at hand. In this regard, although the commentary does not go into detail about conflict of laws/ private international law issues, we know that the implementation of the UNGPs requires the consideration of private international law rules.

The commentary consists of two parts; the first part is dedicated to the UNGPs, and the second part focuses on the Principles for Responsible Contracts (PRCs) which is an integral addition to the UNGPs.

The first part starts with the UNGPs' first pillar, the State's duty to protect in context. The authors Larry Cata Backer and Humberto Cantu Rivera (UNGPs 4&5) emphasize the centrality of the State as an actor in many interactions when it engages in various commercial transactions and the privatization of essential services. Such instances pose a unique opportunity for the State to exercise its influence over businesses, service providers, or investors to facilitate respect for human rights and to fulfill its duty to protect human rights. Furthermore, as Olga Martin-Ortega and Fatimazahra Dehbi highlights (UNGP 7) when a company is operating in a conflict zone, the States that are involved must engage effectively with the situation to protect human rights considering the heightened vulnerability. Overall, actions of privatization or other commercial transactions do not exempt the State from its own duties. On the contrary, the State has heightened duties to ensure and support respect for human rights through various means such as its legislation, policies, agencies or through (effective) membership of multilateral institutions or its contracts.

Moving onto the second pillar, the business' responsibility to respect, Sara L. Seck
emphasizes

that this responsibility is not framed as a

duty—like the State duty to protect but rather is a more flexible term—and is independent of the State. However, more regard could have been given to common situations such as where the lines between the States and the businesses are blurred. I do not mean here the situations where the business enterprises are fully or partially owned by the State but rather – *de facto*—the businesses have more power (both in economic and political terms) on the ground. More examples could have been given such as how the revenues of Shell exceed the GDP's of Malaysia, Nigeria, South Africa and Mexico. In the increasingly globalized and competitive world of today, the (possible) role of businesses changes rapidly. Conversely, the disconnect between the policies, statements, and pledges businesses make with respect to human rights and their actual performance has been identified and highlighted quite accurately. The analysis of the lack of incentives for businesses to respect and engage with human rights by Kishanthi Parella (UNGP 13) provides an excellent mirror to the situation on the ground. It is rightfully identified that although the pressure from the consumers, investors, and/or other stakeholders can incentivize companies to do better, it may be insufficient. For instance, although Shell has been criticized by civil society, affected stakeholders, and the public for over a decade, and has faced several high-profile cases, the change beyond its corporate policies and documents remains highly contested.

Naturally, this brings to the fore the importance of having legally binding, national, regional, and international, rules putting concrete obligations with strong enforcement mechanisms to force companies to do better and create a level playing field for the ones who already are genuinely engaged in human rights issues. Maddelena Neglia discusses the different mandatory legislations initiatives from different countries regarding the implementation of the UNGPs, and Claire Bright and Celine Graca da Pires examine the same initiatives through the lens of Human Rights Due Diligence processes.

However, as the analysis of the current transparency frameworks within the framework of UNGP 13, considering that there are already legally binding rules on non-financial information disclosure, foreshadows the possible outcomes of future legally binding rules, such as the Corporate Sustainability Due Diligence Directive (See also the last documents, the Council position and the Parliament position.) The commentary does not discuss the positions adopted by the Council and the Parliament as they were not yet adopted at the time the commentary was

written). The current transparency laws show that unless such rules have teeth, they are bound to be ineffective.

Of course, the efforts of the States and businesses must be accompanied by strong and effective both State-based and non-State based and judicial and non-judicial remedies for the victims of corporate harm. On this matter, the commentary highlights the mechanisms that we are more prone to forgetting, such as the national human rights institutions (NHRIs) or multistakeholder initiatives (MSIs). It is usually the case that when thinking about remedies, the first thing that comes to mind are State-based judicial remedies. However, as Jennifer A. Zerk and Martijn Scheltema remind us there are several different types of remedies which can even be more effective depending on the context. Furthermore, on an academic level, we tend to focus more on Platon's 'theory on forms/ideas' rather than how things work in practice. As a result of this disconnection between the academics and the victims, we also tend to forget to discuss whether the 'form/idea' complies with the reality on the ground. Therefore, the emphasis in the commentary on the (obvious) link between the remedies and the persons for whom these remedies are intended reminds us that remedies must be stakeholder centric.

