

European University Institute

Seminar : Procedural Law and Procedural Justice in EU Law - Dir. by Prof. Loïc Azoulai and Prof. Giorgio Monti

Presentation : “Complex Procedures, Transnational Procedures, Civil and Criminal Cooperation Law: the New Paradigm ?” - 2011, December 14 – 17 pm. by Jean-Sylvestre Bergé(*)

A set of cases and materials

1. Complex Procedures : a new paradigm ?

1.1. At the international level

How a national situation could be studied in Law at the national and the international level successively:

● ICJ - Diallo Case (Republic of Guinea V. Democratic Republic of the Congo) - 30 november 2010 -

<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=103&PHPSESSID=&lang=en>

65. It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a State which is a party to these instruments can only be compatible with the international obligations of that State if it is decided in accordance with “the law”, in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while “accordance with law” as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case. 70. (...) The Court recalls that it is for each State, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans, Judgment No. 14, 1929, P.C.I.J., Series A, No. 20*, p. 46 and *Brazilian Loans, Judgment No. 15, 1929, P.C.I.J., Series A, No. 21*, p. 124). Exceptionally, where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation. 71. That is not the situation here. The DRC’s interpretation of its Constitution, from which it follows that Article 80 (2) produces certain effects on the laws already in force on the date when that Constitution was adopted, does not seem manifestly incorrect. It has not been contested that this interpretation corresponded, at the time in question, to the general practice of the constitutional

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authorities. The DRC has included in the case file, in this connection, a number of other expulsion decrees issued at the same time and all signed by the Prime Minister. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. It therefore cannot be concluded that the decree expelling Mr. Diallo was not issued “in accordance with law” by virtue of the fact that it was signed by the Prime Minister. 72. However, the Court is of the opinion that this decree did not comply with the provisions of Congolese law for two other reasons. First, it was not preceded by consultation of the National Immigration Board, whose opinion is required by Article 16 of the above-mentioned Legislative Order concerning immigration control before any expulsion measure is taken against an alien holding a residence permit. The DRC has not contested either that Mr. Diallo’s situation placed him within the scope of this provision, or that consultation of the Board was neglected. This omission is confirmed by the absence in the decree of a citation mentioning the Board’s opinion, whereas all the other expulsion decrees included in the case file specifically cite such an opinion, in accordance with Article 16 of the Legislative Order, moreover, which concludes by stipulating that the decision “shall mention the fact that the Board was consulted”. Second, the expulsion decree should have been “reasoned” pursuant to Article 15 of the 1983 Legislative Order; in other words, it should have indicated the grounds for the decision taken. The fact is that the general, stereotyped reasoning included in the decree cannot in any way be regarded as meeting the requirements of the legislation. The decree confines itself to stating that the “presence and conduct [of Mr. Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so”. The first part of this sentence simply paraphrases the legal basis for any expulsion measure according to Congolese law, since Article 15 of the 1983 Legislative Order permits the expulsion of any alien “who, by his presence or conduct, breaches or threatens to breach the peace or public order”. As for the second part, while it represents an addition, this is so vague that it is impossible to know on the basis of which activities the presence of Mr. Diallo was deemed to be a threat to public order (in the same sense, *mutatis mutandis*, see *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Judgment*, *I.C.J. Reports 2008*, p. 231, para. 152). The formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure. 73. The Court thus concludes that in two important respects, concerning procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the expulsion of Mr. Diallo was not decided “in accordance with law”. Consequently, regardless of whether that expulsion was justified on the merits, a question to which the Court will return later in this Judgment, the disputed measure violated Article 13 of the Covenant and Article 12, paragraph 4, of the African Charter.

1.2. At the European level

How a national situation could be studied in Law at the European level... and “comeback” at the national one :

● **ECJ - 22 october 2009 - C315/08 - Bogiatzi -**

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0301:EN:HTML>

(...) This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (OJ 1997 L 285, p. 1), in connection with the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as amended by the four additional protocols signed at Montreal on 25 September 1975 (‘the Warsaw Convention’). The reference was made in the course of proceedings brought by Ms Bogiatzi, married name Ventouras, against Société Luxair, société luxembourgeoise de navigation aérienne SA (‘Luxair’), and Deutscher Luftpool, an association under German law, concerning joint and several liability to compensate her for the injury she suffered as a result of an accident which occurred while boarding a Luxair aeroplane. (...) The European Community is not party to the Warsaw Convention, to which the 15 Member States of the European Union at the material time had acceded. (...) On the other hand, it is clear from recitals 2 and 4 in the preamble to Regulation No 2027/97 and Article 2(2) thereof that, where the regulation does not preclude the application of the Warsaw Convention in order to raise the level of protection of passengers, that