Overall, the commentary points out several important issues about the UNGPs:

- The uncertainty surrounding the UNGPs is real—although this was an intentional choice by Professor Ruggie, considering the current frameworks and how far we have come in the business & human rights world, we should not religiously hold onto the UNGPs but rather search for ways to improve and build upon them. UNGPs indeed were a marvelous achievement at the time, in 2011, when it was even unthinkable for most people that businesses could have any kind of responsibility regarding human rights; yet a worldwide consensus was reached. However, now, there is an enormous momentum to genuinely address corporate disasters through better regulation and enforcement.
- Another important prong in this process still is the international treaty. The commentary does not go into much detail about the Legally Binding Instrument on Business and Human Rights (Penelope Simmons discusses the international treaty within the framework of UNGP 26 as a way to strengthen access to remedy and Barnali Choudhury proposes the international treaty as a way to tackle the remaining problems with the

implementation of the UNGPS and the PRCs), however I do believe that the international treaty must also be discussed as an option to better implement the UNGPs. The drafting process of the treaty is evidence of one of many problems with the implementation of the UNGPs. As Daniel Augenstein (UNGP 1), Gamze Erdem Turkelli (UNGP 10) and Dalia Palombo (UNGP 25) point out, international cooperation is very important to effectively address the multi-faceted and transnational problem of respecting and protecting human rights and facilitating remedy when human rights abuses occur within the context of corporate harm. They show that no sole State can fix such a problem, and cooperation between States is essential. This cooperation can be done through could be done by engaging with other States in cases of corporate harm and exchanging information (or making it easy to exchange information) between authorities and courts, or information, as we increasingly see in private international law instruments. However, when we look at the process of drafting such a treaty which would provide common frameworks and rules to do so, it is clear that there is reluctance of the Global North countries whereas the recipient countries of damage are naturally much more enthusiastic.

- The second part of the commentary concerns the Principles for Responsible Contracts which provide guidance for the preparation, management and monitoring of Investor-State (investment) contracts, together with options for access to remedy for the (possible) victims. The PRCs reflect the same principles as the UNGPs and they are supposed to be read in conjunction.

The focus on the PRCs is valuable because historically international investment law and international human rights law were seen as two separate fields of law with no intersection. However, today, as the understanding of human rights is significantly evolving, the link between investments and human rights is becoming all the more evident. Investments – in all sectors but especially the extractive sector- can adversely impact to a significant extend, environmental degradation and human rights, lives of local and indigenous communities and marginalized and vulnerable groups. Rightly so, as the first part of the commentary on UNGPs, the second part, especially within the scope of PRC 7, Tehtena Mebratu-Tsegaye and Solina Kennedy highlight the importance of meaningful stakeholder engagement with the (potentially) affected stakeholders

and the ways to design more inclusive community involvement strategies.

Secondly, PRCs is a great opportunity to provide guidance to increase the effectiveness and efficiency of the contractual clauses used in investment contracts. Contractual clauses are the most widely used tools among businesses to pledge and ensure human rights compliance in their activities (see p 63). However, the effectiveness of these clauses is rather limited. Therefore, this wide use must be seen as an advantage and be built upon. In other words, the clauses must be structured in such a way that they do not leave unnecessary wiggle room for the companies and successfully cover the governance gaps.

Lastly, the importance of human rights impact assessments by investors before, during and after a project is a common narrative through the part on the PRCs. This emphasis is important as we are on the verge of adopting hard laws on human rights due diligence that may successfully enforce companies to be more engaging, robust and effective when they address human rights concerns. It has to be borne in mind that investors are also businesses enterprises, and they also must conduct their own Human Rights Due Diligence regarding their projects. In this regard, it is sometimes even the case that investors have more adverse impacts than other types of business actors because of their indirect impact via the projects they finance. Thus, the engagement of the investors with human rights is crucial for effective human rights protection.