protection involves the regulation and the system established by the convention being complementary and equivalent to each other. (...) Since Article 29 of the Warsaw Convention simply governs a procedural rule for bringing an action for damages against an air carrier in the event of an accident, it is not in the category of provisions whose application the Community legislature sought to preclude. Having regard to the foregoing considerations, the answer to the second question is that Regulation No 2027/97 must be interpreted as not precluding the application of Article 29 of the Warsaw Convention to a situation in which a passenger seeks to establish the liability of the air carrier on account of harm suffered by him when flying between Member States of the Community.

2. Complex procedures and transnational procedures in civil and criminal cooperation law: a new paradigm ?

2.1. A famous case in front of the ECJ and the ECHR

• ECJ - 28 mars 2000 - C-7/98 - Krombach

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998CJ0007:EN:HTML>

(...) 12 Mr Krombach was the subject of a preliminary investigation in Germany following the death in Germany of a 14-year-old girl of French nationality. That preliminary investigation was subsequently discontinued.

13 In response to a complaint by Mr Bamberski, the father of the young girl, a preliminary investigation was opened in France, the French courts declaring that they had jurisdiction by virtue of the fact that the victim was a French national. At the conclusion of that investigation, Mr Krombach was, by judgment of the Chambre d'Accusation (Chamber of Indictments) of the Cour d'Appel de Paris (Paris Court of Appeal), committed for trial before the Cour d'Assises de Paris.

14 That judgment and notice of the introduction of a civil claim by the victim's father were served on Mr Krombach. Although Mr Krombach was ordered to appear in person, he did not attend the hearing. The Cour d'Assises de Paris thereupon applied the contempt procedure governed by Article 627 et seq. of the French Code of Criminal Procedure. Pursuant to Article 630 of that Code, under which no defence counsel may appear on behalf of the person in contempt, the Cour d'Assises reached its decision without hearing the defence counsel instructed by Mr Krombach.

15 By judgment of 9 March 1995 the Cour d'Assises imposed on Mr Krombach a custodial sentence of 15 years after finding him guilty of violence resulting in involuntary manslaughter. By judgment of 13 March 1995, the Cour d'Assises, ruling on the civil claim, ordered Mr Krombach, again as being in contempt, to pay compensation to Mr Bamberski in the amount of FRF 350 000.

*16 On application by Mr Bamberski, the President of a civil chamber of the Landgericht (Regional Court) Kempten (Germany), which had jurisdiction *ratione loci*, declared the judgment of 13 March 1995 to be enforceable in Germany. Following dismissal by the Oberlandesgericht (Higher Regional Court) of the appeal which he had lodged against that decision, Mr Krombach brought an appeal on a point of law (*Rechtsbeschwerde*) before the Bundesgerichtshof in which he submitted that he had been unable effectively to defend himself against the judgment given against him by the French court.*

17 Those are the circumstances in which the Bundesgerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

(...) 2. May the court of the State in which enforcement is sought (first paragraph of Article 31 of the Brussels Convention) take into account under public policy within the meaning of Article 27, point 1, of the Brussels Convention that the criminal court of the State of origin did not allow the debtor to be defended by a lawyer in a civil-law procedure for damages instituted within the criminal proceedings (Article II of the Protocol of 27 September 1968 on the interpretation of the Brussels Convention) because he, a resident of another Contracting State, was charged with an intentional offence and did not appear in person?

(...) 25 The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures (see, in particular, Opinion 2/94 [1996] ECR I-1759, paragraph 33). For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the

protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) has particular significance (see, inter alia, Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18).

26 The Court has thus expressly recognised the general principle of Community law that everyone is entitled to fair legal process, which is inspired by those fundamental rights (Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraphs 20 and 21, and judgment of 11 January 2000 in *Joined Cases C-174/98 P and C-189/98 P Netherlands and Van der Wal v Commission* [2000] ECR I-0000, paragraph 17).

27 Article F(2) of the Treaty on European Union (now, after amendment, Article 6(2) EU) embodies that case-law. It provides: The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

28 It is in the light of those considerations that the questions submitted for a preliminary ruling fall to be answered.

(...) 35 By this question, the national court is essentially asking whether, in relation to the public-policy clause in Article 27, point 1, of the Convention, the court of the State in which enforcement is sought can, with respect to a defendant domiciled in its territory and charged with an intentional offence, take into account the fact that the court of the State of origin refused to allow that defendant to have his defence presented unless he appeared in person.