Overall, the commentary is a must-have for everyone who is working on business and human rights. The UNGPs constitute the base of all the work that has been done over the years in the field. Thus, to be able to comprehend what business and human rights mean and to build on them, it is essential to examine the UNGPs in detail, which is what the commentary provides.

The standard of human rights

review for recognition and enforcement of foreign judgments: ‘due satisfaction’ or ‘flagrant denial of justice’?

Note on *Dolenc v. Slovenia* (ECtHR no. 20256/20, 20 October 2022)

by Denise Wiedemann, Hamburg

1. Facts and Holding

On 20 October 2022, the ECtHR issued a decision that provides guidance regarding the human rights review of recognition and enforcement decisions. The decision concerns the recognition of Israeli civil judgments by Slovenian courts. The Israeli judgments obliged Vincenc Vinko Dolenc, an internationally renowned neurosurgeon, to compensate a former patient for pecuniary and non-pecuniary damage in an amount equivalent to approximately 2.3 million euros (para. 22). Dolenc had performed surgery on the claimant, who was left severely disabled. After Slovenian courts recognized the Israeli judgments, Dolenc applied to the ECtHR. He contended that Slovenia had violated Art. 6(1) ECHR because it had recognized Israeli judgments that resulted from an unfair proceeding. Specifically, he argued that he had been unable to participate effectively in the trial in Israel because the Israeli court had refused to examine him and his witnesses by way of the procedure provided under the Hague Evidence Convention (para. 61).

The ECtHR found that the Slovenian courts had not examined the Israeli proceedings duly and had not given enough weight to the consequences that the non-examination of the witnesses had for the applicant’s right to a fair trial (para. 75). Therefore, the ECtHR unanimously held that Slovenia had violated Art. 6(1) ECHR.

2. Standard of Review

In its reasoning, the Court confirmed the standard of review that it had laid down in *Pellegrini v. Italy* (no. 30882/96, ECtHR 20 July 2001). In *Pellegrini*, the ECtHR found that Contracting States to the ECHR have an obligation to refuse recognition or enforcement of a foreign judgment if the defendant's rights were violated during the adjudication of the dispute in the state of the judgment's origin (para. 40). As in *Dolenc v. Slovenia*, the ECtHR in *Pellegrini* did not examine whether the proceedings before the court of origin complied with Art. 6(1) of the Convention. Instead, the Court scrutinized whether the Italian courts, i.e. courts in the state of enforcement, applied a standard of review in reviewing the foreign judgment which was in conformity with Art. 6(1) ECHR. As regards the standard of review, the ECtHR required the Italian courts to 'duly satisfy' themselves that the proceedings in the state of the judgment's origin fulfilled the guarantees of Art. 6(1) ECHR (para. 40). Thus, when recognizing or enforcing a civil judgment from a non-Contracting State, Contracting States have to verify that the foreign proceedings complied with Art. 6(1) ECHR.

Yet, in respect of other issues, the ECtHR has limited the standard of review from due satisfaction to that of a 'flagrant denial of justice'. In the criminal law context, the ECtHR held in *Drozd and Janousek v. France and Spain* that Contracting States are obliged to refuse the enforcement of a foreign sentence only if 'it emerges that the conviction is the result of flagrant denial of justice' (para. 110). The same limited review has been applied to extradition cases (*Othman (Abu Qatada) v. the United Kingdom*) and to child return cases (*Eskinazi and Chelouche v. Turkey)*. A flagrant denial of justice is a breach that 'goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.' (*Othman*, para. 260).

It has been argued that in cases regarding the recognition or enforcement of a foreign civil judgement, the review should likewise be limited because the fundamental rights violation in the state of recognition or enforcement would be only of an indirect nature (e.g. *Matscher*, 'Der Begriff des fairen Verfahrens nach Art. 6 EMRK' in Nakamura et al. (eds), Festschrift Beys, Sakkoulas, Athens 2003,

pp. 989–1007, 1005). Contrary to this view, the ECtHR confirmed in *Dolenc v. Slovenia* the requirement of an unlimited review of the proceeding in the state of origin; the Court saw 'no reason to depart from the approach set out in *Pellegrini*' (§ 60).

The approach taken in *Pellegrini* and *Dolenc* is convincing with regard to Art. 1 ECHR, which obliges the Contracting States to fully secure all individuals' rights and freedoms. A deviation from the requirement set out in Art. 1 ECHR is not justified by the fact that recognition or enforcement of a decision issued in violation of Art. 6(1) ECHR would only be of an indirect nature; rather, such a recognition or enforcement would exacerbate the violation and would, therefore, be in direct breach of the Convention. The ECtHR explained the restricted level of review in extradition and child return cases with the fact that, unlike in a recognition or enforcement situation, 'no proceedings concerning the applicants' interests [had] yet been disposed of' (see *Eskinazi and Chelouche v. Turkey*).

However, it is not obvious why the ECtHR applies different standards for the enforcement of foreign criminal judgments ('flagrant denial of justice') and the recognition or enforcement of foreign civil judgment ('due satisfaction'). Whereas Contracting States are not required to verify whether a foreign criminal proceeding was compatible with all the requirements of Art. 6(1) ECHR, they are obliged to do so when a foreign civil proceeding is at issue. In justifying the reduced effect of Art. 6(1) ECHR in criminal cases, the Court explained that a review of all the requirements of Art. 6(1) ECHR 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.' (*Drozd and Janousek v. France and Spain*, para. 110). Thus, the ECtHR seems to place greater importance on cooperation in criminal matters than on cooperation in civil matters. A reason is not apparent.

3. Situations Allowing for a More Limited Review

Despite the confirmation of *Pellegrini v. Italy* in *Dolenc v. Slovenia*, the ECtHR left open the possibility of a more limited review in certain civil recognition and enforcement cases. First, the *Pellegrini* case and the *Dolenc* case concerned judgments emanating from non-Contracting States. If, in contrast, the recognition

or enforcement of a judgment from a Contracting State was at issue, debtors would be obliged to challenge violations of Article 6(1) ECHR in the state of the judgment's origin. If debtors fail to do so – e.g. if they miss the time limit for lodging a complaint at the ECtHR (Art. 35(1) ECHR) –, a further review in the state of enforcement would not be successful. Otherwise, procedural limits for human rights challenges would lose their preclusive effect.

Second, the ECtHR qualified *Pellegrini* as a case having 'capital importance' (para. 40) and *Dolenc* as a case of 'paramount importance to the defendant' (para. 60). While *Pellegrini* concerned a decision annulling a marriage, i.e. determining personal status, the foreign judgment in *Dolenc* caused serious financial and reputational damage to the applicant. However, it is questionable why a judgment for payment of a small amount of money should allow for a more limited review as Art. 1 ECHR does not differentiate between important and less important matters.

Finally, different standards would in any event apply to recognition and enforcement within the EU: In the case of recognition and enforcement under strict EU procedures (without the possibility of refusal), Member States benefit from the 'presumption of compliance' (*Sofia Povse and Doris Povse v. Austria*; *Avoti?š v. Latvia*). With this presumption, the ECtHR seeks to establish a balance between its own review powers vis-à-vis states and its respect for the activities of the EU. In cases with a margin of manoeuvre, in particular through the public policy clause, the ECtHR will not require the Member State of recognition or enforcement to 'duly satisfy' itself that the adjudication proceeding in the Member State of origin complied with Art. 6(1) ECHR. Rather, the ECtHR will assess only whether the application of the public policy clause has been 'clearly arbitrary' (*Royer v. Hungary*, para. 60).