36 By disallowing any review of a foreign judgment as to its substance, Article 29 and the third paragraph of Article 34 of the Convention prohibit the court of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute. Similarly, the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin.

37 Recourse to the public-policy clause in Article 27, point 1, of the Convention can be envisaged only where recognition or enforcement of the judgment delivered in another Contracting 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.

38 With regard to the right to be defended, to which the question submitted to the Court refers, this occupies a prominent position in the organisation and conduct of a fair trial and is one of the fundamental rights deriving from the constitutional traditions common to the Member States.

39 More specifically still, the European Court of Human Rights has on several occasions ruled in cases relating to criminal proceedings that, although not absolute, the right of every person charged with an offence to be effectively defended by a lawyer, if need be one appointed by the court, is one of the fundamental elements in a fair trial and an accused person does not forfeit entitlement to such a right simply because he is not present at the hearing (see the following judgments of the European Court of Human Rights: judgment of 23 November 1993 in *Poitrimol v France*, Series A No 277-A; judgment of 22 September 1994 in *Pelladoah v Netherlands*, Series A No 297-B; judgment of 21 January 1999 in *Van Geysseghem v Belgium*, not yet reported).

40 It follows from that case-law that a national court of a Contracting State is entitled to hold that a refusal to hear the defence of an accused person who is not present at the hearing constitutes a manifest breach of a fundamental right.

41 The national court is, however, unsure as to whether the court of the State in which enforcement is sought can take account, in relation to Article 27, point 1, of the Convention, of a breach of this nature having regard to the wording of Article II of the Protocol. That provision, which involves extending the scope of the Convention to the criminal field because of the consequences which a judgment of a criminal court may entail in civil and commercial matters (Case 157/80 *Rinkau* [1981] ECR 1391, paragraph 6), recognises the right to be defended without appearing in person before the criminal courts of a Contracting State for persons who are not nationals of that State and who are domiciled in another Contracting State only in so far as they are being prosecuted for an offence committed unintentionally. This restriction has been construed as meaning that the Convention clearly seeks to deny the right to be defended without appearing in person to persons who are being prosecuted for offences which are sufficiently serious to justify this (*Rinkau*, cited above, paragraph 12).

42 However, it follows from a line of case-law developed by the Court on the basis of the principles referred to in paragraphs 25 and 26 of the present judgment that observance of the right to a fair hearing is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see, *inter alia*, Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885, paragraph 39, and Case C-32/95 P *Commission v Lisrestal and Others* [1996] ECR I-5373, paragraph 21).

43 The Court has also held that, even though the Convention is intended to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals, it is not permissible to achieve that aim by undermining the right to a fair hearing (Case 49/84 *Debaecker and Plouvier v Bouwman* [1985] ECR 1779, paragraph 10).

44 It follows from the foregoing developments in the case-law 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 right to defend himself before the court of origin, as recognised by the ECHR. Consequently, Article II of the Protocol cannot be construed as precluding the court of the State in which enforcement is sought from being entitled to take account, in relation to public policy, as referred to in Article 27, point 1, of the Convention, of the fact that, in an action for damages based on an offence, the court of the State of origin refused to hear the defence of the accused person, who was being prosecuted for an intentional offence, solely on the ground that that person was not present at the hearing.

45 The answer to the second question must therefore be that the court of the State in which enforcement is sought can, with respect to a defendant domiciled in that State and prosecuted for an intentional offence, take account, in relation to the public-policy clause in Article 27, point 1, of the Convention, of the fact that the court of the State of origin refused to allow that person to have his defence presented unless he appeared in person.

● **ECHR - 13 February 2001 - *Krombach v. France***

[http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=697088&portal=hbkm
&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649](http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=697088&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649)