Today the Russian Federation

ceases to be a High Contracting Party to the European Convention on Human Rights

Today (16 September 2022) the Russian Federation has ceased to be a High Contracting Party to the European Convention on Human Rights (ECHR). This means, *inter alia*, that applications against the Russian Federation will no longer be entertained by the European Court of Human Rights (ECtHR).

However, the Resolution of the ECtHR of 22 March 2022 clarified that "The Court remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022." To view the full resolution, click here. The news item is available here.

The Russian Federation had ceased to be a member of the Council of Europe on 16 March 2022. See here.

We have previously reported on the increasing interaction between the ECHR and Private International Law. This is particularly so in surrogacy and international child abduction cases. See for example a judgment regarding international child abduction rendered by the ECtHR earlier this year, where no violation of article 8 of the ECHR was found against Russia: Case of P.D. v. Russia (Application no. 30560/19). But see Thompson v. Russia (Application no. 36048/17) where a violation of article 8 of the ECHR was indeed found.

For more information about this interaction, click here.

Undoubtedly, today is a sad day for human rights law.

Munich Dispute Resolution Day on 6 May 2022: Human Rights Cases before Civil Courts and Arbitral Tribunals in Germany

by Wolfgang Hau, University of Munich

This year’s Dispute Resolution Day of the Munich Center for Dispute Resolution on 6 May is dedicated to the above mentioned highly topical issue: Can companies in Germany be held responsible for human rights violations that have occurred somewhere in the global supply chain? Are civil lawsuits and commercial arbitration at all suitable for enforcing international human rights obligations of business enterprises? Such and related questions will be examined and discussed by renowned speakers. The conference will be held in German at the University of Munich. You can find the programme and registration information here:

https://www.mucdr.jura.uni-muenchen.de/munich_dispute_resolution_day/drd-2022-flyer.pdf

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A new Justice has been appointed to the Mexican Supreme Court, a specialist in Private International Law and Human Rights

Yesterday the Mexican Senate appointed Loretta Ortiz Ahlf as a new Justice at the Mexican Supreme Court (*Suprema Corte de Justicia de la Nación de México*). She is a senior member (*miembro numerario*) of the Mexican Academy of Private International and Comparative Law (AMEDIP). Loretta Ortiz Ahlf has had several political and legal positions in the Mexican government as a Congress Representative, Advisor of Human Rights, among others. For more information, click here.

This appointment will certainly further the knowledge of Private International Law and Human Rights at the Mexican Supreme Court.

Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms has entered into force –

beware: the time for filing an application has been shortened from 6 to 4 months

Today (1 August 2021) the Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms has entered into force. This Protocol will apply in all 47 States Parties. Although it was open for signature/ratification since 2013, the ratification of Italy only occurred until 21 April 2021.

In the past, we have highlighted in this blog the increasing interaction between human rights and private international law and the need to interpret them harmoniously (see for example our previous posts here (HCCH Child Abduction Convention) and here (transnational surrogacy)).

Protocol No. 15 has introduced important amendments to the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In particular, it has included the principle of subsidiarity and the doctrine of the margin of appreciation in the preamble, which have long and consistently been adopted by the case law of the European Court of Human Rights (ECtHR), and thus this is a welcome amendment.

It will now read as follows (art. 1 of the Protocol):

> *"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".*

Of great important is the shortening of the time for the filing of an application in accordance with article 35 of the ECHR: from 6 to 4 months. This amendment will enter into force 6 months later (I assume on 1 February 2022). Articles 4 and 8(3) of the Protocol state the following:

Article 4

"In Article 35, paragraph 1 of the Convention, the words "within a period of six months" shall be replaced by the words "within a period of four months".

Article 8(3)

"Article 4 of this Protocol shall enter into force following the expiration of a period of six months after the date of entry into force of this Protocol. Article 4 of this Protocol shall not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of Article 4 of this Protocol" (our emphasis).