(...) In April 1977 the applicant, a widower with two children, remarried. His second wife was a French national who herself had two children from a previous marriage with a French national from whom she had been divorced in 1976. During the summer of 1982 the applicant's wife's son and daughter were on school holidays at the applicant's home at Lindau, near Lake Constance. 10. The daughter, K.B., was fourteen years old and a French national. On 9 July 1982 she spent the day wind surfing. On her return she complained that she felt tired and was not as tanned as she would have liked. As he had done several times in the past, the applicant injected her at about 8.30 p.m. with a ferric preparation that was sold under the brand name Kobalt-Ferrcelit and was in principle intended for the treatment of anaemia. 11. At about 9.30 a.m. on 10 July 1982 the applicant found K.B. dead in her bedroom and proceeded to inject her with various products in an attempt to revive her. A call was made to the emergency services and the body examined by a doctor at about 10.20 a.m. He put the time of death at about 3 a.m. and found no traces of violence, apart from marks made by injections to the thorax and right arm. (...) 1. The German proceedings (...) 2. The French proceedings (...) 3. The proceedings in Germany for the enforcement of the judgment of the Paris Assize Court of 13 March 1995 in favour of the civil party (...) 4. The extradition proceedings in Austria (...) In the Court's view, the procedure for a retrial after the contempt has been purged only affects the effective exercise of the defence rights if the accused is arrested, for in such cases the authorities have a positive obligation to afford the accused the opportunity to have a complete rehearing of the case in his or her presence. On the other hand, there can be no question of an accused being obliged to surrender to custody in order to secure the right to be retried in conditions that comply with Article 6 of the Convention, for that would entail making the exercise of the right to a fair hearing conditional on the accused offering up his or her physical liberty as a form of guarantee (see, *mutatis mutandis*, *Khalfaoui v. France*, no. 34791/97, §§ 43 and 44, ECHR 1999-IX). (...) The Court must now examine whether in practice the bar on defence lawyers appearing for the applicant at the trial before the Paris Assize Court adversely affected his right to a fair hearing. In the instant case, it is not disputed that the applicant had clearly manifested an intention not to attend the hearing before the Assize Court and, therefore, not to represent himself. On the other hand, the case file

shows that he wished to be defended by his lawyers, who had been given authorities to that end and were present at the hearing. (...) The Court cannot adopt the Government's narrow construction of the word "assistance" within the meaning of Article 6 § 3 (c) of the Convention. It sees no reason for departing from the opinion it expressed on that subject in *Poitrinol* (see the judgment cited above, pp. 14-15, § 34), in which the Government had already suggested that a distinction should be drawn between "assistance" and "representation" for the purposes of proceedings in the criminal court. Although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of a fair trial. A person charged with a criminal offence does not lose the benefit of this right merely on account of not being present at the trial. Even if the legislature must be able to discourage unjustified absences, it cannot penalise them by creating exceptions to the right to legal assistance (see *Van Geyselghem*, cited above, § 34). (...) In the instant case, the Court observes that the wording of Article 630 of the French Code of Criminal Procedure makes the bar on lawyers representing an accused being tried *in absentia* absolute and that an assize court trying such an accused has no possibility of derogating from that rule. (...) The Court considers, however, that it should have been for the Assize Court, which was sitting without a jury, to afford the applicant's lawyers, who were present at the hearing, an opportunity to put forward the defence case even in the applicant's absence as, in the instant case, the argument they intended to rely on concerned a point of law (see paragraph 44 above), namely an objection on public-policy grounds based on an estoppel *per rem judicatam* and the *non bis in idem* rule (see, *mutatis mutandis*, *Artico v. Italy*, judgment of 13 May 1980, Series A no. 37, pp. 16-17, § 34). The Government have not suggested that the Assize Court would have had no jurisdiction to examine the issue had it given the applicant's lawyers permission to plead it. Lastly, the Court observes that the applicant's lawyers were not given permission to represent their clients at the hearing before the Assize Court on the civil claims. To penalise the applicant's failure to appear by such an absolute bar on any defence appears manifestly disproportionate. (...) In conclusion, there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c). In conclusion, there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3 (c).

2.2. Prospective

How European Union instruments in civil and criminal cooperation law and European standards for protection of the "fair trial" in Europe could be implemented ?

See (in French) : <http://lewebpedagogique.com/jsberge/files/2011/12/Texte-jsb-colloque-Montpellier-nov-2010-Bruylant-Némésis.pdf>

This article intends to test the hypothesis that the right to a fair trial and the law of judicial cooperation in civil and criminal maintain a « relationship implementation ». This expression raises several questions: how the right to a fair trial and the law of judicial cooperation in civil and criminal matters apply together within the European Union? The two systems of law do they aim to sustainably coexist as two separate legal structures or can, however, feel that they are required to be absorbed by one or the other? In response, three golf and potentially confrontational encounter are explored: I – Right to a fair trial and international nature of the trial; II – Right to a fair trial and mutual trust; III – Right to a fair trial and differentiation of private and public interests.