This is perhaps a reaction to the increasing workload of the Court, which seems to be of serious concern to the States Parties. In particular, the Brighton declaration has noted that "the number of applications made each year to the Court has doubled since 2004. Very large numbers of applications are now pending before all of the Court's primary judicial formations. Many applicants, including those with a potentially well-founded application, have to wait for years for a response." Undoubtedly, this may compromise the effectiveness and reliability of the ECtHR. Nevertheless, this reduction of the filing time may also leave out cases that are well founded but during which the parties were late in realising that such recourse / legal challenge was available.

Lastly, I would like to highlight the removal of the right of the parties to object to the relinquishment of jurisdiction to the Grand Chamber in certain circumstances, such as when a case pending before a Chamber raises a serious question affecting the interpretation of the ECHR or its protocols (art. 3 of the Protocol and art. 30 ECHR). In my view, this is an improvement and avoids delays as it allows the Chamber to make that call. It also provides consistency to the case law of the ECtHR. As to its entry into force, article 8(2) of the Protocol sets out the following:

"The amendment introduced by Article 3 of this Protocol shall not apply to any pending case in which one of the parties has objected, prior to the date of entry into force of this Protocol, to a proposal by a Chamber of the Court to relinquish jurisdiction in favour of the Grand Chamber"

International Doctorate Programme “Business and Human Rights: Governance Challenges in a Complex World”

Funded by Elite Network of Bavaria the International Doctorate Programme „Business and Human Rights: Governance Challenges in a Complex World“ (IDP B&HR_Governance) establishes an inter- and transdisciplinary research forum for excellent doctoral projects addressing practically relevant problems and theoretically grounded questions in the field of business and human rights. Research in the IDP B&HR_Governance will focus on four distinct areas:

- Global value chains and transnational economic governance
- Migration and changing labour relations
- Digital transformation
- Environmental sustainability

The IDP’s research profile builds on law and management as the core disciplines of B&HR complemented by sociology, political, and information sciences. Close cooperation with partners from businesses, civil society, and political actors will enable the doctoral researchers to develop their projects in a broader context to ensure practical relevance. The IDP’s curriculum, lasting for eight semesters, aims at contributing to the professional development of independent and critical researchers through a variety of courses, research retreats, colloquia, and conferences as well as the possibility of practical projects.

The IDP B&HR_Governance will include up to twenty doctoral researchers

selected through a competitive process and sixteen principal investigators from Friedrich-Alexander-University Erlangen-Nürnberg (FAU), the University of Bayreuth and Julius-Maximilians-University Würzburg (JMU). The IDP involves law, management, sociology, political sciences and information systems.

The IDP B&HR_Governance will offer a comprehensive and innovative curriculum for the doctoral researchers. Its activities will commence on 1 November 2021.

The Acting Spokesperson of the IDP B&HR_Governance is Professor Markus Krajewski.

The IDP includes the following professors:

- University of Erlangen-Nürnberg: Anuscheh Farahat, Klaus Ulrich Schmolke, Patricia Wiater, Martin Abraham, Markus Beckmann, Evi Hartmann, Dirk Holtbrügge, Sven Laumer, Matthias Fifka, Petra Bendel, Sabine Pfeiffer
- University of Bayreuth: Eva Lohse, Thoko Kaime
- University of Würzburg: Isabel Feichtner, Eva Maria Kieninger

Call for Applications (12 doctoral research positions) – Deadline 15 June 2021

The IDP B&HR invites applications for 12 doctoral research positions (4-year contract) starting 1 November 2021.

Applicants need an excellent university degree at master's level in a relevant discipline (law, management, sociology, political, or information science) and very good knowledge of English. International, intercultural, and practical experiences will be an asset.

An application comprises the following documents:

- Research proposal (in English, max. 5000 words)
- Curriculum Vitae (CV)
- Letter of motivation (in English, max. 1000 words)

- Writing sample, e.g. published article, thesis or seminar paper.
- Certificates of all university degrees with corresponding transcript of records

Applications must be sent in a single PDF document by 15 June 2021 to humanrights-idp@fau.de

The full Call for Applications can found here.

Call for Papers: Corporate accountability for human rights violations originating in Africa

More info here.